Hello Federal Communications Commission,

My authorship on the overlap between copyright secondary liability and net neutrality rules in *Choosing an Internet Shaped by Freedom: A Rationale to Rein in Copyright Gatekeeping* should be adopted (see http://scholarship.law.berkeley.edu/bjesl/vol2/iss1/4/). I also include it below. I advance two arguments here: (1) that shaping net neutrality rules around copyright infringement will keep massive internet carriers on a binge of multibillion dollar purchases of copyright portfolios such as Comcast's recent purchase of NBC instead of investing in the last mile; and (2) that shaping net neutrality rules around copyright infringement is unconstitutional because it undermines copyright law, common law secondary liability, and FCC net neutrality itself.

To persuade the FCC to change its course I also include a second articles I authored entitled *Bringing America Back to the Future: Reclaiming a Principle of Honesty in Property and IP Law*. Both argue that FCC rules and fundamental Constitutional underpinnings of Copyright Law are being actively circumvented by major telecommunications companies using copyright law. Instead of outrage at the blatant flouting of the public's interest in a free and open internet by telecommunication companies, the FCC has now chosen the wording of "commercially unreasonable practices" and the limiting of the no blocking provision to "lawful" sites and content which will make the circumvention of FCC rules and copyright law even easier than it was under the previous net neutrality regime.

In fact in order to avoid judicial oversight and to maximize profits major internet providers and major copyright owners have resorted to self-help measures by launching the Center for Copyright Infringement (see http://www.copyrightinformation.org/about-cci/). This collusion of massive corporate interests allows copyright owners and internet providers to punish internet users and middle class copyright owners without going to court and without the force of law even when the Digital Millennium Copyright Act specifically prescribes copyright takedown methods that were properly balanced against the First Amendment rights by Congress.

Moreover, it should be an affront to the American Government that developed internet companies are using self-help measures. Are we not a First World nation? Is the United States a mature democracy? One sign of our development is that we no longer follow the American rule for real property that required a new buyer or lessor of property to load up the shotguns and force any holdover tenants. So why should we allow self-help for intangible property rights? It makes no logical sense in a developed society.

The fundamental misunderstanding here comes from the fact that copyright law infers secondary infringement from the common law. For example the Comcast subsidiary Xfinity is a secondary infringer when it knowingly allows one of its users to post infringing content onto its website. However because secondary infringement over the internet is inferred from common law and *is not statutory*, the FCC rules take precedent over copyright secondary infringement common law. So, if the FCC shirks its responsibility to define what "commercially unreasonable" means or what "lawful" means *exactly* other than just flippantly referring to copyright law (as the proposed rule does) it is specifically opening the door for these companies to expand vague terms provided by the FCC to override copyright secondary infringement common law itself. This spells the destruction of copyright common law, guarded by the Judicial Branch, by Executive Branch agency rule. Senator Dianne Feinstein has already announced that the Central Intelligence Agency (CIA) has breached the Separation of Powers by cyber attacking Congress' computer systems. The FCC should not allow itself to join the CIA's ranks.

Furthermore the FCC proposed rule will just hand internet legislation to major telecoms to fill in without balancing the public interest that the FCC is avowed to protect. Congress had specifically included the common law traditional contours of copyright law into the Copyright Act in order to safeguard First Amendment rights. Since these safeguards, such as fair use, the originality requirement, first sale doctrine, and the idea/expression dichotomy only get raised in the context of a law suit the FCC cannot possibly insert itself as the definer of unlawful copyright infringement. Thus the proposed rule will land the FCC in an unresolvable quagmire with long standing First Amendment safeguards.

The branch of the government that is charged with caretaking property jurisprudence, that is the Judicial Branch, has emphatically not applied clear property principles to intellectual property or even the broader class of intangible property. Therefore the FCC cannot rely on judicial findings that could fill in the gaps, because there are none. In fact, the Supreme Court recently decided in *Kirtsaeng v. John Wiley & Sons, Inc. (2013)* that the common law property right to alienate property overrides some copyright privileges in an international context. The FCC should not intrude on the ongoing Judicial development of the contours between intangible and tangible property. Instead, the FCC should focus its energies on the significant project of updating the last mile, universal service, and the significant privacy issues revealed by investigative reporters. The fact that under this FCC's watch the internet was used by the CIA to attack Congress should be a significant source of shame.

The FCC is mistaken to assume that the government interest in curbing other forms of illegal activity online such as child pornography would support their limitation on the no blocking provision to only legal content or websites. The Communication Decency Act of 1996 (CDA) (which was Title V of the Telecommunications Act) preempts state laws that seek to prevent secondary gate keeping and require the direct pursuit of criminals.[1] Also the landmark Supreme Court decision *Reno v. ACLU* struck down the anti-indecency provisions of the CDA based on the First Amendment. Thus the proposed rule will likely also run afoul the delicate balance of free speech struck by the CDA and its progeny of case law by handing discretion for blocking to internet providers.

The arguments of many major copyright holders are absurd. They conjure up magical tales about the internet being a Wild West or an ocean full of pirates. But as the FCC well knows the telephone and cable networks that make up the "internet" are in fact just networks. They were set up long ago to facilitate public communication, and the technology that transformed these networks into the "internet" boosted the efficiency of those existing networks. It was once lauded as a triumph for the public good and it was then assumed that the natural effect of the internet on the marketplace should be embraced. According to the very *laissez faire* and capitalist values espoused by Comcast and Verizon if a company begins describing the internet like a shark tank that they can't survive in that just means they should go extinct. The use of hypocritical capitalist and free market arguments to artificially hold a higher position above the common American innovator using the FCC to undermine copyright law, judicial common law, and the U.S. Constitution cannot stand.

Due to the proposed FCC usurpation of legislative and judicial power the FCC must remove copyright law considerations from its rule making. In adopting the proposed rule the FCC will undoubtedly open the door to internet providers to claim quasi-governmental status. They will pursue public policy without even engaging with the American People by underwriting the highly

---

[1] Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J.L. & TECH. 253, 262 (2006).

unconstitutional and insulting activities of the Center for Copyright Infringement (see http://www.copyrightinformation.org/about-cci/). They have already announced their intentions. The Digital Millennium Copyright Act's takedown regime is to be completely circumvented by their activities. This is a violation of free speech and a usurpation of government power by powerful corporations that the FCC should address carefully.

Copyright law contains important Free Speech limitations that will never be weighed and balanced by private companies seeking to maximize copyright monetization through self-help measures. The FCC should take swift action to remedy this by removing their proposed rule. In its place the FCC should create a robust net neutrality that defines "lawful" in the Digital Millennium Copyright Act (DMCA) Section 512(c)(1)(c) using its power to protect the privacy of communications. The DMCA limits copyright takedowns to "lawful" takedowns referring to privacy law. The most robust privacy law still exists in the Telecommunications Act of 1934 and the FCC has been empowered to protect this public interest.

This comment prays that the FCC begin to define the debate on internet neutrality with the American values of liberty and privacy by abandoning its dangerous foray into intangible property enforcement. Both the internet and information are inherently public goods as defined by Carol Rose in her work *The Comedy of the Commons* (see http://digitalcommons.law.yale.edu/fss_papers/1828/). As an inherently public good, shaping policy around private property ownership leads to perilous contradictions and destructive law.

Warm regards,

Joshua J. Schroeder, Esq.
Portland, Oregon

Berkeley Journal of Entertainment and Sports Law

Volume 2 | Issue 1 Article 4

11-22-2013

Choosing an Internet Shaped by Freedom: A Legal Rationale to Rein in Copyright Gate Keeping

Joshua J. Schroeder
Lewis & Clark Law School, joshua@lclark.edu

Follow this and additional works at: http://scholarship.law.berkeley.edu/bjesl

Part of the Entertainment and Sports Law Commons

Recommended Citation
Joshua J. Schroeder, *Choosing an Internet Shaped by Freedom: A Legal Rationale to Rein in Copyright Gate Keeping*, 2 Berkeley J. Ent. & Sports L. (2013).
Available at: http://scholarship.law.berkeley.edu/bjesl/vol2/iss1/4

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of Entertainment and Sports Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact mhoffman@law.berkeley.edu.

Choosing an Internet Shaped by Freedom: A Legal Rationale to Rein in Copyright Gate Keeping

By Joshua J. Schroeder,* J.D. Candidate 2013

Introduction: 48
PART I: The Public Interest in a Free and Open Internet 52
PART II: Contributory and Vicarious Liability Online 57
Contributory Liability 58
Vicarious Liability 58
The Volition Requirement 61
Direct Infringer Required 62
PART III: DMCA Safe Harbors 66
Section 512(m): Protection of Privacy 68
Actual Knowledge 69
"Red Flag Knowledge" 69
DMCA Vicarious Liability 74
Effective Notice 76
Abuse of the Notice Requirement 78
PART IV: FCC Net Neutrality Rules 79
Conclusion 85

INTRODUCTION:

The friction between copyright protection and internet freedom has hit a political boiling point. Last spring, public outcry shut down the Stop Online Piracy Act (SOPA), the Protect IP Act (PIPA), and the Anti-Counterfeiting Trade Agreement (ACTA),[1] and prompted the unveiling of the Electronic

---

* J.D. Candidate 2013, Lewis & Clark Law School. This article went through a number of revisions and would not have been possible without the support of a whole team of colleagues and mentors including Jody Allen-Randolph, Steve Butler, Karen Wetherell Davis, Kohel Haver, Eli Liliedahl-Allen, Lydia Pallas Loren, Judge Michael McShane, Mark Nelson, David Olson, Judge Darleen Ortega, Bob Pimm, Slone Pearson, Li Qi (Adam), Alma Robinson, Huang Song, Joseph Ureno, Jun Ge, and Jeffrey Wilson. A special thanks to the Bridges and Schroeder clans for their unconditional support over the years.

1. *See* Larry Magid, *What Are SOPA and PIPA And Why All the Fuss?*, FORBES, Jan. 18, 2012, http://www.forbes.com/sites/larrymagid/2012/01/18/what-are-sopa-and-pipa-and-why-all-

Communication Privacy Act Modernization Act and the Global Free Internet Act in the House of Representatives.[2] Furthermore, Verizon and MetroPCS have challenged FCC net neutrality rules in Federal Court.[3] Until Congress can decide the future of the internet, courts are faced with making sense of an increasingly dysfunctional body of law regarding online service providers (OSPs). The freewheeling, fast-evolving nature of the internet has facilitated significant contradictions between copyright gate keeping initiatives and the FCC's net neutrality rules.[4] This article argues that in order to avoid dysfunctional and contradictory applications of the law, courts should avoid interpretations of copyright law that undermine the FCC's net neutrality rules. Additionally, this article will explain why the Second Circuit's recent interpretation of the DMCA knowledge requirement on a 12(b)(6) motion should be reversed.[5]

In 2011, the FCC's net neutrality rules were finally printed in the Federal Register.[6] Originally adopted in 2005 on a trial basis,[7] their purpose is to preserve internet freedom and openness and avoid most internet gate keeping

---

the-fuss/ (noting that the laws pit the tech industry against the entertainment industry); Erik Kain, *Final Draft of ACTA Watered Down, TPP Still Dangerous on IP Rules*, FORBES, Jan. 28, 2012, http://www.forbes.com/sites/erikkain/2012/01/28/final-draft-of-acta-watered-down-tpp-still-dangerous-on-ip-rules/ (noting that ACTA would force the DMCA on developing nations and is a dangerous law to pass); David Meyer, *ACTA Rejected by Europe, Leaving The Treaty Near Dead*, ZDNET, July 4, 2012, http://www.zdnet.com/acta-rejected-by-europe-leaving-copyright-treaty-near-dead-7000000255/ (noting that massive protests in Europe prompted the European parliament to reject the treaty).

2. Electronic Communications Privacy Act Modernization Act of 2012, H.R. 6339, 112th Cong. (2011); Global Free Internet Act of 2012, H.R. 6530, 112th Cong. (2011) (One goal of this act would be to encourage other countries to "refrain from compelling Internet service providers and other intermediaries to restrict the free flow of information on the Internet."). *See also* Tom Watson, *Freshly-Minted Declaration of Internet Freedom Demands 'Free and Open Internet'*, FORBES, July 02, 2012, http://www.forbes.com/sites/tomwatson/2012/07/02/freshly-minted-declaration-of-internet-freedom-demands-free-and-open-internet/ (mentioning the new internet privacy and freedom laws in response to public demand).

3. VERIZON, Appellant, v. FEDERAL COMMUNICATIONS COMMISSION, Appellee. Independent Telephone and Telecommunications Providers et al., Interveners., 2013 WL 210111 (C.A.D.C.), 1. *See also* Kenneth Corbin, *FCC Chief Says Broadband Key to Economic Success, Defends Net Neutrality*, CIO, Sept. 25, 2012, http://www.cio.com/article/717232/FCC_Chief_Says_Broadband_Key_to_Economic_Success _Defends _Net_Neutrality; 2011 WL 6837548 (S.E.C. No - Action Letter), 35 (Verizon sought to exclude a shareholder proposal to voluntarily operate its wireless broadband network consistent with the FCC's net neutrality rules. On February 13, 2012, the S.E.C. issued this action letter denying Verizon's request.).

4. *See generally, c.f.* Monica Horten, *Where Copyright Enforcement and Net Neutrality Collide – How EU Telecoms Package Supports Two Corporate Political Agendas for the Internet*, DIGITAL COMMONS @ AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, http://digitalcommons.wcl.american.edu/research/16/ (2010) (an example of how European net neutrality and copyright enforcement materially effect and conflict with each other).

5. The Copyright Act, 17 U.S.C. § 512(c) & (d); Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 33–35 (2d Cir. 2012).

6. Preserving the Open Internet 47 C.F.R. § 8 (2011).

7. *The History of the Open Internet Proceeding*, FEDERAL COMMUNICATIONS COMMISSION, http://www.fcc.gov/topic/open-internet#history; 47 C.F.R. § 8.1 (2011).

by service providers.[8] The net neutrality rules require transparency, no blocking, and no unreasonable discrimination against websites (including BitTorrent) and content (including copyrighted content where there is no direct evidence the copyright holder approves of the dissemination).[9] Despite this, copyright cases have turned file sharing services into a pariah and have chided OSPs like YouTube for keeping a high number of copyrighted works on their networks without direct proof of copyright owner authorization.[10] As many OSP platforms are being shaped to avoid copyright liability, FCC rules made to ensure net neutrality are being needlessly undermined.[11] In response, the Supreme Court should broadly apply three rationales to ease the friction between telecommunications and copyright law: (1) The Ninth Circuit's statutory interpretation of the DMCA safe harbor in *UMG Recordings, Inc. v. Shelter Capital Partners LLC & Veoh Networks, Inc.* that requires specific knowledge,[12] (2) Judge Kozinski's dissent in *Perfect 10 v. Visa*,[13] which focuses vicarious liability on the unjust enrichment of parties facilitating copyright infringement instead of the dissemination of copyrighted works alone, and (3) requiring plaintiffs to thoroughly prove direct infringement (i.e. applying an analysis of fair use and the idea/expression dichotomy) before admitting evidence to prove willful blindness, volition, knowledge or an intent to encourage infringement.

The FCC heavily regulates internet service providers (ISPs) and copyright law puts the brunt of secondary liability on OSPs, creating the impression that the FCC is nearer to the "core" and copyright law is nearer to the "edge" of internet regulation.[14] However, because "communications" and "copyrighted content" are often one-in-the-same in an online context, changes must be made to avoid an impending clash between the two.[15] FCC net

---

8. FEDERAL COMMUNICATIONS COMMISSION, CHAIRMAN JULIUS GENACHOWSKI, REMARKS ON PRESERVING INTERNET FREEDOM AND OPENNESS (2010) (available at http://www.fcc.gov/document/federal-communications-commission-chairman-julius-genachowski-remarks-preserving-internet-f) (hereinafter *FCC Remarks on Internet Freedom*).

9. Preserving the Open Internet 47 C.F.R. § 8 (2011).

10. *YouTube*, 676 F.3d at 32–33 (2d Cir. 2012) (The plaintiffs alleged "secondary copyright infringement based on the presence of unauthorized content on the website. . ."). *See also* Liberty Media Holdings, LLC v. BitTorrent Swarm, 277 F.R.D. 669, 670 (S.D. Fla. 2011) (an attempt to sue torrent users jointly as a "swarm").

11. If copyright law forces OSPs to close off the very public benefits derived from an open internet that the FCC is seeking to preserve by promulgating net neutrality rules, the FCC has effectively been undermined by copyright law.

12. *See generally* UMG Recordings, Inc. v. Shelter Capital Partners LLC, 667 F.3d 1022 (9th Cir. 2011) *opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (The superseding decision still requires specific knowledge and that the entire statute must be read in such a way that gives each provision effect).

13. *See generally* Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, 494 F.3d 788 (9th Cir. 2007) (Kozinski, J., *dissenting*).

14. Preserving the Open Internet, 76 FR 59192-01 (Within its explanation of the net neutrality rules, the FCC labels online service providers, like Facebook and YouTube "edge service providers" and internet service providers like Comcast that provide a connection to internet broadband itself "core service providers."); The Copyright Act, 17 U.S.C. § 512(a) (The DMCA safe harbor gives a broad protection to internet service providers for providing transitory digital network communications.).

15. Rob Frieden, *Adjusting the Horizontal and Vertical in Telecommunications*

neutrality regulation is meant to protect both end users and OSPs from anticompetitive behavior that slows down innovation, yet copyright law is becoming a back door that circumvents these protections. This circumvention is made possible by acquisitions and exclusive transfers of IP rights, with OSPs, ISPs, and content owners being affiliated or under common ownership.[16] For example, the ISP Comcast owns as subsidiaries both NBC and Xfinity. It is therefore in Comcast's interest to use NBC's copyright portfolio to shape the online playing field in Xfinity's favor.[17] Another example is Google/ YouTube's deal with Comcast/NBC for the right to be the exclusive online provider for the 2012 summer Olympics. Because of their agreement, an online viewer had to purchase an unrelated Comcast cable subscription in order to watch the Olympics online.[18] In this scenario, Comcast was able to hire YouTube through copyright licensing to carry out anticompetitive behavior that would have attracted FCC antitrust scrutiny had Comcast simply required the purchase of an unrelated cable subscription themselves.[19] In this way copyright law may be used as a back door for ISPs to circumvent FCC regulation if they create, purchase or enter into exclusive contracts with an OSP.[20] In fact, reports have surfaced that users may have their internet access slowed or blocked via copyright alert systems put into effect by all major ISPs by way of deals they

---

Regulation: A Comparison of the Traditional and a New Layered Approach, 55 FED. COMM. L.J. 207, 212 (2003) ("[T]he internet seamlessly blends content and conduit.").

16. Who Owns the Media?, Free Press, http://www.freepress.net/ownership/chart (showing the high consolidation of media industries).

17. Brief of Respondent-Appellee at 14, 15, 50, 57, 75, Verizon v. FCC, No. 11-1355 (D.C. Cir.). *See also* Marguerite Reardon, *Franken: Comcast Thumbs Nose at Net Neutrality Rules*, CNET, May 7, 2012, http://news.cnet.com/8301-13578_3-57429373-38/franken-comcast-thumbs-nose-at-net-neutrality-rules/ (noting that Comcast might be violating net neutrality rules by exempting its Xfinity video service from monthly data caps).

18. Brent Rose, *How to Watch Every Second of the Olympics (Updated)*, GIZMODO, July 28, 2012, http://gizmodo.com/5928992/how-to-watch-every-second-of-the-olympics (explaining how if you had a subscription to cable you can access the 2012 Olympics, but if you didn't then you either had to purchase one or you would have to buy a VPN number to access the internet in the U.K. to see the Olympics because the BBC didn't require the purchase of a cable subscription to view the Olympics online).

19. FEDERAL COMMUNICATIONS COMMISSION, *FCC Grants Approval of Comcast-NBCU Transaction*, Jan. 18, 2011, *available at* http://transition.fcc.gov/transaction/comcast-nbcu.html#orders (Noting that FCC approval of the Comcast/NBC merger was made on the condition that Comcast would fulfill a number of public interest commitments including "Protecting the Development of Online Competition." Comcast/NBC's exclusive grant of the copyright in the Olympics arguably violates a number of these conditions including "unreasonably withhold[ing] programming from Hulu."); *See also* James R. Weiss & Martin L. Stern, *Serving Two Masters: The Dual Jurisdiction of the FCC and the Justice Department Over Telecommunications Transactions*, 6 COMMLAW CONSPECTUS 195, 198 (1998) ("In numerous Commission decisions reviewing communications industry mergers, the FCC mentions the Clayton Act, but never uses the Clayton Act as its basis for proceeding.").

20. Gerry Smith, *Verizon Copyright Alert System Would Throttle Internet Speeds of Repeat Online Pirates*, HUFFINGTON POST, Jan. 11, 2013, http://www.huffingtonpost.com/2013/01/11/verizon-copyright-alerts-piracy_n_2459133.html (Noting that copyright alert systems could presently be put into effect by all major ISPs by way of deals made by the entertainment industry and major internet service providers that could effectively replace DMCA notices. This could be "a shift in strategy" to self help after SOPA and PIPA failed to pass through Congress.).

made with the entertainment industry, as corroborated by the Motion Picture Association of America's comments to the Congressional Internet Caucus Advisory Committee.[21] Copyright law is being shaped into a leveraging mechanism to justify anticompetitive behavior and circumvent FCC regulation that would otherwise stop the internet from being molded by the interests of massive corporations and used against the public interest.

PART I: THE PUBLIC INTEREST IN A FREE AND OPEN INTERNET

The US is one of the only countries in the world that does not provide the internet as a public utility.[22] Instead, the US internet service market is divided between private telephone and cable carriers.[23] Since these companies hold a natural "duopoly" on the market and the nature of internet communications as a public good,[24] Congress granted the FCC authority to regulate the telecommunications industry pursuant to a public interest standard.[25] In the wake of increased market consolidation,[26] including vertical

---

21. About the Center for Copyright Information, (last visited March 25, 2013), http://www.copyrightinformation.org/about-cci/ (CCI is a coalition of major copyright owner interest groups and ISPs, and they are initiating copyright alert systems in violation of net neutrality). *See also* John Tarnoff, We Don't Need Six Strikes, HUFFINGTON POST, March 7, 2013, http://www.huffingtonpost.com/john-tarnoff/we-dont-need-six-strikes_b_2831489.html; Ernesto, MPAA: BitTorrent is the Best Way to Pirate Movies and TV-Shows, TorrentFreak, March 23, 2013, http://torrentfreak.com/mpaa-bittorrent-is-the-best-way-to-pirate-movies-and-tv-shows-130323/ ("The MPAA, RIAA and the Internet providers participating in the "six strikes" anti-piracy scheme have informed the Congressional Internet Caucus Advisory Committee about their plans.").

22. Sam Gustin, *Is Broadband Internet Access a Public Utility?*, TIME: BUSINESS & MONEY, Jan. 09, 2013, http://business.time.com/2013/01/09/is-broadband-internet-access-a-public-utility/ ("Because the U.S. government has allowed a small group of giant, highly profitable companies to dominate the broadband market, Crawford argues, American consumers have fewer choices for broadband service, at higher prices but lower speeds, compared to dozens of other developed countries, including throughout Europe and Asia."). *See also* Susan Crawford, *U.S. Internet Users Pay More for Slower Internet Service*, BLOOMBERG VIEW, Dec. 7, 2012 http://www.bloomberg.com/news/2012-12-27/u-s-internet-users-pay-more-for-slower-service.html ("the U.S. is rapidly losing the global race for high-speed connectivity, as fewer than 8 percent of households have fiber service. And almost 30 percent of the country still isn't connected to the internet at allFalse All Americans need high-speed access, just as they need water, clean air and electricity. But they have allowed a naive belief in the power and beneficence of the free market to cloud their vision. As things stand, the U.S. has the worst of both worlds: no competition and no regulation.").

23. Nate Anderson, *So Long, Broadband Duopoly? Cable's High Speed Triumph*, ARSTECHNICA, Jan. 3, 2011, http://arstechnica.com/tech-policy/2011/01/so-long-broadband-duopoly-cables-high-speed-triumph/ (noting that telephone services may have lost the broadband internet market and that Comcast may have a monopoly on it, however it is unclear because it is not clear whether wireless internet will or will not change the market.).

24. Carol Rose, The Comedy of the Commons: Custom, Commerce and Inherently Public Property, 53 U. CHI. L. REV. 711, 718–19 (1986) (Defining public goods and natural monopolies as an "exception to the general rule of favoring private property" that occur when market failure "fails to guide privately owned resources to their socially optimal uses.").

25. 47 U.S.C. § 1302 (the FCC can regulate the telecommunications industry according to "public interest, convenience and necessity").

26. Who Owns the Media?, Free Press, http://www.freepress.net/ownership/chart (showing the high consolidation of media industries). *Compare* Jim Chen, *The Echoes of Forgotten*

mergers,[27] and evidence that the monopolistic power of ISPs has been used to limit or remove competition and speech by OSPs and internet users,[28] the FCC adopted prophylactic rules to preserve an open internet, known as the net neutrality rules.[29] Net neutrality is the prohibition of unreasonable discrimination in transmitting lawful internet traffic.[30] These rules are thus intended to prevent blocking, degrading, or favoring internet content or websites, and to preserve the internet as a level playing field for everyone.[31]

Meanwhile, peer-to-peer file sharing technology has become the core of a general category of online distribution that major content owners are seeking to shut down or otherwise control of through copyright law.[32] This has severely crippled the development of beneficial peer-to-peer file sharing projects aimed at increasing learning and knowledge as well as chilled the

---

Footfalls: Telecommunications Mergers at the Dawn of the Digital Millennium, 43 HOUS. L. REV. 1311, 1316 (2007) ("The prospect that the Commission or the Justice Department would actually bar a merger, however, has diminished to a historic nadir."), *with* In Re AT&T Inc. & Deutsche Telekom AG (*Dismissed*) (Nov. 29, 2011), *available at* http://www.fcc.gov/document/bureau-order-dismissing-applications-and-bureau-staff-report (A definite sign of changing times, the FCC has issued an order dismissing the AT&T/T-Mobile merger application because the applicants failed to meet their burden of proving that the merger was in "the public interest." The main reason AT&T gave for why their purchase of T-Mobile would be in the public interest was an increase in "synergies" that would result in increased access to wireless broadband internet. The FCC did not bite.).

27. FEDERAL COMMUNICATIONS COMMISSION, *FCC Grants Approval of Comcast-NBCU Transaction*, Jan. 18, 2011, *available at* http://transition.fcc.gov/transaction/comcast-nbcu.html#orders. *See also* Thomas Curtin, *Achieving "The Franchise": The Comcast-NBC Universal Merger and the New Media Marketplace*, 19 COMMLAW CONSPECTUS 149, 156 (2010) (explaining that as occurred in the Comcast/NBC Universal merger review, the trend has been a loose review of vertical mergers).

28. Brief of Respondent-Appellee at 15, Verizon v. FCC, No. 11-1355 (D.C. Cir.); George S. Benjamin, *Internet Content Discrimination: The Need for Specific Net Neutrality Legislation by Congress or the FCC in Light of the Recent Anti-Net Neutrality Actions by Comcast Corporation*, 39 SW. L. REV. 155, 169 (2009).

29. Preserving the Open Internet 47 C.F.R. § 8.1 ("The purpose of this part is to preserve the Internet as an open platform enabling consumer choice, freedom of expression, end-user control, competition, and the freedom to innovate *without permission*.") (italics added).

30. *FCC Remarks on Internet Freedom*, *supra* note 6. *See also* Preserving the Open Internet 47 C.F.R. § 8 (2011) (ISPs are not allowed to block OSP services that compete with their telephony services nor are they supposed to unreasonably discriminate against their services); Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. Telecomm. & High Tech. L. 141, 142 (2003) (noting that net neutrality "preserv[es] a Darwinian competition among every conceivable use of the Internet so that [*sic*] only the best survive.").

31. Preserving the Open Internet 47 C.F.R. §§ 8.5, 8.7.

32. *See* Geoffrey Neri, *Sticky Fingers or Sticky Norms? Unauthorized Music Downloading and Unsettled Social Norms*, 93 GEO. L.J. 733 (Noting a movement towards the view that unauthorized internet downloading is theft "plain and simple" from the Supreme Court's longstanding view that "interference with copyright does not easily equate with theft.") (quoting Press Release, Motion Picture Ass'n of Am., Inc., Motion Picture and Music Industries File Suit Against Scour.com (July 20, 2000) *available at* http://www.mpaa.org/Press/ScourPressRelease.htm, Eric H. Holder, Jr., Remarks at the Press Conference Announcing the Intellectual Property Rights Initiative (July 23, 1999) *available at* http://www.usdoj.gov/criminal/cybercrime/dagipini.htm and Dowling v. United States 43 U.S. 207, 217 (1985)).

willingness of investors to support new internet software in general.[33] For example, LOCKSS, a peer-to-peer system, was designed so that librarians can quickly and easily determine whether a digital copy of a document remains authoritative and replace damaged copies.[34] With the name and slogan "lots of copies keep stuff safe" contributing institutions naturally may fear copyright liability.[35] Other projects to encourage convenient and easy dissemination of creative works have also been threatened, damaged, or abandoned altogether in the wake of such a pivotal shift in copyright law.[36]

This article argues that the FCC's net neutrality rules are being undermined by secondary copyright liability standards. The FCC has caught many ISPs blocking and degrading file sharing services over their networks, and the ISPs' response seems to have been a collective "so what?"[37] For example, they have been caught throttling internet speeds artificially.[38] Online services like Skype and FaceTime that compete with traditional telephone and cable services have struggled to gain internet access, and their services have been degraded when users try to access them online.[39] Netflix and Hulu have been targeted by discriminatory practices perpetrated by ISPs that own

---

33. *See* Ryanne E. Perio, *Policing the Android Market*, 29 WTR ENT. AND SPORTS LAW 21, 23 (winter, 2012).

34. Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J.L. & TECH. 253, 292 n.209 (2006).

35. *See* What is LOCKSS?, http://www.lockss.org/about/what-is-lockss/ (last visited March 10, 2013) (LOCKSS stands for "lots of copies keep stuff safe"). *See also* Yueyue Wang, *Where Does Fair Use Go? —- An Insight into Regulating File-sharing in Research and Education*, BILETA ANNUAL CONFERENCE 1–2 (April, 2007) (available at http://www.bileta.ac.uk/content/files/conference%20papers/2007/Where%20Does%20Fair%20Use%20Go%20—-%20An%20Insight%20into%20Regulating%20File-Sharing%20in%20Research%20and%20Education.pdf) (noting other academic file sharing services like LionShare, eduCommons, Edutella and The Internet Archive Project.).

36. Perio, *supra* note 29, at 23.

37. Benjamin, *supra* note 25, at 169 (3-2 vote.). *See also* Tony Bradley, *Comcast Toll on Netflix Screams for Net Neutrality*, PC WORLD, Nov. 30, 2010, http://www.pcworld.com/article/211964/comcast_toll_on_netflix_screams_for_net_neutrality.html (explaining how Comcast's non-neutral stance toward Netflix stems from its apparent moral ground in blocking peer-to-peer file sharing services.).

38. Jessica Fink and Brett Noia, on behalf of themselves and all others similarly situated, Plaintiffs, v. Time Warner Cable, Defendant., 2011 WL 8201423 (S.D.N.Y.) (Alleging that Time Warner Cable uses peer-to-peer file sharing as a justification to throttle internet users' use of the internet even when they purchased a "roadrunner" service at an extra cost for faster internet service. Also noting that Comcast was publically criticized by the FCC for the "same illegal throttling practice."). *See also* Daniel Ionescu, *Is Your ISP Throttling Your Internet Connection?*, PCWORLD, Jan. 29, 2009, http://www.pcworld.com/article/158552/check_ISP_speeds.html; Gerry Smith, *Verizon Copyright Alert System Would Throttle Internet Speeds of Repeat Online Pirates*, HUFFINGTON POST, Jan. 11, 2013, http://www.huffingtonpost.com/2013/01/11/verizon-copyright-alerts-piracy_n_2459133.html (Comcast, Time Warner Cable and Verizon are planning on using their gate keeping power to punish people they view as copyright infringers by blocking or slowing their internet access. If this practice becomes the norm courts may no longer need to decide copyright cases involving the internet.).

39. Brief of Respondent-Appellee at 15, Verizon v. FCC, No. 11-1355 (D.C. Cir.). David Kravets, *AT&T: Holding FaceTime Hostage Is No Net-Neutrality Breach*, WIRED: THREAT LEVEL, Aug. 22, 2012, http://www.wired.com/threatlevel/2012/08/facetime-net-neutrality-flap/.

competing online video services.[40] ISPs have been accused of blocking online credit card processing that competed with their affiliated services.[41] And perhaps most troubling for the FCC, ISPs are investing in copyright ownership and fighting net neutrality rules to preserve outdated telephone and cable business models instead of investing in universal high speed internet.[42] Most American internet users still connect to the internet through copper wiring, 30% of America does not have internet access at all and ISPs have little incentive to invest in the fiber optic networks needed to bring America up to date.[43]

In fact, in order to justify their ability to unilaterally slow and block end user internet connections, a coalition has been formed between major copyright owner interest groups and ISPs.[44] They plan on policing and punishing people they claim are infringers without courts or the law.[45] This amounts to a power grab by ISPs and the content industries to take copyright and the internet out of the government's hands by circumventing net neutrality rules as well as any other limits to copyright protection recognized by the law.[46] The public interest that justifies private ownership of telecommunication networks and copyright protection is not only being removed from government oversight by private individuals, it is being yielded by them as if the public interest in telecom and copyright law does not exist.[47]

---

40. Jeffrey Van Camp, *Netflix CEO Calls Out Comcast for Breaking Net Neutrality*, DIGITAL TRENDS, April 16, 2012, http://www.digitaltrends.com/movies/netflix-ceo-calls-out-comcast-for-breaking-net-neutrality/ (Noting that the video watched on Xfinity will not count toward an internet user's monthly data cap when watching it on Hulu or Netflix will.); Bradley, supra note 32 (noting that Comcast requires Netflix to pay extra for uninterrupted streaming of movies when it has a competing on demand video service.).

41. Brief of Respondent-Appellee at 15, Verizon v. FCC, No. 11-1355 (D.C. Cir.) (*available at* http://www.fcc.gov/document/verizon-v-fcc-usa-no-11-1355-dc-cir.).

42. Greg Sandoval, *RIAA Chief: ISPs to Start Policing Copyright by July 1*, CNET, March 14, 2012, http://news.cnet.com/8301-31001_3-57397452-261/riaa-chief-isps-to-start-policing-copyright-by-july-1/ (noting that all the major internet providers made a deal with the music industry to police piracy for them).

43. Crawford, *supra* note 20.

44. About the Center for Copyright Information, (last visited March 25, 2013), http://www.copyrightinformation.org/about-cci/ (CCI is a coalition of major copyright owner interest groups and ISPs, and they are initiating copyright alert systems in violation of net neutrality). *See also* John Tarnoff, We Don't Need Six Strikes, HUFFINGTON POST, March 7, 2013, http://www.huffingtonpost.com/john-tarnoff/we-dont-need-six-strikes_b_2831489.html; Ernesto, MPAA: BitTorrent is the Best Way to Pirate Movies and TV-Shows, TorrentFreak, March 23, 2013, http://torrentfreak.com/mpaa-bittorrent-is-the-best-way-to-pirate-movies-and-tv-shows-130323/ ("The MPAA, RIAA and the Internet providers participating in the "six strikes" anti-piracy scheme have informed the Congressional Internet Caucus Advisory Committee about their plans.").

45. *Id.*

46. *Cf.* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1168 (9th Cir. 2007) (developing fair use defense for a wide variety of images used by search engines).

47. *See* International News Service v. Associated Press 248 US 215, 250 (1918) (Brandeis dissenting) ("But the fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to insure to it this legal attribute of property. The general rule of law is, that the noblest of human productions-knowledge, truths ascertained, conceptions and ideas-become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain cases where the public policy has seemed to demand it.").

This article argues for a return of copyright law to the public interest concerns from which it sprang. This return is necessary in order for copyright to coexist with net neutrality.[48] In fact, the purpose of granting copyright protection is to relieve our fear of underproduction of public goods by spurring the creation and dissemination of new creative works.[49] Historically speaking, creative works were publicly owned goods to which we granted authors *limited* monopolies to in order to increase the excludability of otherwise non-excludable works.[50] Copyright was not characterized as a grant of personal property—it was, after all, of limited duration. Instead, the underlying good, the creation and dissemination of useful information to increase knowledge and learning,[51] is a public good and the grant of copyright protection has always been balanced against the public's interest in it.[52]

By giving some copyright owners too heavy a hand in shaping the internet, secondary copyright liability threatens to destroy the public's interest in a free and open internet. It is imperative that in shaping copyright's secondary liability doctrine, courts return to the public interest that underlies both copyright and telecommunications law. Such a return would ease the friction already inherent between these two areas of federal regulation.

---

48. Benjamin Kaplan, *An Unhurried View of Copyright: Proposals and Prospects*, 66 COLUM. L. REV. 831, 851 (1966) (noting that some scholars believed that as technology progressed copyright protection would actually be reduced because the general public would realize that creators depend on works that come before them.).

49. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1031–32 (2005). *But see* Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108, 112 (1990) ("Old rhetoric about IP equating to monopoly seemed to have vanished, replaced by a recognition that a right to exclude IP is no different in principle from the right to exclude in physical property.").

50. Lydia Pallas Loren, *The Evolving Role of "For Profit" Use in Copyright Law: Lessons from the 1909 Act*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 255, 256 (2010) ("The 'free riding' permitted by the Copyright Act is not an accident, but rather is integral to the design of an effective system meant to promote progress. The rights granted to copyright owners come at a cost borne by the public in reduced access, use, and enjoyment of copyrighted works."); Lemley, *supra* note 40, at 1031–32 (describing the public goods problem that copyright is supposed to solve); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.") (citing Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object of conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors.")). *See also* Rose, *supra* note 22, at 718–19 (basing a public interest in inherently public goods, like public access and use of navigable waterways, and beaches, on property law itself. Because internet access and information itself fit Rose's analysis of "inherent public goods," failure of copyright law to recognize the public's interest in the internet and free flow of ideas through it, risks harm to an interest that predates and underlies copyright law. The FCC's public interest standard recognizes this interest.).

51. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 at 442–43 (1984). *See also* White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1, 20 (1908) (Holmes, J., *concurring*).

52. *Sony*, 464 U.S. at 429 ("First, how much will the legislation stimulate the producer and so benefit the public; and second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.") (quoting H.R.Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909))(internal quotation marks omitted); Lemley, *supra* note 40, at 1031–32. *See also* Rose *supra* note 22, at 718–19.

PART II: CONTRIBUTORY AND VICARIOUS LIABILITY ONLINE

In the early 1990's, some states sought to use OSPs as gatekeepers to block child pornography and other content considered harmful to minors.[53] Their efforts were undone when *Stratton Oakmont, Inc. v. Prodigy Services Co.* found that the Communication Decency Act of 1996 preempted this kind of third party gate keeping. *Prodigy*'s holding was designed to encourage "Good Samaritan blocking and screening of offensive material."[54] This relied on the institution of "more insistent direct regulation" against the child pornography industry.[55] If the combination of limiting secondary liability and encouraging direct enforcement is seen as sufficient to protect our children, it should also be seen as sufficient protection for copyright owners. Nevertheless, where advocates for sexually exploited children have failed to convince lawmakers to extend secondary liability to OSPs for gate keeping purposes, the content industry has succeeded.[56] Perhaps copyright law justifies online gate keeping because the content industry is "more organized and more demonstrably harmed than parents whose kids" were harmed by the online pornography industry.[57] Maybe gate keeping initiatives brought about by private copyright policing are seen by courts as less detrimental to internet freedom than if the government directly required internet gate keeping. Whatever the policy difference may be, courts have continued to empower OSP gate keeping initiatives through contributory and vicarious copyright infringement.

Copyright law infers secondary liability for infringement from the common law.[58] Secondary infringement comes in two forms: (1) Contributory infringement, which is based in tort law negligence; and (2) vicarious infringement, which is grounded in the tort and agency law concept of *respondeat superior*.[59] Both have a threshold requirement that there be at least one direct infringer, so fair use and other copyright defenses can limit secondary infringement.[60] This comment will briefly discuss contributory liability and will spend considerable time addressing vicarious liability,

---

53. Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 22 (2006).

54. Zittrain, *supra* note 30, at 262.

55. *Id.* at 262.

56. *Id.* at 266 (Noting that §512(c) represents "a trend toward gatekeeping had compuserve's distributor liability become the norm for OSPs instead of being trumped by the CDA.").

57. *Id.* at 263.

58. Religious Tech. Ctr. v. Netcom On-Line Commc'n Services, Inc., 907 F. Supp. 1361, 1373 (N.D. Cal. 1995) ("The absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringement on certain parties who have not themselves engaged in the infringing activity. For vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of others.") (quoting *Sony*, 464 U.S. at 434).

59. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1022 (9th Cir. 2001). *See also* Trevor Cloak, *The Digital Titanic: The Sinking of Youtube.com in the DMCA's Safe Harbor*, 60 VAND. L. REV. 1559, 1573 (2007).

60. Cloak, *supra* note 21, at 1576 n.115.

especially because vicarious liability was expressly extended in §512(c) & (d) to the activities of OSPs online.[61]

Contributory Liability

Contributory infringement requires that a defendant both had knowledge of direct infringement and materially contributed to or induced the infringement.[62] In *Perfect 10 v. Amazon*, the Court noted that Google could be held contributorily liable "if it had knowledge that infringing Perfect 10 images were available using its search engine, could take simple measures to prevent further damage to Perfect 10's copyrighted works, and failed to take such steps."[63] Thus, an absence of "simple measures" on the part of a search engine, along with the knowledge of infringing activity, could result in liability.[64] However, if a search engine manages to stay within the §512(d) safe harbor, it is protected from contributory liability.[65] The Court in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster* held that an OSP "infringes contributorily by intentionally inducing or encouraging direct infringement."[66] This differs from the holding in *A&M Records v. Napster*, where the Ninth Circuit found contributory liability because Napster provided "the site and facilities."[67] The *Grokster* standard is also more lenient to OSPs than the one a Ninth Circuit District Court applied previously in *Religious Tech. Ctr. v. Netcom On-Line Commc'n Services, Inc.*, which found material contribution in a mere "failure to cancel [a user's] infringing message and thereby stop an infringing copy from being distributed worldwide. . ."[68] Overall, the "material contribution" prong of contributory liability appears to ask whether gate keeping policies are in place (i.e. "simple measures") rather than focusing on how specifically an OSP aided or abetted infringement.[69] However, if an OSP can manage to stay within the bounds of §512(c) or (d), it will be shielded from all contributory liability claims.[70]

Vicarious Liability

To be vicariously liable, a defendant must have had the right and ability to control the infringer's acts and must have received a direct financial

61. The Copyright Act, 17 U.S.C. § 512(c) & (d).

62. Jeffrey P. Cunard & Richard S. Lee, *Cyberliability 2007: Selected Developments*, 918 PLA/PAT 715, 725 (2007) (*hereinafter* Cunard); Cloak, *supra* note 21, at 1576 n.115.

63. Cunard, *supra* note 24, at 723–24.

64. *Id.*

65. *Id.* at 724.

66. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005).

67. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1022 (9th Cir. 2001) (quoting Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996).

68. Religious Tech. Ctr. v. Netcom On-Line Commc'n Services, Inc., 907 F. Supp. 1361, 1372 (N.D. Cal. 1995).

69. *Id.*

70. The Copyright Act, 17 U.S.C. § 512(c) & (d).

benefit from the infringement.[71] The *Grokster* Court stated that one "infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it."[72] In *Perfect 10*, vicarious liability failed because Google and Amazon did not have the legal right or ability to stop or limit the infringing conduct on third party websites.[73] FCC action against online gate keeping should be interpreted as a limit on the legal right and ability of OSPs to remove content from their networks as well.[74]

In *Perfect 10 v. Visa*, the Court recognized that credit card payment systems "do not help locate and are not used to distribute the infringing images."[75] The Court distinguished credit card payment systems from Google because "Google's search engine itself assists in the distribution of infringing content to Internet users, while defendant's payment systems do not" and "location services are more important and more essential—indeed, more 'material'—to infringement than payment services are."[76] Ultimately, payment processing is "an additional step in the causal chain" and was actually characterized as a roadblock to infringement, unlike search engines that make infringement "fast and easy."[77] It is surely a relief for Google and Amazon that they do not have the legal "right and ability" to limit the infringing conduct on third party websites.[78] Conversely, courts have not yet defined what is different about Grokster, Aimster, Napster, and similar OSPs that gives them a legal right and ability to regulate our online activities. It is also notable that the majority in the *Perfect 10 v. Visa* case did not apply the test for contributory infringement set out in the *Perfect 10 v. Amazon* case requiring "simple measures." This perhaps indicates that the Court treats systems they do not perceive as proper gatekeepers differently than those they do without explaining why or how.[79]

Perfect 10 v. Visa included a ringing dissent by Judge Kozinski, who did not see a meaningful distinction between payment systems and search engines with regard to online secondary infringement.[80]

> [T]here is no "additional step." Defendants participate in every credit card sale of pirated images; the images are delivered to the buyer only after the defendants approve of the transaction and process the payment. This is not just economic

71. *Netcom*, 907 F. Supp. at 1375 (quoting *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 306 (2d Cir. 1963)). *See also* Cloak, *supra* note 21, at 1573 (noting that vicarious liability extends beyond the employee employer relationship that respondeat superior relies on.).
72. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005).
73. Cunard, *supra* note 24, at 724.
74. *Id.*
75. Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, 494 F.3d 788, 796 (9th Cir. 2007).
76. *Id.* at 797 n.8.
77. *Id.* at 811.
78. *Id.* at 812.
79. *Id.* at 801–02.
80. *Id.* at 810–11 (Kozinski, J., *dissenting*).

> incentive for infringement; it's an essential step in the infringement process.[81]

Kozinski also noted that "[i]f it mattered whether search engines or credit cards are more important to peddling infringing content on the Internet, the cards would win hands down."[82] Kozinski perceived the issue of unjust payment for infringing distribution of copyrighted works as more pressing than the increased dissemination of copyrighted works.[83]

This differing opinion, if applied to peer-to-peer file sharing, torrent file sharing, and social networking sites like YouTube and Facebook, would rightfully put the brunt of copyright legal analysis on the second prong of vicarious liability analysis: how and whether these services make money directly from infringing distribution of copyrighted works. Kozinski ties his rationale back to *Fonovisa*,[84] and notes that shutting down the way infringing websites are paid could remove the incentive for developing these systems in the first place.[85] If Judge Kozinski's approach is taken seriously, *Grokster*'s blanket supposition that selling advertising space on a highly accessed site suffices as direct financial gain will need to be fleshed out or abandoned.[86] Likewise, other facts about how and why companies make money online will need to be considered.

For example, courts have yet to consider "network benefits," which the public receives by large portions of society being connected to networks. When most people have internet or telephone subscriptions, the value of owning phones and computers skyrockets. These benefits also make selling advertising space valuable on a website like Facebook or YouTube. Courts should take care in separating out the monetization of the general benefits of networking as not constituting direct profits for vicarious infringement.[87] The benefits

---

81. *Id.*

82. *Id.* at 814.

83. *Id.* at 812 (noting that "if infringing images can't be paid for, there can be no infringement.").

84. *Id.* at 814 (citing Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir.1996)).

85. *Id.* at 815, 817–18 ("If cards don't process payment, pirates don't deliver booty.").

86. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 926 (2005).

87. *Compare* Rose supra note 20, at 770 (Giving a private property rational for limiting the capture of rents when they are derived from public participation in commerce itself: "The individuals involved in commerce help themselves, but they also help others as well, and they need encouragement to do so; thus the cost of the locations necessary for commerce—particularly transport facilities—should be kept at a minimum, and perhaps be borne by the organized community at common expense. Nineteenth-century doctrine attempted to maintain public access to these locations, even at the expense of exclusive ownership rights. It was, after all, the 'publicness' of commerce—the increasing returns from greater participation—that attached an ever-increasing value to a road or waterway, beyond any alternative use of the property; and private owners could not be permitted to capture the rents created and enhanced by commerce itself. In an odd Lockeanism, the public *deserved* access to these properties, because 'publicness,' nonexclusive open access, created their highest value."), *with Fonovisa*, 545 U.S. at 263–64 (noting that direct financial benefit includes "acts as a 'draw' for customers."), *and* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1023 (9th Cir. 2001) (discussing this in a digital context and failing to mention the possibility that direct copyright infringement can be incidental to the reasons why most users access various OSP websites, or the internet in general.). *See also*

conferred by copyright holders may be somewhat incidental to the profitability of OSP business models. Selling advertising space should not be enough to infer a direct financial benefit from the infringement itself without considering the value to consumers of open and unrestricted networking and communications over OSPs. The FCC has recently vowed to protect this openness because of its real value to the public.[88]

The Volition Requirement

Unlike contributory liability, there is no need to show knowledge of direct infringement to prove vicarious infringement.[89] However, there still needs to be a showing of "volition," as online services that are automatic and indiscriminate may not be held liable.[90] The Seventh Circuit in *Aimster*, noting the defendant's "ostrich like refusal" to discover infringement, decided that willful blindness was sufficient to find volition.[91] Even *Grokster* noted that secondary liability may not be imposed solely because of the design or distribution of a system when it is capable of substantial lawful use.[92] If a distributor discovers that it has been used for infringement after the fact, it may not be held liable. It must have had specific knowledge of infringement at the time the system contributed to the infringement and failed to act upon that information.[93] However, in *Grokster*, specific knowledge was interchangeable with evidence the defendant encouraged or promoted infringement and willfully blinded itself to infringing activity on its network.[94]

Grokster marks a significant shift away from prioritizing the dissemination of copyrighted works above granting copyright protection.[95] The *Grokster* Court recognized that its decision would heighten the costs of disseminating copyrighted content.[96] Unlike the *Napster* Court, *Grokster* found liability even when actual knowledge of infringement was lacking because of

---

Cloak, *supra* note 21, at 1588 (noting that legislative history states that in determining whether an ISP received a direct financial benefit, "courts should take a common-sense, fact based approach, not a formalistic one" which this article argues should include a discussion of network benefits when appropriate.).

88. *See FCC Remarks on Internet Freedom*, *supra* note 6.

89. Cloak, *supra* note 21, at 1573.

90. Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 130 (2d Cir. 2008); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 490–92 (1984).

91. Kreimer, *supra* note 15, at 89 ("ostrich-like refusal to discover the extent of which a system is being used to infringe copyright" combined with deliberate design that made knowledge impossible was tantamount to Guilty Knowledge) (quoting In re Aimster Copyright Litig., 334 F.3d 643, 655 (7th Cir. 2003)).

92. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005).

93. *Id.* at 930.

94. *Id.* ("Thus, where evidence goes beyond a product's characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony*'s Staple Article Rule will not preclude liability.").

95. *Id.* at 928–29 (noting that the tension between the value of digital dissemination and offering artistic protection is the subject of *Grokster* and mentioning that promoting "creation" is the primary purpose of offering copyright protection).

96. *Id.* (Noting that the stronger the secondary copyright liability, the higher the cost to technological innovation and dissemination.).

the decentralized nature of Grokster software.[97] Specific knowledge to prove volition was replaced by "evidence of unlawful objective" citing Grokster's actions to capture Napster consumers.[98] The Court also cited evidence that 90% of the files downloaded were "copyrighted works" to support a finding of sufficient knowledge of Grokster's "unlawful objective."[99] However, the Court failed to mention how much of the 90% were transfers disapproved of by copyright owners.[100] *Sony*'s rationale should not have been brushed aside. Certain copyright owners should not be allowed to shape the internet by burdening OSPs with gate keeping responsibilities, when other copyright owners do not disapprove of having their works copied. The existence of "Mr. Rogers" type copyright holders should be reaffirmed as a rational basis for limiting secondary copyright liability for OSPs today.[101] Courts should recognize that one man's online piracy and theft is another man's free publicity and opportunity.

Direct Infringer Required

Secondary infringement can be limited by fair use and the idea/ expression dichotomy if certain uses by OSP users are not considered copyright infringement. If there is no direct infringer, then there can be no secondary infringer. This is how Sony escaped liability for selling VHS recording devices with which users could record television without the express authorization of the copyright holder.[102] Recording live TV on a VHS was found to be a fair use. If lawmakers clarify uses online that do not constitute direct infringement, it could remove some of the chilling effects resulting from broad secondary liability enforcement on OSPs.

Traditionally, the U.S. Supreme Court has refused to grant copyright protection if it meant stifling new innovation in tools of creation and dissemination.[103] This line of case law ending with *Sony* characterized the grant of copyright protection as a social cost. These cases reasoned that dissemination and technological innovation should not be stifled by the social costs linked to the monetization of copyrights—effectively prioritizing the

97. *Id. Cf.* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 at 442–43 (1984); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1021–22 (9th Cir. 2001); Religious Tech. Ctr. v. Netcom On-Line Commc'n Services, Inc., 907 F. Supp. 1361, 1374 (N.D. Cal. 1995).

98. *Grokster*, 545 U.S. at 925, 937–40 (noting that Grokster inserted codes on its website that caused their website to appear on search engines when consumers searched for "napster" or "free file sharing, and the obvious observation that Grokster is a derivative of the name Napster. Also noting internal StreamCast e-mails about positioning itself to capture the flood of the 32 million former Napster users.).

99. *Id.* at 922 (citing a determination from a statistician hired by the plaintiff).

100. *Cf. Sony*, 464 U.S. at 445 (Noting Mr. Rogers's approval of time shifting of his copyrighted material); *infra* note 183, and accompanying text.

101. *See infra* note 183 and accompanying text; Zittrain, *supra* note 30, at 295; The Patent Act, 35 U.S.C. § 271.

102. *Sony*, 464 U.S. at 442.

103. *Id.* at n.11. *See* White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1, 20 (1908) (Holmes, J., *concurring*).

dissemination of content above encouraging the creation of content. Ever since the dawn of the internet, courts have been moving away from this rationale. This trend away from *Sony* culminated in the Supreme Court's findings in *Grokster* and has reverberated in most copyright cases involving the internet since.

There is no reason why *Sony* should not hold greater or equal emphasis in future internet copyright cases. *Sony* is still valid law, and cases so seldom cite its rationales that it can seem arcane and foreign. Therefore, a review of *Sony*'s findings is in order: (1) Copyright protection is entirely statutory and is not based on any sort of natural property right;[104] (2) the reward authors receive in controlling creative works is a "secondary consideration" to the public benefit derived from the dissemination of an author's creative works;[105] (3) it is ultimately the legislature's responsibility to balance grants of private copyright control with society's competing interest "in the free flow of ideas, information and commerce";[106] (4) Copyright law has "developed in response to significant changes in technology" and so the facts of this case do not warrant a significant departure from past copyright decisions just because of new technology that makes copying easier;[107] and finally (5) "respondents have no right to prevent other copyright holders from authorizing [time shifting] for their programs."[108]

---

104. *Sony*, 464 U.S. at 429 n.10 (citing H.R. Rep. No. 2222 60th Cong. 2d Sess. 7 (1909)) ("enactment of copyright legislation is not based on any natural right the author has with his writings but actually is based upon "the ground that the welfare of the public will be served and progress of science and useful arts will be promoted. . .") (Also noting that the 1909 Congress considered two questions when enacting the 1909 Copyright Act: (1) "how much will the legislation stimulate the producer and so benefit the public" and (2) how much will the monopoly granted be detrimental to the public goal of Congress to ensure that through copyright – the "benefit to the public [] outweighs the evils of the temporary monopoly [of copyright]."); *Sony*, 464 U.S. at 431 (noting that protection given by copyright is wholly statutory and that the only remedies for infringement are "those prescribed by congress") (quoting Thompson v. Hubbard, 131 U.S. 123, 151 (1889)).

105. *Sony*, 464 U.S. at 429 ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors. It is said that reward to the author or artist serves to induce release to the public of the product of his creative genius.") (citing Fox Film Corp. v. Doyal 281 U.S. 123, 127 (1932)).

106. *Id.* at 429 ("As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on one hand, and society's competing interest in the free flow of ideas, information and commerce on the other hand, our patent and copyright statutes have been amended repeatedly.") (citing H.R. Rep. No. 2222, 60th Congress, 2d Sess. 7 (1909)); *Sony*, 464 U.S. at 431 (emphasizing that because of Congress's "Constitutional authority and institutional ability" should "accommodate. . .the varied permutations of competing interests that are inevitably implicated by such new technology." Also the Court noted a recurring theme of the judiciary's "reluctance to expand copyright protection without explicit legislative guidance" citing a number of pre-1976 Supreme Court cases).

107. *Id.* at 430 ("From its beginning, the law of copyright has developed in response to signification changes in technology. . .Indeed, it was the invention of a new form of copying equipment – the printing press – that gave rise to the original need for copyright protection."); *Sony*, 464 U.S. at n.12 cites Forward to B. Kaplan, An Unhurried View of Copyright at vii-viii (1967) (noting a balance between a publisher disseminating ideas and an author controlling them that has existed before the United States was formed.); *Sony*, 464 U.S. at n.11 (gives a short

Evidence of note that influenced the *Sony* fair use finding appears in telecommunications law. "First Amendment policy of providing the fullest possible access to the information through public airwaves" is strikingly similar to the FCC's current stance on ensuring internet openness.[109] Also Mr. Rogers,[110] the copyright owner of Mr. Rogers' Neighborhood, testified that he had absolutely no objection to home taping for non-commercial use and expressed the opinion that it is a real service to families to be able to record children's programs and show them at appropriate times.[111]

The Court based its finding of fair use largely on a discussion of patent law's "staple article of commerce"[112] doctrine. Drawing inspiration from this doctrine, the Court concluded that the fact that an article of commerce can be used for infringement does not necessitate secondary liability on the producer of the article. Furthermore, the Court noted that Patent law has this doctrine despite its higher standard—in comparison to copyright law—of expressly codified secondary liability.[113] Copyright law loosely draws its theories of secondary liability from common law sources.[114] They also justified their use of the staple article of commerce doctrine by emphasizing that Copyright and Patent law both have the primary goal of dissemination of information to the public.[115]

A large part of the *Grokster* opinion focused on *Sony*'s use of patent law's staple article of commerce doctrine.[116] It listed a number of patent cases and concluded that "where an article is 'good for nothing else' but

---

history of the effect of technology on copyright law beginning with player pianos in 1908 through cable and microwave retransmission technology that inspired modifications to the copyright act. Also, it was of note that when the music publishing industry sued the inventors of player pianos, a new copying technology, the Court sided with copying technologies in White Smith v. Apollo (1908)).

108. *Sony*, 464 U.S. at 493 (J. Blackmun with Marshall, Powell and Rehnquist *dissenting*) (The dissent argues that this is "confusing liability with the difficulty of fashioning an appropriate remedy." However, this dissent rings hollow in the context of its place in history with the continued success of broadcasted creative works to generate economic value for its owners.).

109. *Id.*

110. Funding for Mr. Rogers' Neighborhood was provided through not for profit business models, so Mr. Rogers' Neighborhood was not dependant on a wealth maximizing business model as other television programs at that time may have been. For a discussion about copyrighted material with an alternative incentive, other than wealth maximization, see generally Lydia Pallas Loren, The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection 69 LA. L. REV. 1 (Fall 2008) (Discussing whether copyright holders that were not incentivized by a traditional wealth maximization principle to create should help guide lawmakers in shaping a more realistic copyright protection.).

111. *Sony*, 464 U.S. at 445 n.27.

112. The Patent Act, 35 U.S.C. § 271.

113. The Patent Act, 35 U.S.C. § 271(b) & (c); *Sony*, 464 U.S. at 435.

114. *Sony*, 464 U.S. at 435.

115. *Id.*

116. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 936–37 (2005) ("For the same reasons *Sony* took the staple-article doctrine of patent law as a model for its copyright safe harbor rule, the inducement rule, too, is a sensible one for copyright. We adopt it here, holding that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.").

infringement, there is no public interest in its unlicensed availability."[117] The Court found that an article with substantial non-infringing uses could be liable for contributory infringement without specific knowledge of infringement if the distributor of such technology is caught promoting its infringing uses.[118] Thus, after *Grokster*, constructive knowledge of the potential for infringement may stand in the place of specific knowledge, and *Sony*'s staple article doctrine will not stand in the way of liability.[119] Scholars have argued that the proper interpretation of *Grokster* will make only the slightest adjustment to Sony and will still allow broad immunity to software providers.[120] However, the fear that *Grokster* would broaden the liability of software providers has had chilling effects.[121] The *Grokster* Court noted that underscoring the evidence of intentional facilitation of infringement was Grokster's failure to filter out infringing material from their site, indicating that any evidence of gate keeping would have weighed against a finding of liability.[122] This is probably why Google had already removed Music Junk, Music Wizard, Music Zilla, and Groove Shark when it received notice of infringements even though *Sony* might still have protected Google's distribution of these applications.[123]

Along with this majority opinion, Justice Ginsberg, joined by Justices Souter and Kennedy, reasoned that *Sony* protection be removed entirely for devices "overwhelmingly used to infringe."[124] Justices Breyer, Stevens, and O'Connor took an alternative approach, arguing that Sony should remain unmodified for internet software tools.[125] The concurrence defended its stance by noting that unauthorized copying likely diminished music industry revenue, though it is not clear by how much.[126] They further noted that copyright owners may still bring suit against direct infringers, citing evidence that because of the record industry suits for direct infringement, the number of consumers downloading on Napster was reduced by 12 million, and those that continued downloading reported downloading fewer files.[127] Also, in 2004, online consumers who used paid services rose from 24% to 43% while the number using free services plummeted.[128] Lastly, it mentioned lawful use of

---

117. *Id.* at 932–33, 936.

118. *Id.* at 934–35.

119. *Id.* ("Thus, where evidence goes beyond a product's characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony*'s Staple Article Rule will not preclude liability.").

120. Zittrain, *supra* note 30, at 293 n.212, 296 (*Grokster* "[s]uggests most code cannot of itself easily be labeled contraband unless it flunks *Sony*'s generous test; only the activity surrounding its promotion can give rise to liability.").

121. Perio, *supra* note 29, at 22.

122. Zittrain, *supra* note 30, at 291.

123. Perio, *supra* note 29, at 23.

124. *Grokster*, 545 U.S. at 948–49.

125. *Id.* at 961 ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music and other useful arts.") (quoting Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)).

126. *Id.*

127. *Id.* at 962.

128. *Id.* at 964.

downloading technology and noted that "finger printing" and watermarking technology could be used to fill in the gaps.[129]

One thing was made clear: Peer-to-peer file sharing is not considered the type of dissemination that is deemed a "public benefit" such that fair use in the line of *Sony*'s rationale is permitted.[130] One might guess that this is because of the possible supplanting nature of peer-to-peer file sharing to traditional content industry business models; however this has not been explicitly stated in the case law thus far.[131] From the rationales of recent cases, it seems that the Court's stance toward technological dissemination itself has taken a new turn. The future is uncertain, but if the Court adopts the Ginsberg concurrence, entire forms of dissemination with untold public benefits attached to them may fall by the wayside, and massive investments in the American tech industry could be laid to waste because of copyright dead hand control. Of course, this also depends on how the DMCA safe harbors for OSPs are interpreted going forward.

PART III: DMCA SAFE HARBORS

The DMCA took effect on October 28, 1998.[132] It was "intended to balance the need for response to potential infringement with the end users['] legitimate interests in not having material removed without recourse."[133] As such, the DMCA creates "strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital network environment."[134] It also facilitates the removal of infringing material without the time and expense of getting an injunction.[135] However, an OSP failing to comply with the DMCA cannot be cited as evidence of infringement.[136] All in all, the DMCA is best compared to an alarm company sticker for OSPs in that it reduces the amount of third party suits brought against them.[137] With the passage of the DMCA, Congress decided to strike a balance between encouraging experimental technology and protecting copyright holders from infringement online.[138]

§512 safe harbors do not protect OSPs for violations of §1201(a)(2).[139] §1201prohibits most distributions of tools that circumvent technological

---

129. *Id.* at 964–65.

130. *Id.*

131. Cf. *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1523 (9th Cir. 1992) (citing Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985).

132. Ian C. Ballon, *DMCA Liability Limitations for Social Networks, Blogs, Websites and Other Service Providers*, 978 PLI/PAT 641, 649–50 (2009).

133. *Id.* at 650, n.950.

134. *Id.* at 650.

135. *Id.* at 657.

136. *Id.* at 650. *Cf. supra* notes 25–26 and accompanying text.

137. *Id.* at 658.

138. Cloak, *supra* note 21, at 1569. *Cf.* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 492 (1984) (about copyright law delineating a balance when considering infringement between the dual goals of creation and dissemination).

139. *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 217, 220 (S.D.N.Y. 2000) (§1201 of the DMCA is a prophylactic measure to stop the spread of hacking tools that destroy DRM.).

measures that protect access to copyrighted works.[140] It does not discriminate between effective and ineffective technological measures when allocating liability and can even spread liability for distributing easily accessible hacks to simple technological measures.[141] §512 also does not apply to violations of §1202, which prohibits providing false "Copyright Management Information" (CMI),[142] or removing or altering CMI.[143] CMI can include the title of the work and the name of the author among many other types of information copyright owners use to monitor their works.[144] This could be a roundabout codification of a "right of attribution" for online activities.[145] It is an open question as to whether this section will preempt contractually created rights to attribution online via creative commons licensing.[146]

The FCC has recognized YouTube as one of the internet's great success stories.[147] To be sure, YouTube facilitates free speech globally, especially in countries whose governments try to suppress the speech of its citizens.[148] Yet early on, YouTube was targeted by major players in the content industry despite the substantial benefits it confers on that industry as well.[149] This comment will now focus on how the Ninth and Second Circuits differ in their interpretations of the §512(c) safe harbor when considering a 12(b)(6) motion to dismiss.

Both Circuits recently emphasized the words "by reason of" to infer a broad inclusion of the types of activities protected by §512(c).[150] They found that "by reason of" in §512(c) extends protection to functions performed "for the purpose of facilitating access to user-stored material."[151] The plaintiffs in both cases tried to read in a narrowing "proximate cause" requirement from an antitrust law use of "by reason of."[152] Ordinarily, courts can presume that

---

140. *Id.* at 216.

141. Universal City Studios, Inc. v. Corley, 273 F.3d 429, 437 (2d Cir. 2001) (Noting that liability still exists even if a 14 year old can create the circumvention tool and even when the tool has been widely disseminated over the internet.).

142. The Digital Millennium Copyright Act 17 U.S.C. § 1202(a) (2000).

143. The Digital Millennium Copyright Act 17 U.S.C. § 1202(b) (2000); Cunard, *supra* note 24, at 754.

144. The Digital Millennium Copyright Act 17 U.S.C. § 1202(a) & (b) (2000).

145. *Id.*

146. See generally *The Licenses: Attribution*, CREATIVE COMMONS ORGANIZATION, http://creativecommons.org/licenses/.

147. *See infra* note 219 and accompanying text. *See also* Cloak, *supra* note 21, at 1592 (noting that subjecting YouTube to liability would destroy a major American facilitator of creativity and information.).

148. *Id.*

149. *See generally* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012).

150. UMG Recordings, Inc. v. Shelter Capital Partners LLC, 667 F.3d 1022, 1031 (9th Cir. 2011) *opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 7 of the superseding decision extends this finding.); *YouTube*, 676 F.3d at 38–39 ("by reason of" ensures that the statute does not "confine the word 'storage' to narrowly to fit the statute's purpose." Thus the YouTube's functions considered in this case fall within the §512(c) safe harbor.).

151. *YouTube*, 676 F.3d at 39 (quoting *Shelter Capital*, 667 F.3d at 1088). *See also Shelter Capital*, 667 F.3d at 1031–35 *opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Pages 7-9 of the superseding decision extends this finding.).

152. *Shelter Capital*, 667 F.3d at 1031 (compares §512 to the Racketeer Influenced and

"similar language in similar statutes should be interpreted similarly."[153] However, both Circuits found the statutes to be too dissimilar to carry over a narrowed reading of "by reason of" in §512(c).[154] The Second Circuit followed the Ninth Circuit in finding that §512(c) "is clearly meant to cover more than mere electronic storage lockers."[155] However, the Second Circuit remanded YouTube's function of content syndication (a function that links videos to others by similar interest) for a finding of whether it fits into the safe harbor.[156]

Section 512(m): Protection of Privacy

To be eligible for DMCA protection, OSPs must meet three threshold eligibility requirements: (1) "adopt[] and reasonably implement" a termination policy for repeat infringers;[157] (2) "inform subscribers" that such a termination policy exists;[158] and (3) "accommodate and. . .not interfere with standard technical measures" used by copyright owners to protect or track their own works.[159] However, the threshold requirements of §512(i) are balanced against the provision in §512(m). §512(m) puts the burden of monitoring copyrighted content online on content owners "except to the extent consistent with a standard technical measure complying with the provisions of subsection (i)."[160] §512(m) also removes a condition of safe harbor protection if the conduct it requires is "prohibited by law."[161] This means that the conditions of §512 safe harbors in their entirety should be subject to the FCC open internet policies and could also be limited by any new telecommunications regulation from Congress.[162]

Corrupt Organizations Act 18 USC §§ 1961–1968 which also contains the "by reason of" language.") *opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 6 of the superseding decision extends this finding.).

153. *Shelter Capital*, 667 F.3d at 1031 (quoting United States v. Sioux, 362 F.3d 1241, 1246 (9th Cir.2004)) (Page 6 of the superseding decision extends this finding.).

154. *Id.*

155. *YouTube*, 676 F.3d at 39 (quoting *Shelter Capital*, 667 F.3d at 1031 *opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013)).

156. *Id.* at 17.

157. §512(i)(1)(A) (It remains to be seen whether a similar analysis of requiring "simple measures" will be inferred into this requirement of the statute from common law contributory liability cases.). *See also* Cunard, *supra* note 24, at 724.

158. Id.

159. §512(i)(1)(B). *See also* Cloak, *supra* note 21, at 1570.

160. The Digital Millennium Copyright Act, 17 U.S.C. § 512(m). *See also* UMG Recordings, Inc. v. Shelter Capital Partners LLC, 667 F.3d 1022, 1039, 1042 (9th Cir. 2011) *opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Pages 11-13 of the superseding decision extends this finding.); Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 40–41 (2d Cir. 2012).

161. The Digital Millennium Copyright Act, 17 U.S.C. § 512(m)(2).

162. *See infra* notes 211–12 and accompanying text; *supra* note 120 and accompanying text; *Shelter Capital*, 667 F.3d at 1037–39, 1042 *opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Pages 11-13 of the superseding decision extends this finding.); *YouTube*, 676 F.3d at 23, 33.

Actual Knowledge

Along with its codification of vicarious liability, §512(c) & (d) require that an OSP does "not have actual knowledge" of infringing conduct over its network, "red flag knowledge" (i.e. "is not aware of facts or circumstances from which infringing activity is apparent"), and "upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material."[163] Failing to expeditiously remove content once an OSP has gained actual or red flag knowledge results in the OSP falling out of the safe harbor. Some interpret the DMCA to require copyright owners to monitor online locations for future acts of infringement and argue that OSPs need only respond to substantially complying notifications for material online at the time of notification.[164] However, an exchange between the founders of YouTube about the treatment of copyrighted content residing on their network absent any notification has been used to inform the DMCA knowledge requirement analysis in *Viacom v. YouTube*.[165]

It remains to be seen how courts will choose which common law principles should be imported into §512. *Grokster*'s willful blindness rationale has been extended to the statutory interpretation of §512 by the Second Circuit in *Viacom v. YouTube*.[166] The Ninth Circuit in *Shelter Capital* construed the §512 knowledge requirements narrowly and required a showing of "specific knowledge" of infringing activity occurring on an OSP's network that could be used for substantial non-infringing purposes. The Second Circuit found that requiring "specific knowledge" was inappropriate.[167]

"Red Flag Knowledge"

Nimmer coined the term "red flag knowledge," which has been criticized as a high bar for safe harbor protection, especially for developing, "middle class" tech startups providing online services.[168] On one hand, courts read the statutory language imposing vicarious liability "in its proper context" as a part of statutory safe harbors meant to protect OSPs from copyright liability.[169] On the other hand, they are required to interpret the statute so that

163. The Digital Millennium Copyright Act 17 U.S.C. §§ 512(c)(1)(i-iii) & 512(d)(1)(A-C) (2000).

164. Ballon, *supra* note 93, at 656; Cloak, *supra* note 21, at 1585 (noting that direct notice is almost always required to satisfy "actual knowledge.").

165. *See infra* note 155 and accompanying text.

166. *See infra* note 138and accompanying text.

167. *Shelter Capital*, 667 F.3d at 1043 *opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 11 of the superseding decision extends this finding.); *YouTube*, 676 F.3d at 36.

168. Cloak, *supra* note 21, at 1585–86; Zittrain, *supra* note 30, at 292 (noting a fear persists, despite the enactment of the DMCA, that "middle class" software providers may be "frozen out" of the market by broadly applied secondary liability for copyright infringement).

169. *Shelter Capital*, 667 F.3d at 1039 *opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 15 of the superseding decision extends this finding.). *See also YouTube*, 676 F.3d at 26–28.

"all its language is given effect."[170] The Second Circuit disagreed with the Ninth Circuit in *Viacom v. YouTube* because it prioritized its duty to ensure that the "red flag" knowledge provision §512(c)(1)(A)(ii) was not rendered superfluous above the overall intent of Congress to provide protection for OSPs.[171] The Ninth Circuit decided not to require less than specific knowledge because anything less would shift the burden of policing copyright infringement online to OSPs, which would negate the benefits of complying with the safe harbor's requirements.[172]

The role of §512(m) is somewhat of a wildcard. It places the onus of internet copyright policing on the content owner.[173] It also limits or removes safe harbor conditions when they require unlawful action.[174] The Second Circuit cited a number of cases that resist requiring OSPs to identify material as infringing,[175] noting that §512(m) is inconsistent with the broad common law duty to seek out infringing activity based on general awareness.[176] However, the Second Circuit found that because §512 does not "speak directly" to the willful blindness doctrine, §512(m) does not abrogate the doctrine.[177] The Court thus found that willful blindness was an appropriate doctrine to apply to OSPs.[178] However, there seems to be no meaningful difference between applying a willful blindness doctrine and requiring OSPs to monitor user activities online for infringing activity. Ironically, §512(m) and §512(c)(1)(C) are being rendered superfluous by the Second Circuit in its effort to give the entire statute "effect." The Ninth Circuit did not consider applying the willful blindness doctrine and steered clear from imposing "investigative duties on service providers."[179]

---

170. *Shelter Capital*, 667 F.3d at 1039 *opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 15 of the superseding decision extends this finding.). *See also YouTube*, 676 F.3d at 31.

171. *YouTube*, 676 F.3d at 31–32.

172. *Shelter Capital*, 667 F.3d at 1037 *opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 12 of the superseding decision extends this finding. Regarding red flag knowledge, the Ninth Circuit acknowledged that willfully bury their heads in order to "avoid obtaining such *specific knowledge*.") (italics added).

173. *Shelter Capital*, 667 F.3d at 1037–38 (declining "to shift [that] substantial burden from the copyright owner to the provider.") (citing Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1113 (9th Cir. 2007) *opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 12 of the superseding decision extends this finding.) .

174. The Digital Millennium Copyright Act 17 U.S.C. § 512(m)(2) (2000).

175. *YouTube*, 676 F.3d at 34–35.

176. *Id.* at 35. ("Writing in the trademark infringement context, we have held that '[a] service provider is not. . .permitted willful blindness. When it has reason to suspect that users of its service are infringing a protected mark, it may not shield itself from learning of particular infringing transactions by looking the other way.'") (quoting Tiffany (NJ) Inc. v. eBay Inc., 600 F.3d 93, 109 (2d Cir. 2010).

177. *Id.* at 35 ("A person is 'willfully blind' or engages in 'conscious avoidance' amounting to knowledge where the person 'was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.'") (quoting United States v. Aina-Marshall, 336 F.3d 167, 170 (2d Cir. 2003)).

178. *Id.*

179. *Shelter Capital*, 667 F.3d at 1039, 1042 *opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 12 of the superseding decision extends this finding.) (quoting Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1114 (9th Cir.

The Ninth Circuit cited *Napster*'s holding that without specific information of infringing activity an OSP cannot be held contributorily liable.[180] Thus the Court refused to take a broad view of the knowledge requirement.[181] The Court reiterated that the §512(c)(1)(A)(ii) "red flag knowledge" test is limited by §512(m) by requiring copyright owners to monitor possible infringement online.[182] In a sense, its effect was given and then it was virtually taken away by the statute. Thus, the Ninth Circuit concluded: "Requiring specific knowledge of particular infringing activity makes good sense in the context of the DMCA, which Congress enacted to foster cooperation among copyright holders and service providers in dealing with infringement on the internet."[183] The Second Circuit, however, decided that there was no specific knowledge requirement, and even approved of using the willful blindness doctrine despite the limitations of §512(m).[184]

The Second Circuit interpreted *Shelter Capital* to be "importing a specific knowledge requirement into §512(c)(1)(B) that renders the control provision duplicative of §512(c)(1)(A)."[185] The Court noted that "superfluous language is disfavored."[186] However, the Second Circuit erred in giving too much weight to ensuring effect is given to all the language in the DMCA. As a result of its approach, the Second Circuit is sailing dangerously close to irresolvable paradoxes in its logic. Such a trend could render the safe harbors of §512(c) unworthy of justifying the effort of compliance for most OSPs, which would cast doubt on the entire statute's purpose. The evidence cited by the Court, inspired by *Grokster*'s "evidence of unlawful objective"[187] as valid "red flag knowledge," reveals just how deep the problem goes. The Ninth Circuit, not wavering on its requirement of specific knowledge, seemed to agree somewhat with the Second Circuit by investigating emails for evidence of unlawful objective that also meets a specific knowledge standard.[188]

2007)).

180. *Id.* at 1037 ("We do not place the burden of determining whether [materials] are actually illegal on the service provider," and "[w]e impose no such investigative duties on service providers.") *opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 12 of the superseding decision extends this finding.) (citing *CCBill*, 488 F.3d at 1114).

181. *Id.* at 1038 (*opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 11 of the superseding decision extends this finding.)).

182. *Id. opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 11 of the superseding decision extends this finding.).

183. *Id.* at 1037 *opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 11 of the superseding decision extends this finding.) (citing S. Rep. N. 105–190 at 20; HR Rep. No. 105–551, pt. 2, at 49 (1998)).

184. Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 35 (2d Cir. 2012).

185. *Id.* at 36 ("[U]ntil [the OSP] becomes aware of specific unauthorized material, it cannot exercise its 'power and authority" over the specific infringing item. In practical terms, it does not have the kind of ability to control infringing activity the statute contemplates.") (citing *Shelter Capital*, 667 F.3d at 1041 *opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013)).

186. *Id.*

187. *See infra* note 60 and accompanying text.

188. *Shelter Capital*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013)).

For instance, the Second Circuit cited a statement from YouTube founder Jawed Karim in March 2006 that "[a]s of today [,] episodes and clips of the following well-known shows can still be found [on YouTube]: Family Guy, South Park, MTV Cribs, Daily Show, Reno 911, [and] Dave Chapelle [sic]."[189] However, this statement was made when streaming video online was the new frontier: Hulu had not yet been founded, Netflix was primarily mailing DVDs, and Blockbuster was still in business.[190] The Court also mentioned a statement by Karim that YouTube might benefit from preemptively removing content that is blatantly illegal and likely to attract criticism.[191] Based on these statements, the Second Circuit found that a reasonable jury may find that the defendant knew about or was willfully blind to Viacom's material on YouTube and that liability exists once "red flag knowledge" exists.[192] However, this policy would require the taking down of material once it is discovered simply because it is copyrighted and regardless of whether the copyright holder has approved of the use. Instead of requiring proof of authorization, courts should continue to exempt companies like Sony, Google, and Veoh that provide new technology of creation and dissemination from secondary liability as they have in the past.[193]

The Second Circuit continued to cite e-mails between other YouTube founders, which demonstrated red flag knowledge without an expeditious takedown. One from Founder Chad Hurley proposed that YouTube needed to reject clips of Budweiser commercials, to which Steve Chen, the third YouTube founder, responded, "Can we wait a bit longer? Another week or two can't hurt." In response, Karim noted that he "added back in all 28 bud videos."[194] Going back further in time, the Court noted a conversation from 2005 in which Hurley suggested being diligent about "rejecting copyrighted content" specifically regarding a CNN clip of a space shuttle.[195] Chen replied that they should wait for a cease and desist letter. So early on in the history of user-generated content sites, it was not clear that Budweiser objected to the use, without a cease and desist letter.

An inclination to wait for a cease and desist letter is reasonable if an OSP founder has received legal advice regarding the Ninth Circuit's opinion in *Shelter Capital*, the FCC's open internet policies, the §512(m)(1) requirement that copyright holders police online infringement, the §512(c)(1)(C) statutory process for take downs beginning with a notice from the copyright owner, and *Sony*'s reluctance to find liability when some copyright owners do not disapprove of copying and dissemination via a new technology. However, the Second Circuit found that a reasonable juror could conclude otherwise. Proving knowledge of infringement should require some level of knowledge about the

189. *YouTube*, 676 F.3d at 33.

190. *See generally* Lore Sjoberg, *The Year in Online Video*, WIRED, Dec. 26, 2006, http://www.wired.com/culture /lifestyle/news/2006/12/72341 (giving many examples of how YouTube pioneered the online video market).

191. *YouTube*, 676 F.3d at 34.

192. *Id.* at 33–35.

193. *See supra* note 65 and accompanying text.

194. *YouTube*, 676 F.3d at 33–34.

195. *Id.*

traditional contours of copyright (such as fair use and idea/expression dichotomy defenses).[196] Until courts give clearer guidance on the scope of the traditional contours in an online context, there is no way for an OSP to know the difference between censoring free speech and participating in secondary infringement.

Though the Second Circuit acknowledged the District Court's finding that "mere knowledge of [the] prevalence of such activity in general . . . is not enough,"[197] it nevertheless found that a reasonable jury could find that "red flag knowledge" existed. Accordingly, it found that summary judgment was premature.[198] The Second Circuit put forward this confusing standard:

> The difference between actual and red flag knowledge is thus not between specific and generalized knowledge, but instead between a subjective and objective standard. In other words, the actual knowledge provision turns on whether the provider actually or "subjectively" knew of specific infringement, while the red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement "objectively" obvious to a reasonable person.[199]

This comment argues that the Second Circuit's confusing red flag objectivity/subjectivity standard, now possibly extended by the Ninth Circuit in its rehearing of *Shelter Capital*, should be limited via §512(m)(2) and by FCC open internet policies.[200] If it is not, the Second Circuit may be responsible for undermining national goals of internet freedom by enabling gate keeping regimes that benefit massive content holding entities at a high public cost. Still more, the effect of the Second Circuit's holding may be to give a nod to online censorship worldwide most heavily practiced in anti-democratic nations by undermining FCC regulations.[201]

---

196. *See* Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 560 (1985).

197. *YouTube*, 676 F.3d at 14.

198. *Id.* at 29.

199. *Id.* at 31; (*UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 9 quotes this passage agreeing that there is a difference between red flag and actual knowledge—however it still holds that anything less than specific knowledge could render section 512(m) and section 512 (c)(1)(C) superfluous. "Of course, a service provider cannot willfully bury its head in the sand to avoid obtaining such *specific knowledge*.").

200. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 445 (1984). *See also Shelter Capital*, 667 F.3d at 1036 (noting that there was substantial copyrighted content *legally* residing on Veoh's network and emphasized Congress's intent to facilitate "quick and easy" dissemination over OSP networks.) (quoting S. Rep. No. 105-190 at 8) *opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (extended 10).

201. *See e.g.,* Mark McDonald, *Watch Your Language! (In China, They Really Do)*, INTERNATIONAL HERALD TRIBUNE: RENDEZVOUS, March 13, 2012, http://rendezvous.blogs.nytimes.com/2012/03/13/watch-your-language-and-in-china-they-do/?ref=internetcensorship (Commenting on China's "Golden-Shield" law).

DMCA Vicarious Liability

Congress must have intended the vicarious liability codified in §512 to represent "something beyond the elements of vicarious liability."[202] Thus, it is unclear how much of the common law will apply to the statutory interpretation involved when an OSP is protected by §512. Advertising revenue may not constitute a direct financial gain associated with infringing activity as it is analyzed under §512(c)(1)(b).[203] *Hendrickson v. eBay* noted that the right and ability to control cannot simply mean removing or blocking access to infringing files, given that such activity was already required elsewhere in the statute.[204] The Ninth Circuit has noted that Congress was "loath to permit the specter of liability to chill innovation that could also serve substantial socially beneficial functions" and that "by limiting [service providers'] liability it would ensure that the efficiency of the quality of services on the Internet will continue to expand."[205] In their ordinary operations, most OSPs open themselves up to copyright liability in countless ways.[206] Thus, to effectively gain the cooperation of OSPs, the knowledge requirement must be narrowly construed. Unfortunately, the Second Circuit disagrees. It stated, "[r]ather than embarking upon a wholesale clarification of various copyright doctrines, Congress elected to leave current law in its evolving state and, instead, to create a series of 'safe harbors[]' for certain common activities of service providers."[207] They went on to justify their use of whatever common law interpretations of secondary liability they chose were best, while disregarding others.

The Ninth Circuit in *Shelter Capital*[208] noted that excluding OSPs subject to vicarious liability would undo the benefits of the safe harbor altogether.[209] It interpreted the "right and ability to control" as needing "something more" than the common law definition of vicarious liability.[210] Subsequently, the *YouTube* Court in the Second Circuit agreed with the Ninth Circuit's interpretation of §512(c) requiring "something more" than the

---

202. Cloak, *supra* note 21, at 1587–88.

203. *Id.* at 1588 n.181.

204. *Id.* at 1588–89; Hendrickson v. eBay, Inc., 165 F. Supp. 2d 1082, 1093 (C.D. Cal. 2001).

205. *Shelter Capital*, 667 F.3d at 1030 (quoting S. Rep No. 105-190 at 8 (1998)) (quotation marks omitted) *opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013)
(extended 5).

206. *Id.* (quoting S. Rep No. 105-190 at 8 (1998)).

207. Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 27 (2d Cir. 2012) (quoting S. Rep. No. 105-109 at 19 (1998)) (quotation marks omitted).

208. *See generally Shelter Capital*, 667 F.3d *opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013).

209. *Id.* at 1044 (quoting Lee, 32 Colum. J.L. & Arts at 236–37).

210. *Shelter Capital*, 667 F.3d at 1043 (quoting A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1024 (9th Cir. 2001)) (citing Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1181 (C.D. Cal. 2002)) *opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013)
(Page 19 of the superseding decision extends this the Napster quote however it also agrees with the YouTube court test of "right and ability to control" as meaning to "exert[] substantial influence on the activities of users." This includes "purposeful conduct" as in Grokster and high levels of control over activities of users like in Cybernet.).

common law requires to show a "right and ability to control."[211] However, the two courts failed to agree about what "something more" means. The Ninth Circuit found, and continued to find in its rehearing, that a right and ability to control also required specific knowledge.[212] The Second Circuit did not recognize specific knowledge as a requirement and was extremely vague about what would be required.[213]

Tracing this back to the secondary infringement analysis above, specific knowledge was mentioned in connection with the volition requirement of secondary liability.[214] The Second Circuit held that automatic and indiscriminate services will not be held liable for secondary infringement because specific knowledge is necessary for the volition required for infringement.[215] The Second Circuit's refusal to extend a specific knowledge requirement for the vicarious liability codified in the DMCA arguably removed volition as a threshold requirement for liability. It is unclear whether this overturns a volition requirement in the Second Circuit, or whether volition is tested by a different standard, if tested at all, when considering the DMCA conditions. It seems that the Second Circuit extended a broader *Grokster* rationale to DMCA interpretation than how the *Grokster* Court intended its findings to be applied to common law secondary infringement.[216]

The result of the new Second Circuit approach will be to tie the hands of OSP development. Litigants will use the hunt for smoking gun e-mails to drive up the cost of discovery. Now, any colorable evidence found can be used to get past a 12(b)(6) motion to dismiss, which will hike up the price of settlement as well. Thus, the cost of litigation will be too high for developing OSPs. OSP platforms invented in a garage could become a thing of the past, while only well-heeled OSPs will be able to shoulder the risk of copyright liability associated with developing new OSP platforms. Large content owners may use the threat of litigation to shape internet communications facilitated by OSPs at a high cost to end users and small content owners.

Furthermore, the Second Circuit opinion in *YouTube* will probably override the Ninth Circuit. If one circuit raises the requirements for a valid 12(b)(6) motion under these circumstances, it may have the effect of becoming the new national rule because OSPs are especially susceptible to plaintiff forum shopping.[217] In turn, this effect will undermine the FCC's goal of protecting

---

211. *YouTube*, 676 F.3d at 27–28 (citing Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1173 (C.D. Cal. 2002)) (as the only case so far that has found an OSP to have the right and ability to control).

212. *Shelter Capital*, 667 F.3d at 1043 *opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 19 of the superseding decision extends this finding.).

213. *YouTube*, 676 F.3d at 20–31.

214. *See supra* note 55 and accompanying text.

215. Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 130 (2d Cir. 2008); *Sony*, 464 U.S. at 490–92.

216. *See supra* note 81 and accompanying text.

217. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (OSPs purposely avail themselves anywhere end users access their commercial or sufficiently interactive services online.). *But see* Howard v. Missouri Bone & Joint Ctr., Inc., 373 Ill. App. 3d 738, 743, 869 N.E.2d 207, 212 (2007) (Courts have not agreed on the *Zippo's* sliding scale test,

internet openness and freedom, and will eventually justify arguments such as Verizon's current complaint that the FCC net neutrality rules are solving problems that do not exist.[218]

The Second Circuit *YouTube* decision should be reversed via adoption of three rationales. First, as the Ninth Circuit reasoned, the benefits of compliance with the safe harbor will be undone if something less than specific knowledge can get a plaintiff past a 12(b)(6) motion.[219] Second, Judge Kozinski's approach in *Perfect 10 v. Visa* should be adopted so that the nature of OSP direct profits from end user infringing activities is considered more central to imposing liability than merely facilitating dissemination.[220] In so doing, "direct financial benefit" in §512 should be defined to exclude profits derived from general network benefits.[221] Third, the requirement of a direct infringer and the traditional contours of copyright should be considered during the interpretation of the DMCA vicarious liability provision.[222] In addition, *Sony*'s use of the staple article of commerce doctrine and recognition of content owners that do not disapprove of dissemination should be applied to hold a majority of YouTube end users as fair users.[223] Finally, as an underpinning for these rationales, §512(m) should be interpreted to limit any condition of safe harbor protection that encourages OSPs to undermine FCC regulations. FCC net neutrality regulations should be used to inform the scope of an OSP's "right and ability" in the DMCA vicarious liability provision as well.

Effective Notice

§512 (c) & (d) safe harbors require that upon notification of claimed infringement that the OSP expeditiously removes or disable access to the infringing material.[224] §512(d) further requires "information reasonably sufficient to permit the service provider to locate that reference or link."[225] The alternative for OSPs to removing links to alleged infringing material in order to comply with the §512 safe harbor is to implement "simple measures" to avoid the contributory liability that the safe harbor protects OSPs from.[226] As we saw

---

but many have adopted it).

218. Brief of Appellant at 51 Verizon v. FCC, No. 11-1355 (D.C. Cir.).

219. UMG Recordings, Inc. v. Shelter Capital Partners LLC, 667 F.3d 1022, 1043 (9th Cir. 2011) *opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 17-18 of the superseding decision extends this finding. DMCA "right and ability to control" is not coextensive with the common law, but it included This includes "purposeful conduct" as in Grokster and high levels of control over activities of users like in Cybernet.).

220. *See supra* note 41 and accompanying text.

221. *See supra* note 49 and accompanying text.

222. *See supra* note 63 and accompanying text.

223. *See supra* note 74 and accompanying text.

224. The Digital Millennium Copyright Act 17 U.S.C. §§ 512(c)(1)(C) & 512(d)(3) (2000).

225. The Digital Millennium Copyright Act 17 U.S.C. § 512(d)(3) (2000).

226. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1172 (9th Cir. 2007) (deciding that Google did not implement "simple measures" to stop access to infringing material over their network and that if they fall out of §512(d) safe harbor they could be liable contributorily for

above, the Second Circuit opinion will incentivize OSP failure to comply with the safe harbor provision because the cost of implementing simple measures may not be as high as complying with the safe harbor's requirements.[227] Supposing that an OSP has decided to comply with § 512, once an OSP receives a notice of infringing activity. § 512(g) outlines the process for taking down the infringing material pursuant to (c)(1)(C) of the Copyright Act.[228] There is no "liability for taking down generally."[229] However, the OSP must promptly notify the subscriber that it has removed or disabled access to the material. Then, upon counter-notification from the user, the OSP must notify the user that the removed material will be put back up, or the OSP will cease disabling access within 10 business days.[230] The material must be replaced or access must be enabled within 10 to 14 business days following the receipt of the counter-notice.[231]

However, if the OSP receives notice that the person claiming infringement has filed an action seeking a court order to restrain the subscriber, then the OSP must refrain from enabling access or replacing the alleged infringing material.[232] §512(g)(3) requires a counter-notification to include the alleged infringer's physical or electronic signature, identification of the material that has been removed, the location from which it was removed, a statement under penalty of perjury that the subscriber has a good faith belief that the material was removed by mistake or misrepresentation. The counter-notice must also include the alleged infringer's name, address, telephone number and a statement that the alleged infringer consents to the jurisdiction of the Federal District Court.[233] § 512(h) gives copyright owners the ability to subpoena the personal information of alleged infringers that have revealed themselves by submitting a counter-notice.[234]

In general, the content industry can ensure that content is taken down without a ruling about fair use or idea/expression merger bars on the limited rights granted to them through the Copyright Act.[235] The legal action supported by §512(g) & (h) implicates pressing questions about the breadth of our First Amendment rights online.[236] Forbes has noted that there is a commonly known corporate wisdom in using the DMCA to force take downs of embarrassing disclosures about businesses and politicians,[237] and the FCC has taken a strong stance against these sorts of takedowns, repeatedly renewing its dedication to

---

copyright infringement.).

227. *See supra* note 170 and accompanying text.

228. *Perfect 10*, 508 F.3d, at 1172 (9th Cir. 2007) (§512(g) does not mention safe harbor §512(d), so presumably once a link is alleged to lead to infringing material an OSP must expeditiously remove it or fall out of the safe harbor).

229. *Id.*

230. The Digital Millennium Copyright Act 17 U.S.C. § 512(g)(2)(B) (2000).

231. The Digital Millennium Copyright Act 17 U.S.C. § 512(g)(2)(C) (2000).

232. *Id.*

233. The Digital Millennium Copyright Act 17 U.S.C. § 512(g)(3) (2000).

234. The Digital Millennium Copyright Act 17 U.S.C. § 512(h) (2000).

235. *Id.*

236. *Id.*

237. Daniel Lyons, *Fighting Back,* FORBES, Nov. 14, 2005, http://www.forbes.com/forbes/2005/1114/128sidebar.html.

preserving an open internet.[238] However, abuse of the notice and takedown requirements also threatens the value of OSPs adhering to the safe harbor requirements. Furthermore, the recent Second Circuit holding will justify using invalid notices as evidence to get past a 12(b)(6) motion based on red flag knowledge.

Abuse of the Notice Requirement

The DMCA does have §512(f) as an "express remedy for misuse of the DMCA's safe harbor provisions,"[239] which gives a remedy to any party that misrepresents a claim of copyright ownership.[240] An example is the *Diebold* case.[241] Diebold was found to have violated §512(f) for using the DMCA as a "sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property."[242] The case went on to note that the DMCA was made to protect service providers and not copyright holders and ultimately found that Diebold "knowingly materially misrepresented" under §512(f).[243] This provision provides damages and costs to be paid by the violating party.

Substantially complying notices have been interpreted to only be effective regarding material online up to the time when the notice was sent and cannot be used to impose an ongoing obligation for an OSP to monitor its service.[244] Notices that do not fully comply with §512(c)'s specifications for notices are deemed defective and do not require OSPs to take down material.[245] However, if the Second Circuit's recent opinion allows defective notices to be used as evidence of "red flag knowledge," §512(m) and §512(c)(1)(C) could become superfluous.[246] A blanket statement that a plaintiff's works are within 22,000 pages of documents, without specific identification of infringing pages, did not provide sufficient notice to OSPs under the DMCA.[247] That being said, it is still unclear how many pages in which notice can be hidden and still constitute sufficient notice and/or constitute sufficient evidence that an OSP had "red flag knowledge." Because the law is unclear on this, OSPs may be burdened with reviewing lengthy documents from content owners who may be

238. *See supra* note 98 and accompanying text.

239. Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1205 (N.D. Cal. 2004).

240. The Digital Millennium Copyright Act 17 U.S.C. § 512(f) (2000).

241. *Diebold*, 337 F. Supp. 2d at 1205.

242. *Id*. at 1204–05.

243. *Id*. ("Knowing material misrepresentation" was defined by the *Diebold* Court: "Knowingly means that a party actually knew, should have known if acted with reasonable care or diligence, or would have no substantial doubt had it been acting in good faith that it was making misrepresentationFalse Material means that the misrepresentation affected the ISP's response to a DMCA letter.").

244. Ballon, *supra* note 93, at 656 n.966 (citing Hendrickson v. Amazon.com, Inc., 298 F. Supp. 2d 914, 918 (C.D. Cal. 2003)).

245. *Id.*

246. Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 31 (2d Cir. 2012); UMG Recordings, Inc. v. Shelter Capital Partners LLC, 667 F.3d 1022, 1033–34 (9th Cir. 2011) *opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (extended 13).

247. Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1112 (9th Cir. 2007).

trying to remove safe harbor protection in order to launch favorable copyright suits. Additionally, OSPs may have to take costly defensive measures to conceal or avoid e-mail communications involving these matters.[248] At some point, the simple measures required to avoid common law contributory liability will be seen as less costly than the costs involved in staying within the safe harbor.

PART IV: FCC NET NEUTRALITY RULES

The FCC announced open internet principles in 2005 because it had found clear deviations from internet openness.[249] Chairman Genachowski was concerned with "real risks to the Internet's continued freedom and openness. Broadband providers have natural business incentives to leverage their positions as gatekeepers of the Internet."[250] He also remarked that "openness is a quality – a generative power – that must be preserved and protected," and defined internet openness as "the ability to speak, innovate, and engage in commerce *without having to ask anyone's permission*," accrediting this as the reason for the Internet's "unparalleled success."[251] Unfortunately, if interpretations of copyright law are adopted that increase the gate keeping obligations of OSPs[252] and maximize copyright protection,[253] the inevitable result will be destruction of any vision for the internet that includes not having to ask for anyone's permission to participate.

In a recent defense of its net neutrality rules, the FCC noted three incentives ISPs have in blocking or disrupting the activities of OSPs (what the FCC calls "edge providers" like Netflix or Skype).[254] First, ISPs that provide telephone or video services have an interest in blocking or disrupting online video and voice providers like Netflix or Skype. Second, ISPs have an incentive to block end user access to OSPs unless the OSP pays additional costs for end user access. The FCC also noted that ISPs could similarly charge end users tiered prices for access to popular websites, including access to potentially unwanted, extra services. Finally, ISPs have an incentive to charge for prioritized access to OSPs giving the highest internet speeds and quality to the highest paying OSPs. The effects would be highly disruptive to online

---

248. The Digital Millennium Copyright Act, 17 U.S.C. § 512(m).

249. *FCC Remarks on Internet Freedom*, *supra* note 6.

250. *Id.* (giving a generally negative view to gatekeeping that should be carried over to copyright law). *See also, Kneecapping the Future: Comcast's Unjustified Internet Caps and the Plan to Kill Video Competition*, FREE PRESS, June 25, 2012, http://www.savetheinternet.com/sites/default/files/resources/Comcast%20New%20Caps%20 Factsheet_FINAL.pdf (reporting that Comcast has a cap on the data an internet subscriber can download through Comcast, but exempted its video provider Xfinity); *The Facts About AT&T's Facetime Blocking*, FREE PRESS, Sept. 30, 2012, http://www.savetheinternet.com/resource/100084/facts-about-atts-facetime-blocking.

251. *FCC Remarks on Internet Freedom*, *supra* note 6.

252. *See generally* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

253. *See* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 33 (2d Cir. 2012) (YouTube didn't bid for a permission from the football league and left clips of their football games up on the site.).

254. Brief of Respondent-Appellee at xi, Verizon v. FCC, No. 11-1355 (D.C. Cir.).

innovation, and "the next Google or Facebook may never begin."[255] Because ISPs can purchase content and enter into exclusive licensing agreements with content owners, these ends may as well be achieved through copyright law. Thus, copyright law should be interpreted with broad limits on OSP copyright liability.

The FCC has kept a watchful eye on business developments online to support its findings. From 1995 until 2010, small businesses and startups brought in more than 22 million new American jobs, and the internet had a central role in facilitating this.[256] In 2005, there were 600 billion web pages and 50 million blogs.[257] Clearly, as Genachowski noted, "[t]he internet has been an unprecedented platform for speech and democratic engagement, and a place where the American spirit of innovation has flourished. We've seen new media tools like Twitter and YouTube used by democratic movements around the world."[258] Interpretations of copyright law that maximize online gate keeping will limit the effect of OSPs disseminating American culture and influence globally. American OSPs' foreign operations have been on the frontlines as a symbol of free speech and public criticism.

In fact, a number of movements against an open internet have been showing up around the world. China, a communist republic, blocks its citizens from accessing social networking sites like Twitter and YouTube by burdening ISPs and OSPs with vicarious liability.[259] The Pakistani Supreme Court has ordered criminal cases against telecommunications officials and Internet intermediaries for failing to block Danish newspaper cartoons that depicted the prophet Muhammad.[260] A Belgian court ruled that Google had violated European Union (EU) copyright laws by not blocking links to articles originally published in Belgian newspapers without getting permission.[261] Germany has imposed strict liability on ISPs for hosting copyright infringement.[262] The EU has pushed initiatives to get ISPs to block objectionable content from the internet.[263] Australia, France, Sweden, and Germany have all induced ISPs and OSPs to block speech deemed as "hate speech" in their countries from being transmitted over the internet, and at least one major search engine has responded by blocking sites globally that constitute "hate speech" as defined by the Swiss, German and French governments.[264] In response, two new pieces of legislation have recently been

---

255. *Id.* at 13.
256. *FCC Remarks on Internet Freedom*, *supra* note 6.
257. Kreimer, *supra* note 14, at 17.
258. *FCC Remarks on Internet Freedom*, *supra* note 6.
259. Kreimer, *supra* note 15, at 18 (China has lead the way in targeting ISP's, routers and search engines as a means of controlling access to Internet content.); Joshua Schroeder, *A Glass Half Full: An Alternative View on China's IP Future*, SWIDER MEDIEROS HAVER BLOG, July 16, 2012, http://www.smhllaw.com/articles/wp-content/uploads/2012/07/A-Glass-Half-Full-An-Alternative-View-of-Chinas-IP-Future-NUMBER-THREE2.pdf (noting that MAPIC, a Chinese law, has been employed for some time now to enlist ISPs to gate keep).
260. Kreimer, *supra* note 15, at 19.
261. Cunard, *supra* note 24, at 753.
262. Kreimer, *supra* note 15, at 20.
263. *Id.* at 21.
264. *Id.* at 19–21.

unveiled that could facilitate the protection of internet freedom. They are called the "Electronic Communication Privacy Act 2.0" and the "Global Free Internet Act."[265] If enacted, they may be used along with the FCC's net neutrality regulations to limit secondary infringement suits against OSPs via §512(m) of the DMCA.

A cost of using OSPs to block copyright infringing material is the risk of error and misuse.[266] Risk-averse OSPs will drop risky speech to a greater degree than was intended by regulation.[267] For instance, in *Democracy and Technology v. Pappert*, the Court found that OSPs blocked around 1.2 million "innocent" websites in response to a demand from law enforcement that they disable 400.[268] Another example is when Diebold invoked the DMCA to block embarrassing disclosures of the flaws in its voting machines.[269] People easily use the DMCA to force OSPs to take down critical or embarrassing content from websites.[270] Nevertheless, the law continues its journey away from the *Sony* decision and the sentiment that copyright law should not "censor freely broadcasting companies at the behest of others who sought compensation."[271] Freely blogging and freely streaming companies should not be treated any differently simply because they conduct their activities over the internet.

The FCC's net neutrality regulation does not protect unlawful content and communications.[272] Thus, it is a good general rule that in cases of direct infringement, FCC regulation gives way to copyright law. However, this is not true regarding cases of secondary infringement by OSPs. The DMCA safe harbor contains a provision in §512(m) that anything barring the entry of an OSP to the safe harbor should be disregarded if it forces the OSP to do something illegal.[273] In the case of secondary infringement by an OSP, there is no reason to presume copyright law's preeminence over FCC regulation. To date, courts have not made any clear decision on the interpretation of §512(m)(2), and using telecommunications law in conjunction with it remains an unexplored limitation on cases of secondary copyright liability by OSPs. Furthermore, it should be a viable interpretation, as courts have relied on telecommunications findings to reach conclusions about the DMCA in the past. For instance, when considering whether §1201 DMCA violated the First Amendment, the Second Circuit applied the standard from a

---

265. ECPA 2.0 Act of 2012, H.R. 6529, 112th Cong. § 2(d) (2012), 2012 CONG US HR 6529 (*available at* http://www.gpo.gov/fdsys/pkg/BILLS-112hr6529ih/pdf/BILLS-112hr6529ih.pdf); Global Free Internet Act of 2012, H.R. 6530 112th Cong. § 2(d) (2012), 2012 CONG US HR 6530 (*available at* http://www.gpo.gov/fdsys/ pkg/BILLS-112hr6530ih/pdf/BILLS-112hr6530ih.pdf).

266. Kreimer, *supra* note 15, at 27, 29 (noting that Fair Uses may be blocked to avoid copyright infringement).

267. *Id.* at 29. *See generally* Ctr. For Democracy & Tech. v. Pappert, 337 F. Supp. 2d 606 (E.D. Pa. 2004).

268. Ctr. For Democracy & Tech. v. Pappert, 337 F. Supp. 2d 606, 655 (E.D. Pa. 2004).

269. Kreimer, *supra* note 15, at 32 (ISPs complied even though the claim was improper).

270. Lyons, *supra* note 198.

271. Kreimer, *supra* note 15, at 56 n.130.

272. Preserving the Open Internet, 47 C.F.R. § 8.5 (noting that ISPs may not block users from accessing "lawful" websites.).

273. The Digital Millennium Copyright Act, 17 U.S.C. § 512(m).

telecommunications law case, *Red Lion*: "Differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[274] The Second Circuit also noted that "[w]hen the Framers of the First Amendment prohibited Congress from making any law 'abridging the freedom of speech,' they were not thinking about computers, computer programs, or the internet. But nor were they thinking about radio, television or movies."[275] The Second Circuit seemed to conclude that Congress could not go wrong by instituting the prophylactic criminalization of hackers.[276] It also noted that the First Amendment is wrought with "doctrinal ambiguities and inconsistencies result[ing] from the absence of any detailed judicial analysis of [its] true rationale,"[277] and concluded that it might be "fundamentally unintelligible."[278] In short, the telecommunications law standard in *Red Lion* allowed the Court to punt to Congress and the Supreme Court to better define the free speech standard that should be applied to the DMCA.

Unlike in *Remeirdes*, courts cannot punt away problems with free speech without promulgating significant contradictions in the law that are likely to undermine the goals of the FCC regarding internet openness. OSPs like Google and Facebook are spending a tremendous amount of money to get a definition of the copyright liability they face for facilitating speech over the internet. Legal advice often includes implementation of a takedown system that complies with the requirements of §512. Unfortunately, following these requirements can result in a conflict with communications regulation. Taking down copyrighted content could trigger a fine by the FCC if it finds that it is censorship of "lawful" free speech,[279] but in many instances, leaving "unlawful" copyright infringing content online will cause the OSP to fall out of the §512 safe harbor.[280] Determining which content is "lawful" is a complicated legal question that is normally debated vigorously in court before it is decided

---

274. Universal City Studios, Inc. v. Corley, 273 F.3d 429, 453 (2d Cir. 2001) (In this case the restricted speech is code that was "designed to facilitate unlawful access to copyrighted works, which the Court used to inform the scope of 1st amendment protection of these works. They also found that the functionality of computer code reduced the scope of first amendment protection afforded to DeCCS.) (quoting *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 386 (1969)).

275. *Corley*, 273 F.3d, at 434 ("The Congress shall make no law. . .abridging the freedom of speech.") (quoting U.S. CONST. amend. I).

276. *Id.* at 444 ("Congress could not 'diminish' constitutional rights of free speech even if they wished to. . ."). *See also* Universal City Studios, Inc. v. Reimerdes, 82 F. Supp. 2d 211, 220 (S.D.N.Y. 2000) (The District Court issuing an injunctive order appeared to agree that Copyright law naturally should get a free pass when it came to the first amendment noting that "Copyright law restricts speech: it restricts you from writing, painting, publically performing, or otherwise communicating what you please.") (quoting Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 165–66 (1998)) (internal quotation marks removed).

277. *Reimerdes*, 82 F. Supp. 2d, at 225 (quoting Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 54 (1984)).

278. *Id.* (quoting John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 419 (1983)).

279. *See infra* notes 251 and accompanying text.

280. *See supra* note 22 and accompanying text.

by judges and juries.[281] Asking OSPs to answer this question outside of court is unfair and inappropriate.

Chairman Genachowski has noted that in many key respects, content creators, internet providers, and American consumers have aligned interests.[282] Essentially, the more people use the internet to upload and access content, still more people will create new and innovative ways to upload and access content on the internet. Genachowski supports a net neutrality framework because "consumers and innovators have the right to a level playing field. No central authority, public or private, should have power to pick which ideas or companies win or lose over the internet, that's the role of the market and the marketplace of ideas."[283] Net neutrality is the prohibition of unreasonable discrimination in transmitting lawful internet traffic.[284]

Opponents of net neutrality have argued it is "a solution in search for a problem."[285] Currently Verizon is using this concept to challenge the rules in Federal Court as arbitrary and capricious.[286] But this is an outdated argument,[287] as the FCC has frequently caught service providers crimping free speech and engaging in anticompetitive behavior, including: blocking VoIP services over their networks, censoring private e-mails, blocking a webcast when singer Eddie Vedder criticized George Bush, and blocking text messages from an abortion rights group to its subscribers because it claimed the right to block "controversial or unsavory" text messages.[288] Network operators should not be able to control what people do online, just like telephone companies should not control how people communicate over the phone.[289]
In addition, Cox cable provider has admitted to blocking file sharing applications.[290] RCN, a regional internet and cable provider, settled when it was accused of blocking OSPs.[291] AT&T admitted to restricting its mobile customers' ability to use competing calling applications such as Skype from

---

281. *See generally* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

282. *FCC Remarks on Internet Freedom*, *supra* note 6. *See also* Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831, 1831–32 (2009) (noting the symbiotic relationship between technology and content production. Also discussing the anti-copyright sentiment that happens when copyright holders shut down the services of tech industries.).

283. *FCC Remarks on Internet Freedom*, *supra* note 6.

284. *Id. See also* Preserving the Open Internet 47 C.F.R. § 8 (2011) (ISPs are not allowed to block OSP services that compete with their telephony services nor are they supposed to unreasonably discriminate against their services).

285. Benjamin, *supra* note 25, at 161 n.59.

286. *See generally* Brief of Appellant at 51 Verizon v. FCC, No. 11-1355 (D.C. Cir.).

287. Benjamin, *supra* note 25, at 166 ("Comcast's recent practices. . .belie the notion that network neutrality is still 'searching for a problem.'") (quoting Formal Complaint of Free Press and Public Knowledge against Comcast Corp for Secretly Degrading Peer to Peer Applications, 23 FCCR 13028, (2008) (No 07-52) (Internal quotation marks omitted) and at 167 (Comcast has been accused of "cutting off and slowing speeds" to BitTorrent file transfers.).

288. *Id.* at 158.

289. *Id.* at 160 n.45 (citing Vint Cerf, a well-known expert in the tech field).

290. Brief of Respondent-Appellee at 15, Verizon v. FCC, No. 11-1355 (D.C. Cir.).

291. *Id.*

their cell phones.[292] Skype has had problems gaining internet access in order to provide its services.[293] ISPs have even been charged with blocking online credit card processing that competed with their affiliated services.[294] The right to take these actions is generally preserved in most ISP terms of service, including "sweeping rights to block, degrade, or favor traffic."[295]

Free Press and Public Knowledge brought an action against Comcast for blocking and degrading BitTorrent access over its network, and the FCC held against Comcast for violating their net neutrality policies.[296] In its complaint, the Free Press and Public Knowledge cited that "over 20,000 Americans complained about Comcast's blatant and deceptive blocking of peer-to-peer communications."[297] It also noted that content providers such as Vuze, Inc., CBS, Twentieth Century Fox, and Sports Illustrated all had utilized Torrents to legally distribute their content to users.[298] It characterized Torrents as a new way to cheaply and quickly disseminate communications by harnessing multiple internet connections.[299] Google and Vuze, Inc. have solicited the FCC for more clarity about what types of network management protocols are acceptable, especially as they are looking to comply while also avoiding secondary copyright liability.[300]

Post *Napster* & *Grokster*, sympathizers with file sharing technology like BitTorrent, Publius, FreeNet, LOCKSS, and Exeem have re-characterized them as "overlay networks" and have cast their use as a "collective hard drive for all of humanity."[301] They especially point to LOCKSS, which used a peer-to-peer system designed for libraries to determine whether a digital copy of a document remains authoritative and to replace damaged copies.[302] Some other academic file sharing services that are living under the shadow of a rising risk of secondary copyright liability include LionShare, eduCommons, Edutella and The Internet Archive Project.[303] As Comcast subsidiary NBC creates copyrighted content and its other subsidiary Xfinity distributes it online, directly competing with OSPs like Netflix and Hulu, we must ask ourselves when copyright misuse will become a relevant defense again.[304] As Josh Silver, the Executive Director of Free Press, opined, "[T]he fight is far from over. A

---

292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.*
296. Benjamin, *supra* note 248, at 169 (3-2 vote.).
297. *Id.* at 168 n.131.
298. *Id.* at 167 (citing *Formal Complaint* at 13030).
299. *Id.*
300. *Id.* at 172.
301. Zittrain, *supra* note 30, at 295.
302. *Id.* at 292 n.209.
303. *See* Wang, supra note 32, at 1–2.
304. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 454 F. Supp. 2d 966, 997 (C.D. Cal. 2006) ("In sum, the existing case teaches that the misuse defense applies when a copyright holder leverages its copyright to restrain creative activity. In the instant case, StreamCast advances a litany of vague allegations of anticompetitive conduct on the part of Plaintiffs. None of the alleged misconduct has sufficient nexus with the public policy embodied in the grant of copyright to implicate the misuse defense.").

duopoly market—where phone and cable companies control nearly 99% of high speed internet connections—will not discipline itself."[305]

CONCLUSION

Until internet and computer technology arrived, the content industry retained near complete control over the creation and dissemination of creative works.[306] Content businesses were able to become and remain "gatekeepers" to creative content mostly because of limited public access to new technology.[307] Literary, video, music recording, and publishing equipment was too rare and expensive for the general public to afford, which allowed content businesses to set prices high and limit access to creative works. This also limited competition in the content industry by keeping the supply of professional grade creative works into the stream of commerce relatively low. Under this regime, prices remained high for consumers, competition low in the content industry, and many artists were not fairly compensated for their creative efforts.[308]

For the first time in history, state of the art tools of creation and dissemination have been cheaply placed into the hands of the general public. Through computers and the internet, successful new business models are being pioneered by artists themselves. Not only do these artists frustrate the traditional content industry, they compete with it, driving traditional profit margins down. Many new artists are adapting nicely to this new world whether or not they are signed with the content industry. Many have elected to release their creative works under creative commons licenses so that they may be shared freely over the internet, including over peer-to-peer file sharing networks. In the meantime, major players in the content industry have been rallying support for even stronger copyright protection that might destroy emerging business models and limit the effects of the technological revolution.[309]

Using OSPs as gatekeepers stunts the growth of new business models for copyrighted works. Those who support OSP gate keeping have said "you can't compete with free,"[310] and claim that the whole content industry could go down in flames due to online copyright infringement. However, enterprising artists have proved that free internet dissemination can be used to make a

---

305. Benjamin, *supra* note 257, at 170.

306. Mark G. Tratos, *The Impact of the Internet & Digital Media on the Entertainment Industry*, 896 PLI/PAT 133, 138 (2007).

307. *Id.*

308. *Id.* at 141. *See also* Mike Masnick, *The Future of Music Business Models (And Those Who Are Already There),* TECH DIRT, Jan. 25, 2010, http://www.techdirt.com/articles/20091119/1634117011/future-music-business-models-those-who-are-already-there.shtml (noting that the old music industry was a "lottery" where only a small percentage of artists make any money at all).

309. *See White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1, 18 (1908) (Not only did the Court side with roller pianos and against copyright holders. They decided that perforated rollers were not "copies" as intended in the copyright act because they were part of a machine and worked as part of a mechanism. This indicates that the "copies" copyright law is to allow copyright holders control over can be more creatively interpreted than is the current trend today.).

310. Masnick , *supra* note 270. *See also infra* note 278 and accompanying text.

living.[311] A common strategic trend in the music industry is for artists to capture the value of a copyrighted work in live performance ticket sales, merchandise, and special edition versions of their works.[312] Literary authors have distributed copies online for free to attract public attention to their works.[313] Google images have been held to be a fair use in the Ninth Circuit partly because disseminating thumbnails of images makes it more likely that the author will monetize his images.[314] Across the board, online content is being used as a loss leader for other products sold at a price. OSP gate keeping will limit the content owner's ability to utilize their work as a loss leader and will artificially increase the cost of breaking into the content industries. If required to act as gatekeepers, OSPs may also block other new business models being pioneered by working class artists. For example, some musicians sell "memberships" online that connect fans to online feeds of new content as it is produced.[315]

Most artists today get discovered online.[316] Artists like Christina Perri, Colbie Caillat, Dane Cook, OAR, and many others have since been signed and are represented by content industry professionals while OSPs are being sued for providing this service.[317] Since the rise of the internet, there is more creative content being produced, invested in, and disseminated than there ever was in the past.[318] In fact, the purpose set out in the Constitution of "progress" through

---

311. Masnick , *supra* note 270. *See also* Jeff Goins, *Why I Did the Unthinkable and Gave My eBook Away for Free*, GOINS WRITER BLOG (June, 30, 9:29 AM), goinswriter.com/unthinkable-giveaway (Goins gave his book away online for free for two days as a promotion and his blog included links to claim free copies. This blog posting includes a number of comments, one claiming that giving copyrighted works away for free online is a "tiny advertising cost." Goins gave 3 of his own reasons why he did this: "Because I care more about spreading an idea than making money. Because anonymity is a writer's greatest enemy. Because giving away a book is a great strategy to sell one." citing a fellow writer Sarah Mae who "gave away 2000 copies and sold 20,000.").

312. Masnick , *supra* note 270 (hypocritically, artists signed to the content industry are using similar strategies while demanding higher protection of copyright).

313. Jeff Goins, *Why I Did the Unthinkable and Gave My eBook Away for Free*, GOINS WRITER BLOG (June, 30, 9:29 AM), goinswriter.com/unthinkable-giveaway.

314. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1168 (9th Cir. 2007).

315. Masnick , *supra* note 270.

316. May 24, 2012 Posting on Joshua Schroeder's Facebook Profile, FACEBOOK, www.facebook.com/joshua.schroeder2 (Facebook users express their understanding that Justin Bieber, Esmee Denters, Bo Burnham, Greyson Chance, Christina Perri, Sophia Grace, Rosie, Colbie Caillat, Dane Cook, OAR (discovered on a PTP filesharing website), Ted Williams (the "Golden Voice"), Kimbra, The Pretty Reckless, Sara Bareilles, Karmin, Dondria, Jackie Evancho (skipping the on stage initial audition on America's Got Talent submitting hers through YouTube and was vote #1 through online vote), and OK Go were discovered or got their start online through OSPs like Facebook, MySpace and YouTube.); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 349 ("The alienation of copies is perhaps the most rational way to gain exposure for one's ideas. This is a non-economic, and perhaps higher, form of the idea of recognition: respect, honor, and admiration. Even for starving artists recognition of this sort may be far more valuable than economic rewards.").

317. *See generally* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012); UMG Recordings, Inc. v. Shelter Capital Partners LLC, 667 F.3d 1022 (9th Cir. 2011) *opinion withdrawn and superseded on reh'g,* 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (The superseding decision extends many of the findings of the prior decision.).

318. Masnick , *supra* note 270 (citing a Harvard Study); Sony Corp. of Am. v. Universal

creation and dissemination of creative works is being achieved at ever increasing levels.[319]

Plenty of artists and some content industry businesses are embracing internet dissemination via creative commons licensing including peer-to-peer file sharing.[320] It may be that free internet distribution of music results in "better, stronger and more efficient business models."[321] Nevertheless, major players in the content industry have been able to secure increasingly robust copyright protection that they will use to shape the way the internet functions to their benefit and at a cost to the public interest, middle class copyright owners, and the general future state of the internet.[322]

City Studios, Inc., 464 U.S. 417, 442 (1984).

319. ARTISTS AND ART MATERIALS USA 2009, http://www.namta.org/files/public/Mrkt_Stdy_ExecSum.pdf (last visited July 30, 2012) (noting that as of 2009 there were 4.4 million visual artists in the United States, 122,000 art degree seeking college students); KEY BUSINESS SKILLS: STRATEGIC ANALYSIS, http://www.artistmentorsonline.com/?tag=how-many-artists-are-there (noting that in the United States there are more than twice as many visual artists as there are engineers and six times as many artists as there are medical doctors that produce anywhere from around 36 to 75 creative works a year each).

320. Masnick , *supra* note 270 (1 - Trent Reznor from Nine Inch Nails released tracks under creative commons licenses, encouraged fans to bring cameras to concerts and encouraged the posting of videos and images they capture online. He releases his content for free on his website and also gives options to purchase including a 2 disc CD set for $10, a Deluxe Edition for $75 which included a DVD, Blu-ray and photo book, an Ultra-Deluxe Limited Edition package for $300 each with only 2,500 available. The Ultra-Deluxe Limited Edition sold out bringing in $750,000. These efforts also increase the demand for live performance tickets. 2 - Josh Freese, made considerable money with a similar marketing strategy. 3 – Jill Sobule was dropped by 2 labels after having 1 hit song and raised all the money she needed for her next project by selling advance copies of her work before it had been created. 4 – Corey Smith used to be a high school teacher, but now he uses the internet to connect him to fans who he gives his music away for free to. From the ticket sales he brings in from live shows he has grossed nearly 4 million dollars in 2008. Corey also tried pulling free music off of his website and found that his iTunes sales dropped when he did that. 5 – Jonathon Coulton was a computer programmer but in 2006 he decided to write, record and release a new song every week of the year under a creative commons license. Because people could share his music freely he became a cult sensation. Due to the ability to crowd source his following on the internet he was able to "parachute" in to play shows in venues that would make him money. With the money his music business makes Jonathon doesn't have to be a computer programmer anymore. 6 – Motoboy, a Swedish singer/songwriter purposely put his album out onto Peer-to-Peer websites including Pirate's Bay which turned him into a star in Sweden. He also did a "YouTube concert" for his fans. 7 – Amanda Palmer, a singer from a punk cabaret duo called the Dresden Dolls, released a solo album on Roadrunner records, a subsidiary of Warner Music, but they weren't interested in promoting the album. She used Twitter to set up "flash gigs" and makes money selling merchandise online, sometimes via an "online auction." 8 – Terry McBride runs Nettwerk, a Canadian based label that embraces these "new" music industry business models. They allowed fans to mix one of their hip-hop artist's songs themselves. The album made it to the top 50. 9 – Matthew Ebel – performed on Second Life. Fans could pay $5, $10 or $15 for benefits including access to new songs every couple of weeks as well as having recorded shows sent to them. Ebel makes a good living doing this. 10 – Mold Over is an electronic band in San Francisco that made a CD case with a working circuit board with buttons noises and lights including a jack to plug it into your computer. The CD's sold for $50 apiece and sold very well because he gave his fans a reason to buy physical CDs instead of downloading them online for free.).

321. *Id.*

322. *Id.* ("Stop worrying and learn to embrace the business models that are already helping

The next era of internet regulation should find its cornerstone in the public interest, and should maximize openness and freedom for OSPs and end users. For a bright regulatory future, the DMCA must be interpreted in a way that does not undermine the FCC net neutrality rules made to limit the effects on OSPs and end users from gate keeping regimes. Anything less will result in contradictions that make the application of internet law dysfunctional and unnecessarily contradictory. Reversing the Second Circuit's most recent holding in *YouTube* is an auspicious way of getting these changes underway. The Ninth Circuit statutory interpretation in the *Shelter Capital* case, Judge Kozinski's rationale in *Perfect 10 v. Amazon* emphasizing the second prong of vicarious liability, and *Sony*-inspired fair use findings for direct infringers all should be employed to limit the conditions of the DMCA safe harbors.

If FCC regulation can be aligned with copyright law to safeguard continued openness and freedom online, the public will reap untold rewards when it is needed most. New ways of communicating and making money should be celebrated. Logging onto a dot com website should mean that you have entered the freest and most open form of internet possible. This reality is within reach and lawmakers should seize it for the sake of continued freedom and openness of the internet, for our nation, and for the world.

---

musicians make plenty of money and use file-sharing to [your] advantage, even in the absence of licensing or copyright enforcement.")

Hamline University's School of Law's Journal of Public Law and Policy

Volume 35
Issue 1 *Transcending Intellectual Property Rights: An Exploration Into the Unchartered Territories of the Intangible, Infringed, and the Internet*

Article 1

2-26-2014

Bringing America Back to the Future: Reclaiming a Principle of Honesty in Property and IP Law

Joshua J. Schroeder

Follow this and additional works at: http://digitalcommons.hamline.edu/jplp

Recommended Citation
35 Hamline J. Pub. L. & Pol'y 1

This Article is brought to you for free and open access by DigitalCommons@Hamline. It has been accepted for inclusion in Hamline University's School of Law's Journal of Public Law and Policy by an authorized administrator of DigitalCommons@Hamline.

Bringing America Back to the Future:Reclaiming a Principle of Honesty in Property and IP Law

Joshua J. Schroeder[*]

> "If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone. . . . He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation."[1]
>
> "[The truth is great and will prevail if left to herself, [] she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons free argument and debate errors ceasing to be dangerous when it is permitted freely to contradict them."[2]
>
> — Thomas Jefferson, Founder, United States of America

---

[*]Joshua J. Schroeder, holds a J.D. from Lewis & Clark Law School in Portland, Oregon. Thank you to Professor Jeffrey Jones for his wisdom, input and support through the making of this piece. Also a special thank you to Joseph Ureno for his contribution and a thank you to Hon. Darleen Ortega for supporting us all.

Letter from Thomas Jefferson to Isaac McPherson, Aug. 13, 1813, *in* JEFFERSON: WRITINGS 1291 (Merrill D. Peterson, ed. 1984).

[2] Thomas Jefferson, *A Bill for Establishing Religious Freedom*, *in* JEFFERSON: WRITINGS, *supra* note 1, at 347 (This bill was enacted by the Virginia General Assembly with the support of James Madison. It vindicates religious and intellectual freedom and was one of the sources that Congress drew upon when drafting the Bill of Rights in 1789).

INTRODUCTION: THE PROBLEM OF INTANGIBLE PROPERTY

It has been five years since the global market sunk into a "great recession"[3] and thus far there has been a serious lack of reevaluation. The "tea party" libertarians and the "occupy movement" liberals don't seem to carry us much further than the ruminations of F. Scott Fitzgerald and Ayn Rand on the economy.[4] Meanwhile, the deep division between the public interest and private property ownership has been rushed to extremes. For example, the Tenth Circuit has allowed local government officials to sell the freedom of speech in Salt Lake City's town to the private corporate ownership of a religious institution.[5] Of course the project of defining the scope of public property, public goods, and the public interest under the First Amendment has always at a constant

---

[3] DAVID A. STOCKMAN, THE GREAT DEFORMATION: THE CORRUPTION OF CAPITALISM IN AMERICA 3–5 (1st ed. 2013) (Stockman called the approval of the TARP bill bail out the "triumph of crony capitalism."). *See generally*, Mark Szeltner et al, *Diminished Lives and Futures: A Portrait of America in the Great-Recession Era*, RUTGERS: WORK TRENDS (Feb. 2013), *available at* http://www.heldrich.rutgers.edu/sites/default/files/content/Work_Trends_February_2013.pdf.

[4] *Compare* F. SCOTT FITZGERALD, THE GREAT GATSBY 110 (The Scribner ed. 1925) ("Can't repeat the past? . . . Why of course you can!"), *with* AYN RAND, ATLAS SHRUGGED 577 (First Plume Printing ed. 1957) ("[Robin Hood] is remembered not as a champion of *property*, but as a champion of *need*, not as a defender of the *robbed*, but as a provider to the *poor*. . . . He is the man who became the symbol of need, not achievement, is the source of rights, that we don't have to produce, only to want, that the earned doesn't belong to us, but the unearned does.").

[5] Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249, 1256 (10th Cir. 2005) (signs informing the public that the town square was no longer "public" along with the Mormon Church's purchase of the property including the public's easement to traverse the town square ousted the public's free speech rights in Salt Lake City's main street plaza including the ability for homosexuals to show affection while on the plaza grounds).

tension with private property ownership.[6] However, as it intended by the framers,[7] this tension was not meant to protect the "human interposition" of dishonest creation, allocation and valuation of intangible property that commonplace in the market today.[8] After all, it was in the framer's plan to waylay the dangers of "error" by guaranteeing the public's freedom to contradict them with truth.[9] Thus, as intangible property is used to cloak error as truth,[10] thereby

---

[6] Letter From John Adams to James Sullivan, May 26, 1776, *in* 9 THE WORKS OF JOHN ADAMS 375–78 (C. Adams, Ed., 1854) ("Such is the frailty of the human heart, that very few men who have no property, have any judgment of their own. They talk and vote as they are directed by some man of property, who has attached their minds to his interest. . . . [P]ower always follows property. . . . [T]he balance of power in a society, accompanies the balance of property in land. The only possible way, then of preserving the balance of power on the side of *equal liberty* and public virtue, is to make the acquisition of land easy to every member of society.") (italics added).

[7] *Id.*

[8] Thomas Jefferson, A Bill for Establishing Religious Freedom, enacted on January 16, 1786, *in* JEFFERSON: WRITINGS, *supra* note 1, at 347 (This bill was enacted by the Virginia General Assembly with the support of James Madison. It vindicates religious and intellectual freedom and was one of the sources that Congress drew upon when drafting the Bill of Rights in 1789).

[9] *Id.*

[10] Thomas Lee Hazen, *Volatility and Market Inefficiency: A Commentary on the Effects of Options, Futures, and Risk Arbitrage on the Stock Market*, 44 WASH. & LEE L. REV. 789, 795 (1987) (noting that options and futures trading can be "manipulative and artificial"). *C.f.* John Letzing, *Google Says Patents, Tech Were Less Than Half of Motorola's Price*, THE WALL ST. J., July 24, 2012, http://blogs.wsj.com/digits/2012/07/24/google-says-patents-tech-were-less-than-half-motorolas-price/ ("Google said . . . that $2.9 billion of the purchase price for Motorola was attributable to cash acquired, $2.6 billion was related to goodwill, $730 million for customer relationships and $670 million for 'other net assets acquired.'" Google characterized consumer relationships with Motorola and what consumers thought about Motorola as worth billions of dollars when consumer's themselves may own their relationships and thoughts); Jon Leibowitz, F.T.C. Chairman, *Remarks as Prepared for Delivery at the Sixth Annual Georgetown Law Global Antitrust Enforcement Symposium*, FEDERAL TRADE COMMISSION, Sept. 19, 2012, WL 4339298 at 3 (Noting a major circuit split over pay-for-delay contracts regarding whether they violate antitrust law between the Third and the Second, Eleventh and Federal Circuits: "Eliminating pay-for-delay deals would

disarming the truth of "her natural weapons [of] free argument and debate,"[11] the Courts must hold intangible property claims to a minimum standard of honesty as a formality.[12]

Intangible property springs from the positivist view that anything from which value can be derived is "property."[13] Thus, intangibles can be defined as any property that is not physical or tangible. Intangibles may include the field of law known as Intellectual Property (IP), but so far is not limited by it. Stocks, futures, mortgages, securities, insurance and other creative business tools can be included in the category of "intangible property." Since intangible property is not necessarily connected to real, tangible property it is notoriously dubious to valuate.[14] In fact, market-wide

---

save American consumers $3.5 billion annually and, because the federal government accounts for roughly one-third of the nation's prescription drug spending, it would lower the federal budget deficit by $5 billion over ten years."). *See In re K-Dur Antitrust Litig.*, 686 F.3d 197, 214 (3d Cir. 2012) ("First, we take issue with the scope of the patent test's almost un-rebuttable presumption of patent validity."). *See also* C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement As A Regulatory Design Problem*, 81 N.Y.U. L. REV. 1553, 1616 (2006) (Noting that self-help measures like pay-for-delay contracts disrupt the balance struck by patent regulation between innovation and competition).

[11] Thomas Jefferson, A Bill for Establishing Religious Freedom, enacted on January 16, 1786, *in* JEFFERSON: WRITINGS, *supra* note 1, at 347.

[12] J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY, 320 (2d ed. 1979) (noting that even the claims of innocent owners gave way to "honest sales which took place in a market or fair."). *See also* 2 WILLIAM BLACKSTONE, COMMENTARIES *448–49 (commenting on market overt, that honesty was so important to England's Saxon ancestors in the transfer of title that sales and bargains of chattels had to be "contracted in the presence of credible witnesses.").

[13] Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16, 19 (1913) (hereinafter *Hohfeld I*). *See generally* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 26 YALE L.J. 710, 712–13 (1917) (hereinafter *Hohfeld II*). *See* Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 357 (1980).

[14] Brief of Antitrust Economists as Amici Curiae in Support of Respondents, 23-24, Fed. Trade Comm'n v. Actavis, Inc., 133 S. Ct. 2223 (2013) (No. 12-416), 2013 WL 836946 (One of the arguments made to the Supreme Court for not limiting pay-for-delay agreements regarding drug patents included the difficulty

problems with the creation, allocation and valuation of intangible property resulted in perpetual cycles of market failure.[15]

Seemingly undaunted by global market crisis, intangible property owners have pushed their property claims beyond precedent.[16] In fact, some have voiced their desire for unlimited and absolute rights to intangibles.[17] Perhaps the most telling example is

---

of valuating the agreements due to the central nature of intangibles to them: "There is typically significant ambiguity around the value of such agreements because they often include the purchase of intellectual property, real options (through joint ventures), supply agreements, risk sharing, and the settlement of other litigation. Determining the value of such one-of-a-kind business agreements can be very difficult."); Hazen, *supra* note 10, at 795; Ben Hirschler, *UK Watchdog Accuses GSK Over "Pay-For-Delay" Drug Deals*, REUTERS, April 19, 2013, http://www.reuters.com/article/2013/04/19/us-glaxosmithkline-antitrustidUSBRE93I07720130419.

[15] STOCKMAN, *supra* note 3, at 3–5, 361–63, 501–07 (Drawing a correlation between market failures due to widespread opportunism and overvaluation of intangible property in America).

[16] *Compare* Milton Friedman, *The Need for Futures Markets in Currencies*, 31 CATO J. 635, 636 (Fall 2011) http://www.cato.org/sites/cato.org/files/serials/files/cato-journal/2011/9/cj31n3-15.pdf (advocating for a need for a futures market in the 1970's when America's currency was "floated" and no longer backed by a promise of gold value in exchange.), *with* 2 WILLIAM BLACKSTONE, COMMENTARIES *398 ("By the rules of the ancient common law, there could be no future property, to take place in expectancy, created in personal goods and chattels."), *and* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2590 (2012) ("The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent. We have said that Congress can anticipate the effects on commerce of an economic activity. . . . But we have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce.").

[17] William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 517–18 (2003) (explaining how maximized copyright protection could be drafted in federal statute to avoid unconstitutionality); Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455, 482, 520 (2010) (Proposing a "carryover hypothesis" involving the determination of "how few deviations from the traditional views of property intangibles need to be made in order to develop a sensible system form copyright and patents."); Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108, 112, 118 (1990) ("Old rhetoric about IP equating to monopoly seemed to

the rise of an unprecedented coalition between powerful American content owners and internet service providers called the Center for Copyright Information.[18] This organization was established with the purpose of enforcing self-help measures to eradicate uses of online content by the public in the wake of public outcry against the Stop Online Piracy Act (SOPA), Protect IP Act (PIPA) and the Anti-Counterfeiting Trade Agreement (ACTA) and the resulting

---

have vanished, replaced by a recognition that a right to exclude IP is no different in principle from the right to exclude in physical property. . . . Except in the rarest case we should treat intellectual and physical property identically in the law - which is where the broader currents are taking us."). *See also* Geoffrey Neri, *Sticky Fingers or Sticky Norms? Unauthorized Music Downloading and Unsettled Social Norms*, 93 GEO. L.J. 733 (Noting a movement towards the view that unauthorized internet downloading is theft "plain and simple.") (quoting Press Release, Motion Picture Ass'n of Am., Inc., *Motion Picture and Music Industries File Suit Against Scour.com* (July 20, 2000), *available at* http://www.mpaa.org/Press/ScourPressRelease.htm); Eric H. Holder, Jr., Remarks at the Press Conference Announcing the Intellectual Property Rights Initiative (July 23, 1999), *available at* http://www.usdoj.gov/criminal/ cybercrime/dagipini.htm; Dowling v. United States, 43 U.S. 207, 217 (1985).

[18] About the Center for Copyright Information, (last visited March 25, 2013), http://www.copyrightinformation.org/about-cci/ (CCI is a coalition of major copyright owner interest groups and ISPs, and they are initiating copyright alert systems in violation of net neutrality). *See also* John Tarnoff, *We Don't Need Six Strikes*, HUFFINGTON POST, March 7, 2013, http://www.huffingtonpost.com/john-tarnoff/we-dont-need-six-strikes_b_2831489.html; Ernesto, *MPAA: BitTorrent is the Best Way to Pirate Movies and TV-Shows*, TORRENTFREAK, March 23, 2013, http://torrentfreak.com/mpaa-bittorrent-is-the-best-way-to-pirate-movies-and-tv-shows-130323/ ("The MPAA, RIAA and the Internet providers participating in the "six strikes" anti-piracy scheme have informed the Congressional Internet Caucus Advisory Committee about their plans."); *Kneecapping the Future: Comcast's Unjustified Internet Caps and the Plan to Kill Video Competition*, FREE PRESS, June 25, 2012, http://www.savetheinternet.com/sites/default/files/ resources/Comcast%20New%20Caps%20 Factsheet_FINAL.pdf (reporting that Comcast has a cap on the data an internet subscriber can download through Comcast, but exempted its video provider Xfinity); *The Facts About AT&T's Facetime Blocking*, FREE PRESS (Sept. 20, 2012), http://www.savetheinternet. com/sites/default/files/att-factsheet-fp.pdf.

government rejection of SOPA, PIPA and ACTA.[19] According to the Federal Communications Commission (FCC) net neutrality rules and the First Amendment, these self-help measures are illegal.[20] The major content owners' zeal comes from an overblown concept of property alone. Not unlike the fate of property claims in the African American slaves of 1865,[21] the People may eventually recognize some of the property claims of the Motion Picture Association of America (MPAA) and the Recording Industry Association of America (RIAA) as baseless, destructive and immoral.[22]

---

[19] *See* Larry Magid, *What Are SOPA and PIPA And Why All the Fuss?*, FORBES (Jan. 18, 2012), http://www.forbes.com/sites/larrymagid/2012/01/18/what-are-sopa-and-pipa-and-why-all-the-fuss/ (noting that the laws pit the tech industry against the entertainment industry); Erik Kain, *Final Draft of ACTA Watered Down, TPP Still Dangerous on IP Rules*, FORBES (Jan. 28, 2012), http://www.forbes.com/sites/erikkain/2012/01/28/final-draft-of-acta-watered-down-tpp-still-dangerous-on-ip-rules/ (noting that ACTA would force the DMCA on developing nations and is a dangerous law to pass); David Meyer, *ACTA Rejected by Europe, Leaving The Treaty Near Dead*, ZDNET (July 4, 2012), http://www.zdnet.com/acta-rejected-by-europe-leaving-copyright-treaty-near-dead-7000000255/ (noting that massive protests in Europe prompted the European parliament to reject the treaty).

[20] Preserving the Open Internet, 47 C.F.R. § 8 (2011); U.S. CONST. amend. I.

[21] U.S. CONST. amend. XIII (The Thirteenth Amendment abolished property rights in people in 1865. This is a perfect example of how human rights can win out over property rights).

[22] *Compare* Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1033 (2005) ("Courts and commentators . . . make a subconscious move, one that the economic theory of property does not justify: they jump from the idea that intellectual property is property to the idea that the IP owner is entitled to capture the full social value of her right."), *with* Hillary Clinton, then acting U.S. Secretary of State, *Trafficking in Persons Report*, at 20, THE U.S. DEP'T OF STATE, (June 2012) *available at* http://www.state.gov/documents/organization/192587.pdf (noting that many corporate supply chains have been found to have been tainted with slavery, also noting that an estimated 20.9 million modern slaves exist today and that it constitutes an estimated $20 billion dollar industry globally). *See also* President Barak Obama, *Fact Sheet: the Obama Administration Announces Efforts to Combat Human Trafficking at Home and Abroad*, THE WHITE HOUSE, Sept. 25, 2012 (The President said that modern slavery should "concern every business, because it distorts markets.").

Granting absolute claims to intangible property would also put unbearable pressure on the U.S. Constitution that was written in the time of Blackstone—when property was necessarily physical.[23] In fact, a strict positivist approach to property would characterize a right to free speech as intangible property. Such a mischaracterization trivializes violations of the First Amendment.[24] A property right in free speech would make it seem like the marketplace-of-ideas in itself is a monetizable commodity.[25] If the

---

[23] 2 WILLIAM BLACKSTONE, COMMENTARIES *316–17, *396–97 (Noting that there is a difference between grant and livery to account for the incorporeal aspects of estates. "Grants, *concessiones;* the regular method by the common law of transferring the property of *incorporeal* hereditaments, or such things whereof no livery can be had. For which reason all corporeal hereditaments, as lands and houses, are said to lie *in livery;* and the others, as advowsons, commons, rents, reversions, etc., to lie *in grant*." Also noting that other than physical property "in things personal" held in absolute possession, there were natural goods like light and water that could only held in a qualified (i.e. less than absolute) possession. Finally, Blackstone recognized "property in action" which "depends entirely upon contracts." Thus, property was once parsed into categories and absolute rights were only granted to physical property held in absolute possession). *See* Vandevelde, *supra* note 13, at 333 ("The courts of Blackstone's era claimed to be protecting the possession of things." As such, incorporeal rights were only granted in limitation and depended on contract law until it "had been reified, and the resulting thing was owned absolutely.").

[24] *See, e.g.*, DVD Copy Control Ass'n, Inc. v. Bunner, 31 Cal. 4th 864, 881 (2003) (holding that "[t]he First Amendment does not prohibit courts from incidentally enjoining speech in order to protect a legitimate property right.") (citing San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 537–40 (1987) (a trademark case that enjoined the use of the word "Olympic" in advertising without permission from the Olympic Committee)).

[25] *Compare* Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249, 1256 (10th Cir. 2005) (finding that Salt Lake City's sale of its Main Street Plaza, including public use easement, to the LDS church for a total of $13.375 million to manage it as an "ecclesiastical park" constituted a relinquishment of any first amendment free speech rights in the town square. Thus, private ownership in a traditionally public forum ousted public rights to free speech), *with* Paul Barbagallo, *Verizon First Amendment Challenge of Net Neutrality Tests Century of Regulation*, BLOOMBERG BNA, Jan. 24, 2013, http://www.bna.com/verizon-first-amendment-n17179872014/ (noting that Verizon's recent challenge seeks to destroy any First Amendment justification for FCC prophylactic regulation to

rights guaranteed in the Constitution are propertized and valuated, some may begin to believe that rights guaranteed by the Constitution may not only be purchased, but also placed in the "despotic dominion" of a private owner.[26] This is exactly the hope of those who would maximize copyright and patent rights beyond the express limits to the Copyright and Patent Clauses.[27]

Before the strong upswing of positivist thought took hold in the early twentieth century,[28] property in a legal sense was bound to be physical and absolute.[29] In other words, the protection of intangibles was perceived as mere covenant or promise unless or

---

protect free speech over the internet because internet networks are privately owned and operated by corporations). *See also* Nicole Radzievich, *Law Professor Takes Issue with Free-Speech Restrictions at Steel Stacks*, LEHIGH VALLEY'S NEWSPAPER: THE MORNING CALL, Oct. 11, 2012, http://articles.mcall.com/2012-10-11/news/mc-bethlehem-steelstacks-free-speech-20121011_1_seth-moglen-restrictions-aim-steelstacks (noting that local governments and organizations are cleverly drafting free speech restrictions in under the guise of private property, in deed restrictions regarding public forums – *Unclear wording/sentence structure; do you mean to say: "in deed restrictions regarding public forums, local governments and organizations are cleverly drafting free speech restrictions under the guise of private property."*).

[26] 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

[27] Landes & Posner, *supra* note 17, at 517–18. *But see* Dowling v. U.S., 473 U.S. 207, 216–17 (1985) (reasoning that a copyright is "no ordinary chattel."); Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 540 (1985) (noting that "[t]he First Amendment's protections [are] embodied in the [Copyright] Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use."); Kirtsaeng v. John Wiley & Sons, Inc., No. 11–697, slip op. at 19, 31 (2013) (noting the objective of copyright in the constitution is "Progress in Science and useful Arts," as well as noting that "the Constitution describtes the nature of American copyright law[as] providing Congress with the power to 'secur[e]' to '[a]uthors' 'for limited [t]imes' the '*exclusive [r]ight to their . . . [w]ritings*.'") (quoting U.S. CONST. art. I, § 8, cl. 8).

[28] Hohfeld I, *supra* note 13, at 19 (noting that all valuable interests can be conceptualized as property). *See generally* Hohfeld II, *supra* note 13, at 712–13 (1917). *See* Vandevelde, *supra* note 13, at 357.

[29] 2 WILLIAM BLACKSTONE, COMMENTARIES *316–17, *396–97. *See* Vandevelde, *supra* note 13, at 333–35.

until it resulted in a legal claim to actual physical property.[30] As all property presumably had something physical backing up the property claim, it was easy to require due diligence on the part of the buyer and seller to value the property correctly before a property sale.[31] However, buyer's remorse is not so easily applied in cases of intangible property for the simple reason that there is nothing physically there to inspect. Thus scholars suggest that intangible property rights should be inherently limited.[32] However, intangible property owners do not seem to share this idea.

Unheeded by most, the dangers ahead continue to mount as intangible assets continue their dauntless course toward maximization as an absolute form of property. Companies worldwide have been mindlessly criticized for not claiming hundreds of billions of dollars of intangible value including unclaimed marketplace goodwill.[33] In fact, overvalued intangible

---

[30] 2 WILLIAM BLACKSTONE, COMMENTARIES *316–17, *396–97.

[31] Sherwood v. Walker, 66 Mich. 568, 577, 33 N.W. 919, 923 (1887) (deciding that, where the buyer of a cow believes the cow to be a breading cow, and finds, after the fact, that the cow is barren, the buyer does not have a contract remedy when the buyer could have inspected the cow beforehand. The court reasoned that "the mistake was not of the mere quality of the animal, but went to the very nature of the thing. A barren cow is substantially a different creature than a breeding one."). *See also* Wood v. Boynton, 64 Wis. 265, 25 N.W. 42, 44 (1885) (deciding that a person who sold a diamond for a dollar, because she was ignorant of the "nature and value" of the stone, did not have a contract remedy for making a bad bargain. "If she chose to sell it without further investigation as to its intrinsic value to a person who was guilty of no fraud or unfairness which induced her to sell it for a small sum, she cannot repudiate the sale because it is afterwards ascertained that she made a bad bargain."); John Patrick Hunt, *Taking Bubbles Seriously in Contract Law*, 61 CASE W. RES. L. REV. 681, 693 (2011).

[32] Vandevelde, *supra* note 13, at 357–58 ("This new property had been dephysicalized and thus consisted not of rights over things, but of any valuable right. The new property had also been limited. It consisted not of an absolute or fixed constellation of rights, but of a set of rights which are limited according to the situation.").

[33] Tim Boreham, *IP assets a closed book for most companies*, THE AUSTRALIAN, April 5, 2013, http://www.theaustralian.com.au/ business/opinion/ip-assets-a-closed-book-for-most-companies/story-e6frg9lo-1226612839028 (noting that, in a disagreement regarding the going value of international businesses, a possible

property has proven to have a serious detrimental effect on pension funds, retirement and the stock market.[34] Shareholders continue to have very little recourse when public businesses write off bad acquisitions of intangibles worth billions.[35] The problem has infected our government to the highest levels. For instance, in 2011, the U.S. treasury's valuation of the U.S. varied by $2 trillion from Standard and Poor's valuation.[36] Furthermore, estimates of the daily U.S. hedging activity including futures and option contracts is around $4 trillion. In contrast, the underlying daily trade of physical merchandise is only $40 billion.[37] This constitutes a 100:1 ratio of the trade of intangibles in the form of options and futures to the underlying physical property value being traded. Furthermore, when contracts involving intangibles are ripe for judicial review,

---

value of $850 billion, $250 billion pertained to the value of unrecorded IP assets a possible $850 billion valuation disagreement regarding going value of international businesses, $250 billion of which pertained to the value of unrecorded IP assets, like brand recognition).

[34] James B. Stewart, *Bad Directors and Why They Aren't Thrown Out*, N. Y. TIMES, Mar. 29, 2013, http://www.nytimes.com/2013/03/30/business/why-bad-directors-arent-thrown-out.html?_r=0 (noting that HP's purchase of Autonomy, a British software maker, for $11.1 billion, was "the worst corporate acquisition" in history, even though HP later attributed $8.8 billion of that price to fraud; being HP's purchase of Autonomy, a British software maker, for $11.1 billion. HP later wrote off $8.8 billion of that price, claiming that it had been defrauded—also noting that HP's failure had a detrimental effect on New York City's pension fund.).

[35] *See, e.g.*, Amy Thompson, *Microsoft Drops After Goldman Says PC Market Share Will Falter*, SAN FRANCISCO CHRONICLE, April 11, 2013, http://www.sfgate.com/business/bloomberg/article/Microsoft-Drops-After-Goldman-Says-PC-Market-4427371.php (noting a possible overvaluation of Microsoft Window's 8 software IP).

[36] Ian Katz &Vinny Del Giudice, *S&P's Analysis was Flawed by $2 Trillion Error, Treasury Says*, BLOOMBERG, Aug. 5, 2011, http://www.bloomberg.com/news/2011-08-06/s-p-s-analysis-was-flawed-by-2-trillion-error-treasury-says.html (when the going value of businesses and countries are given the color of property, future projections of value become fixed in the present as if they are real and as such projections can vary wildly.).

[37] STOCKMAN, *supra* note 3, at 289 (an estimated $3.96 trillion dollar gap between future and actual tangible property is traded every day).

judges are told to look the other way.[38] Lawmakers should not listen to such requests because intangibles have played a central role in the generation of massive deadweight losses that have been shamelessly foisted onto the U.S. government and the middle class.

This article puts forth one central argument: The hyper-broad concept of property used to justify absolutist claims to intangible property is unconstitutional. This article demonstrates how a principle of honesty enforced by the Court can keep intangible property claims within the bounds of the constitution. Furthermore, a principle of honesty can be used to protect property common law from the political fallout driven by the highly contentious valuations of intangibles that have escalated to differences in valuation within the trillions of dollars. Finally, enforcing honesty in the courts will enable the lower and middle classes to continue to better themselves by participating in the marketplace.

To arrive at a principle of honesty, this article discusses the role of intangible property in constitutional interpretation. In Part I it analyzes the recent *Sebelius* and *Kirtsaeng* decisions, arguing that a reevaluation of Constitutional interpretation is currently underway. Then, in Part II this article lays out the current concept of property discourse (centered on a Liberal/Libertarian debate) and its role in spurring America on a course toward worldwide intangible property maximization. Finally, in Part III this article will propose that the Court reclaim a standard of honesty in the context of property rights analysis as a minimum formality requirement. The marketplace allowance of shameless dishonesty in the creation, marketing and valuation of intangible property as if it is physical or tangible has exacerbated and accelerated market failure to a global crescendo in 2008. Thus, all lawmakers should take a clearer stance against this type of dishonesty in the future.

---

[38] Brief of Antitrust Economists as Amici Curiae in Support of Respondents, 23-24, Federal Trade Commission v. Actavis, Inc., 133 S. Ct. 2223 (2013) (No. 12-416), 2013 WL 836946; Friedman, *supra* note 16, at 636; Hirschler, *supra* note 14.

PART I: THE ROLE OF PROPERTY IN CONSTITUTIONAL INTERPRETATION

According to the Commerce Clause, Congress can regulate "things" in interstate commerce.[39] These "things" Congress can regulate are informed by claims to property in a broadening class of items. For example, Justice Ginsberg's concurrence in *Sebelius* sought to assert a strong property right in medical licenses against any poor, lower class citizen who would not have been able to afford the costs of necessary medical services. The federal government, according to Justice Ginsberg, should be accorded the authority to coerce lower class, impoverished Americans to purchase insurance to ensure that doctors always get paid. With this cart before the horse view, poor people that depend on free medical services from licensed professionals are seen as trespassers. This section will consider the new *Sebelius* decision regarding the function of the Article I Constitutional grants of legislative power, and its possible effect on past decisions. Finally it will discuss the *Kirtsaeng* decision that interpreted common law property rights as a limitation on copyright protection.

The *Sebelius* Decision

With its recent decision regarding the Affordable Care Act, known popularly as Obamacare, the Supreme Court reached perhaps its most pivotal Constitutional law decision since *Brown v. Board of Education*.[40] Three concurrences carried the day,[41] without a clear majority opinion on exactly how the Commerce and

---

[39] U.S. CONST. art.I, § 8, cl. 3.

[40] *Compare* Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012), *with* Brown v. Bd. of Ed. of Topeka, Shawnee County, Kan., 347 U.S. 483, 492 (1954) *supplemented sub nom.* Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294 (1955).

[41] *Sebelius*, 132 S. Ct. at 2566, 2609, 2642 (Ginsberg, J. concurring in part, concurring in the judgment in part, and dissenting in part) (Kennedy, J. dissenting).

Necessary and Proper Clauses interact with other Article I grants of legislative power. However, one majority found that the Commerce Clause could not be used to enact a penalty-tax and mandate for Americans to buy health insurance.[42] A second majority held that nevertheless, the tax clause could justify the penalty-tax and mandate even without Commerce Clause support.[43] Only Chief Justice Roberts found that both of these propositions may legally coexist.[44] None of the Justices considered the practical effect of their decision as a work around for the Constitutional limit that all Federal taxes be "uniform."[45]

None of the Justices intended to underwrite a workaround for limits on the legislative grants of power in Article I in general. However, Chief Justice Roberts (with the support of the Ginsberg concurrence for purposes of the remedy) put forward a hands-off approach that may indicate that he would allow *de facto* workarounds.[46] Because the Chief Justice also found that states cannot be coerced to expand Medicaid, only the states opting in would be subject to the penalty-tax. The practical result is a non-uniform federal tax that only Chief Justice Roberts held up as constitutional.

This penalty-tax is no ordinary tax or penalty.[47] In order to avoid being struck under the Anti-Injunction Act,[48] the Chief Justice decided that it was actually a penalty for purposes of the statute.[49] On the other hand, he decided that the penalty was a tax

---

[42] *Id.* (Chief Justice Roberts and Justices Scalia, Kennedy, Thomas and Alito).

[43] *Id.* (Chief Justice Roberts and Justices Breyer, Kagan, Ginsberg and Sotomayor).

[44] *Id.*

[45] *Id.*

[46] *Sebelius*, 132 S. Ct. at 2608 ("the Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved for the people.").

[47] *Id.* at 2566 (finding a penalty payable to the IRS.).

[48] Anti-Injunction Act, 26 U.S.C. § 7421(a) (2013) (baring suits to "restrain[] the assessment or collection of any tax.").

[49] *Sebelius*, 132 S. Ct. at 2584 ("The Affordable Care Act does not require that the penalty for failing to comply with the individual mandate be treated as a tax for proposes of the Anti-Injunction Act.").

for the purpose of constitutionality under the Tax Clause.[50] However, every Justice other than the Chief Justice agreed that this sort of two-sided finagling was either not needed or not justified.[51] The Ginsberg concurrence noted that judicial treatment of the Commerce Clause should continue to justify tax-like laws like this.[52] The Kennedy dissent decided that the Affordable Care Act should be overturned because the Commerce Clause should not justify the law as enacted, and because the individual mandate cannot be a penalty for purposes of the Anti-Injunction Act and a tax for purposes of the Tax Clause.[53] Justice Thomas especially made clear in his own concurring dissent that the substantial effects test itself should be wholly removed.[54]

A majority of the court centered their opinions on a determination of the scope of the Commerce Clause. Furthermore,

---

[50] *Id.* at 2600 ("The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.").

[51] *Id.* at 2609 (Ginsberg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("The Chief Justice's crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress' efforts to regulate the national economy in the interest of those who labor to sustain it." Essentially, the tax for one purpose and penalty for another is merely dicta in Ginsberg's dissent because the Commerce Clause is already sufficient to justify the Affordable Care Act making the legitimacy of Congress' tax power to support the individual mandate an "auxiliary holding." She did not discuss the Anti-Injunction Act.); *Id.* at 2647 (Kennedy, J., dissenting) ("As we said at the outset, whereas the precise scope of the Commerce Clause and the Necessary and Proper Clause is uncertain, the proposition that the Federal Government cannot do everything is a fundamental precept.").

[52] *Id.* at 2609 (Ginsberg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (arguing that the Chief Justice's reading of the Commerce Clause "should not have staying power.").

[53] *Sebelius*, 132 S. Ct. at 2656 (Kennedy, J., dissenting) ("What the Government would have us believe in these cases is that the very same textual indications that show this is *not* a tax under the Anti-Injunction Act show that it *is* a tax under the Constitution. That carries verbal wizardry too far, deep into the forbidden land of the sophists.").

[54] *Id.* at 2677 (Thomas, J., dissenting).

the *de facto* majority did not attempt to give a workable definition of interstate commerce other than the one already existing. Thus, Chief Justice Roberts' interpretation of the Necessary and Proper Clause as a limit on the Commerce Clause carried the day, but should not control future Constitutional interpretation. This reading of the Necessary and Proper Clause should still be seen as a minority view.[55] However, the view that the Commerce Clause is somehow more limited than it had been is a majority view over Justice Ginsberg's concurrence.[56]

Thus, the *Sebelius* decision seems to announce that our constitutional interpretation has shifted, and that the Commerce Clause is now more limited than it was in the past.[57] In response to Chief Justice Roberts' concern that constitutional provisions are being rendered "superfluous" this article will turn to IP law. Past IP case law that had relied on an expansive reading of the Commerce Clause provides a useful lens to propose an agreeable limit on Commerce Clause application going forward. The Article I grants of power must coexist, including the limits to each grant of power.

---

[55] U.S. CONST. art. II, § 2 (Past Supreme Court decisions about the Necessary & Proper Clause stretching back to *McCulloch v. Maryland* allowed Congress the *necessary* regulatory power to institute effective regulation and remains controlling); McCulloch v. Maryland, 17 U.S. 316, 324, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."). *See also* Missouri v. Holland, 252 U.S. 416, 432 (1920); Reid v. Covert, 354 U.S. 1, 6–19 (1957) (deciding that though the Necessary and Proper Clause may increase the scope of regulatory power granted to Congress, Congress may not invoke the Necessary and Proper Clause merely to comply with a treaty that would otherwise override an express prohibition in the Constitution).

[56] *Sebelius*, 132 S. Ct. at 2609 (Ginsberg, J. concurring in part, concurring in the judgment in part, and dissenting in part) (Justice Ginsberg's constitutional interpretation included herself and Justices Breyer, Kagan, and Sotomayor. This is a four Justice minority interpretation.).

[57] *Id.* at 2586 (The Chief Justice seems to have limited his constitutional interpretation in such a way as to give every provision effect: "If the power to 'regulate' something included the power to create it, many of the provisions in the Constitution would be superfluous.").

To this end, by adopting reasonable limits to Congress's Commerce Power informed by the First Amendment and the Copyright and Patent Clauses, the Court may also protect property law itself from being commandeered by interests in intangible property.[58] The result would be a rationalized constitutional interpretation that functions independently from the economic interests of those who engage in dishonest practices in the creation, valuation and allocation of intangibles.

In fact, an unbridled conception of intangible property rights undertook a subtle but powerful role underlying the *Sebelius* decision. In Justice Ginsberg's concurrence, she noted that the legislature enacted the changes to the Medicaid program as a solution to a "free-riding problem."[59] Ginsberg implicitly validated, and no other Justice challenged, that there actually is a free-riding problem in the American health system. The idea that the existence of poverty itself creates free-riders, and that being a sick, poor person in need of medical help makes a person by their very nature a trespasser is an abominable notion. The concept of property itself, first adopted to ensure the equality of class,[60] becomes an

---

[58] Kirtsaeng v. John Wiley & Sons, Inc., No. 11–697, slip op. (2013) (using property common law rights in physical property that may contain copyrighted works to limit ambiguous portions of the copyright act).

[59] *Sebelius*, 132 S. Ct. at 2623 (Ginsberg, J. concurring in part, concurring in the judgment in part, and dissenting in part). *Cf.* Lemley, *supra* note 22, at 1043 n.48–54 (giving a number of examples of how IP courts are preoccupied with uprooting free riders); Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 167 (1992) ("A culture could not exist if all free riding were prohibited within it."); PHILLIP E. AREEDA & HERBERT HOVENKAMP, 2 THE FUNDAMENTALS OF ANTITRUST LAW 818 (Aspen Law & Business ed., 2002) ("Our initial examples of free riding on another's innovation or property beautification indicate that free riding is both widespread and socially tolerated unless society enacts special legislation to control it, such as the patent laws.").

[60] Letter From John Adams to James Sullivan, May 26, 1776, *in* 9 THE WORKS OF JOHN ADAMS, *supra* note 6, at 375–78 (arguing that in order to promote "equal liberty," voting and property rights should be given to women). *See also* Thomas C. Grey, *The Disintegration of Property*, *in* PROPERTY NOMOS XXII 69 (New

oxymoron when it is used to label the weakest and poorest among us as trespassers by their very nature of being impoverished and in need of care.

This characterization is an absolutist claim to intangible property at work. Medical licenses, the intangibles in play here, are not supposed to carry with them a property assurance that all services performed by medical professionals will be paid for. It is good and right in any society of mortals, that doctors and hospitals would be expected to write off some of their practices to help" the least of these."[61] These costs should never be and should never have been characterized as free-riding on a type of property. A standard of honesty is a practicable way for the Judiciary to adjudicate these types of property claims, as they are of the dishonest type that nearly destroyed our nation in 2008. Furthermore, such a standard would limit the Commerce Clause power in a way not only distinguishable from the Lochner era, but hopefully also acceptable to Justice Ginsberg herself who feared the era's reemergence.[62]

The Pre-*Sebelius* IP Cases

The Second and Eleventh Circuits have drawn upon a number of Supreme Court interpretations of the Commerce Clause to uphold the copyright bootlegging provision as constitutional. Both found that the Copyright Clause does not positively forbid Congress "from extending copyright-like protection under other constitutional clauses, such as the Commerce Clause, to works of authorship that may not meet the fixation requirement inherent in the term 'Writings.'"[63] However, both also recognized the Supreme

---

York Univ. Press 1980) ("property conceived as the control of a piece of the material world by a single individual meant freedom and equality of status.").

[61] *Matthew* 25:40 ("Truly I tell you, whatever you did for one of the least of these brothers and sisters of mine, you did for me.").

[62] *Sebelius*, 132 S. Ct. at 2609 (Ginsberg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[63] U.S. v. Moghadam, 175 F.3d 1269, 1280–81 (11th Cir. 1999) (it is notable that this case did not consider the "limited times" limit because it was not raised in trial whereas *Martignon* did). *See also* U.S. v. Martignon, 492 F.3d 140, 149,

Court's acknowledgement that "in some circumstances the Commerce Clause cannot be used to eradicate a limitation placed upon Congressional power in another grant of power."[64] However, both decisions seized on a weak logical inference from case law; that because *Gibbons* struck a tax law and not a tax-like law for being non-uniform, the Commerce Clause could not act as a workaround for an actual "copyright law" but could act as a workaround for "copyright-like laws."[65]

The Commerce Clause allows Congress to regulate the "channels of interstate commerce", instrumentalities, persons or things in interstate commerce, and "intrastate activities that substantially affect interstate commerce."[66] Thus, the applicable test

---

152 (2d Cir. 2007) ("Congress exceeds its power under the Commerce Clause by transgressing limitations of the Copyright Clause only when (1) the law it enacts is an exercise of the power granted Congress by the Copyright Clause and (2) the resulting law violates one or more specific limits of the Copyright Clause." But, "[g]iven the nexus between bootlegging and commerce, it is clear that absent any limitations stemming from the Copyright Clause, Congress would have had the power to enact [the Bootlegging Provision] under the Commerce Clause.").

[64] *Moghadam*, 175 F.3d at 1279–80 (citing Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 468–69 (1982) ("[I]if we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate form the Constitution a limitation on the power of Congress to enact bankruptcy laws.")). *See also Martignon*, 492 F.3d at 149.

[65] *Martignon*, 492 F.3d at 150 ("[I]n order to demonstrate unconstitutionality, Martignon must establish that [the Bootlegging Provision] is a copyright law and not just that it is copyright-like.") (citing *Gibbons*, 45 U.S. at 465; Heart of Atlanta Motel, Inc. v. U. S., 379 U.S. 241, 261 (1964); In re Trade-Mark Cases, 100 U.S. 82, 89 (1879)); *Moghadam*, 175 F.3d at 1280 (citing *Gibbons* 45 U.S. at 465; *Heart of Atlanta*, 379 U.S. at 261; *Trade-Mark Cases*, 100 U.S. at 89). *See also* Kiss Catalog, Ltd. v. Passport Int'l Prods., Inc., 405 F. Supp. 2d 1169, 1176 (C.D. Cal. 2005) ("In contrast to [*Gibbons*], the question is not whether legislation empowered by the Copyright Clause—but invalid under it—can otherwise be empowered by the Commerce Clause. The question is whether matters not encompassed within the Copyright Clause can be addressed by the Commerce Clause free of the restrictions of the Copyright Clause. The answer to that question is, clearly, yes."). *But see Sebelius*, 132 S. Ct. 2566, 2586 (2012) (the answer is not clearly yes anymore).

[66] *Moghadam*, 175 F.3d at 1275 (citing United States v. Lopez, 514 U.S. 549, 558–59 (1995) ("The Commerce Clause empowers Congress to legislate

was "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce."[67] The substantial effects test required a law to "bear more than a generic relationship to several steps removed from interstate commerce and it must be a relationship that is apparent, not creatively inferred."[68]

Martignon and *Moghadam* upheld a criminal statute known as the Copyright Bootlegging Provision as bearing the requisite apparent relationship to interstate commerce.[69] The provision provides criminal relief of five years of imprisonment (or ten years for the second offense) when a person, "without the consent of the performer or performers, 'knowingly' and for 'commercial advantage or private financial gain' (1) fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation, (2) transmits or otherwise communicates to the public the sounds or images of a live musical performance, or (3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent or traffics in any recording described in (1)."[70] Finally, Congress believed that it was legislating under its grant of power from the Copyright Clause so it did not include a jurisdictional element to the law, which would normally appear in laws enacted under the Commerce Clause.[71] Nevertheless, the

---

regarding three things: (i) the use of channels of interstate commerce; (ii) instrumentalities and persons or things in interstate commerce; and (iii) intrastate activities that substantially effect interstate commerce.")). *See also Martignon*, 492 F.3d at 152–53.

[67] *Moghadam*, 175 F.3d at 1275 (internal quotation marks omitted) (quoting *Lopez*, 514 U.S. at 557) (internal quotation marks omitted).

[68] *Moghadam*, 175 F.3d at 1275 (quoting United States v. Wright, 117 F.3d 1265, 1270 (11th Cir. 1997) *opinion vacated in part on reh'g*, 133 F.3d 1412 (11th Cir. 1998) (cert denied, 525 U.S. 894) (vacated on other grounds) (internal quotation marks omitted).

[69] Anti-Bootlegging Provisions, 18 U.S.C. § 2319A (2006).

[70] *Martignon*, 492 F.3d at 142–43 (quoting 18 U.S.C. § 2319A (2006)). *See Moghadam*, 175 F.3d at 1272.

[71] *Martignon*, 492 F.3d at 143 (citing S. REP. NO. 103-412, at 224 (1994)); *Moghadam*, 175 F.3d at 1275 ("Congress thought it was acting under the Copyright Clause") (citing *Lopez*, 514 U.S. at 562–63 ("Congressional findings

courts decided that the court could, on its own initiative, test the jurisdictional scope and decide whether the statute fits within the limit of interstate commerce.[72]

Martignon found that the Bootlegging Provision "regulates only fixing, selling, distributing, and copying with a commercial motive, activities at the core of the Commerce Clause."[73] But this is assuming that intangibles act the same way marijuana, a tangible good, does. *Moghadam* cited to *Wickard*, a Supreme Court opinion about farming wheat that held a Federal law constitutional even though it regulated growing wheat for home consumption because it depressed interstate commerce.[74] Again, wheat is a tangible good. *Moghadam* distinguished itself from *Lopez*, a Supreme Court opinion that struck a law banning guns within 1000 feet of a school because it "ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[75] In so doing it concluded "the antibootlegging statute has a sufficient connection to interstate and foreign commerce to meet the *Lopez* test."[76]

The Second and Eleventh Circuits arrived at their conclusions about how bootlegging implicates commerce by mixing in an expansive conception of property.[77] In fact, *Martignon* said of

---

would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye. . . . Congress normally is not required to make [such] formal findings.")).

[72] *Moghadam*, 175 F.3d at 1276 ("The absence of such a jurisdictional element simply means that courts must determine independently whether the statute regulates activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect[] interstate commerce.") (quoting *Lopez* 514 U.S. at 561) (internal quotation marks omitted).

[73] *Martignon*, 492 F.3d at 152 (citing Gonzales v. Raich, 545 U.S. 1, 25 (2005)).

[74] *Moghadam*, 175 F.3d at 1276.

[75] *Id.* (citing Wickard v. Filburn, 317 U.S. 111, 127–28 (1942); *Lopez* 514 U.S. at 561).

[76] *Id.* at 1277.

[77] *Martignon*, 492 F.3d at 150–51 ("[T]hough allocation of property rights is not a sufficient condition for calling something a copyright law… it is a necessary one."); *Moghadam*, 175 F.3d at 1278.

the bootlegging provisions that "[i]t is, perhaps, analogous to the law of criminal trespass."[78] Both *Moghadam* and *Martignon* included trademark and copyright under the category of "Intellectual Property" and decided that trademark laws are thus copyright-like laws that are entirely enacted under the Commerce Clause.[79] Thus, both courts decided that copyright-like acts could be justified under the Commerce Clause even if they would have exceeded limits had they been enacted under the Copyright Clause.[80] Then the courts distinguished the fact that a law against criminal trademark infringement was unconstitutional because there was no jurisdictional element to trigger criminal penalties because the *Trade-mark cases* predated the New Deal expansion of the Commerce Clause.[81] In effect, the court used property to draw an analogy between trademark and copyright that perhaps it ought not.[82] Then the Court used a mere property analogy to infer

---

[78] *Martignon*, 492 F.3d at 151.

[79] *Moghadam*, 175 F.3d at 1278–79 ("Indeed, modern trademark law is built entirely on the Commerce Clause. . . . and we have found no case which suggests that trademark law's conferral of protection on unoriginal works somehow runs afoul of the Copyright Clause.") (citing Michael B. Gerdes, *Getting Beyond Constitutionally Mandated Originality As A Prerequisite for Federal Copyright Protection*, 24 ARIZ. ST. L.J. 1461, 1470 (1992) ("The constitutionality of current federal trade-mark legislation . . . supports the conclusion that the Copyright Clause does not limit Congress's Commerce Clause power to grant copyright-like protection."); *Martignon*, 492 F.3d at 146 ("[W]hen an intellectual property law could not have been enacted pursuant to the Copyright Clause because it governs works that lack originality, a court should alternatively consider whether it was validly enacted under the Commerce Clause.") (citing *In re* Trade-Mark Cases, 100 U.S. 82, 94 (1879) (noting that trademark protection does not require originality, however that criminal trademark protection was not bound by interstate commerce and thus was unconstitutional).

[80] *Moghadam*, 175 F.3d at 1278.

[81] *Id.*

[82] The Lanham Act, 15 U.S.C. § 1127 (2006) (Trademarks are defined as anything that signifies in the minds of consumers the origin of goods or services. This means that granting trademarks protection is entirely driven by a goal of minimizing customer confusion and is limited by it. This also means that a trademark is necessarily connected or affixed to a certain class of good, and alone the mark is no trademark and is not protected). *See also* Chance v. Pac-Tel

Commerce Clause authority, when trademarks can implicate interstate commerce whether or not they are labeled "Intellectual Property" because they are necessarily affixed to goods that are bought and sold to minimize customer confusion. Copyright laws neither share this inherent nexus with the marketplace for tangible goods nor the purpose of minimizing customer confusion. Thus, trademark laws are probably not copyright-like laws at all and they do not need an analogy to being intangible property to implicate interstate commerce.

The purpose of justifying the bootlegging provisions under the Commerce Clause was to address two of the Copyright Clause limits it allegedly breached.[83] The district court found that, "Congress may not, if the Copyright Clause does not allow for such legislation, enact the law under a separate grant of power, even when that separate grant provides proper authority."[84] In fact, this finding seems to agree with prior Supreme Court precedent as well, that the Copyright Clause is "both a grant of power and a limitation."[85] Recognizing these limits, the Second Circuit said that the question in *Martignon* was "the extent to which the Copyright Clause can be read to limit Congress's power to enact legislation under the Commerce Clause."[86] However, the Second Circuit overturned the district court opinion and offered a work around for express Constitutional limits noting that "[s]ometimes Congress can

---

Teletrac Inc., 242 F.3d 1151, 1157 (9th Cir. 2001) (explaining that token uses merely to reserve a mark are not enough to create a trademark protection, and that to have trademark protection a trademark owner must have engaged in an actual, *bona fide* use of the trademark in connection with goods or services).

[83] *Martignon*, 492 F.3d at 143–44 ("[T]he district court held that [the bootlegging provisions] could not be sustained under the Copyright Clause because it 'provides seemingly perpetual protection for unfixed musical performances.'") (quoting United States v. Martignon, 346 F. Supp. 2d 413, 423 (S.D.N.Y. 2004)).

[84] United States v. Martignon, 346 F. Supp. 2d 413, 425 (S.D.N.Y. 2004) *vacated and remanded*, 492 F.3d 140 (2d Cir. 2007).

[85] Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 5 (1966).

[86] *Martignon*, 492 F.3d at 144 ("in limited instances, the expressed limitations on a clause do apply to externally to another clause") (citing Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 468 (1982)).

enact legislation under one constitutional provision that it couldn't under another."[87]

Once *Moghadam* found that the Commerce Clause justified the constitutionality of the bootlegging provisions, the court refused to consider whether the Copyright Clause, or any other clause, sustains the legislation.[88] However, had they looked closer at the copyright act itself they may have found a major problem with their reasoning. The *Mogdaham* Court decided that though public performances are not "fixed" they are required to be fixed in order to be triggered, and thus concluded that it is not completely adverse to the fixation requirement. However, the copyright act's definition of fixed already includes these sorts of recordings.

The bootlegging provision's fixation trigger directly collides with the Copyright Act's broad definition of fixation that employs a legal fiction of "simultaneous fixation" in order to include transmissions of sporting events and other live televised performances. The Copyright Act states that a work is "'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission."[89] Thus the victims of bootlegging may already have a copyright infringement cause of action identical to the criminal bootlegging provision that is enacted, provided that they prove that they "authored" a recording of the performance. Yet televised performances are "copyright" and bootlegged televised performances are "copyright-like." One is

---

[87] *Id.* at 146, 148 (The Heart of Atlanta court "simply reasoned that it didn't matter if Congress lacked the power to enact anti-discrimination legislation covering private actors under the Fourteenth Amendment as long as it possessed sufficient power under the Commerce Clause.") (citing Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241, 250 (1964)).

[88] *Moghadam*, 175 F.3d at 1277 ("[T]he various grants of legislative authority contained in the Constitution stand alone and must be independently analyzed.") (citing to Heart of Atlanta, 379 U.S. at 250 ("[W]e have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass but merely that since the commerce power is sufficient for our decision here we have considered it alone.")).

[89] Copyright Act, 17 U.S.C. § 101 (2006) (definition of "fixed"); H. R. REP. NO. 94-1476 (1976) (commenting on the legal fiction of "simultaneous fixation").

limited by the Copyright Clause and the other is not. Even so *Moghadam* boldly states that "common sense" dictates that the bootlegging provision is not at odds with the fixation requirement whereas *Gibbons* was in conflict with the uniform taxation limit.[90]

Sebelius arguably overturns both *Moghadam* and *Martignon* in that the Commerce Clause may no longer be used to supplement other grants of legislative power.[91] However, it is not clear whether the Commerce Clause is limited by definition,[92] or by means of the Necessary and Proper clause.[93] The practical effect of the opinion of the court, which was underwritten by the Ginsberg dissent for purposes of the remedy, was that a Constitutional limit can be worked around even without the support of another grant of power like the Commerce Clause.[94] However, according to Chief Justice Roberts it is unlikely that the Constitutional grounding will merely shift while leaving the ultimate outcome of *Moghadam* and *Martignon* intact because doing so would render some Constitutional provisions "superfluous."[95] Thus, the Court should hold that the Article I grants of power must coexist and thus not accept a reading of the constitution that leaves portions superfluous and without effect.

Martignon was remanded to decide whether the traditional contours of copyright have been abandoned and whether the bootlegging provision violates First Amendment Free speech.[96]

---

[90] *Moghadam*, 175 F.3d at 1281.

[91] *Sebelius*, 132 S. Ct. 2566, 2586 (2012). *Cf. Martignon*, 492 F.3d at 150–51; *Moghadam*, 175 F.3d at 1278.

[92] *Sebelius*, 132 S. Ct. at 2643 (Kennedy, J. dissenting) (Congress cannot force someone into an interstate market in order to justify their regulation under the Commerce Clause).

[93] *Id.* at 2592, 2599 (noting that necessary and proper actually precludes *improper* laws).

[94] *Id.* at 2607; *Sebelius*, 132 S. Ct. at 2630 (Ginsberg, J. concurring in part, concurring in the judgment in part, and dissenting in part).

[95] *Id.* at 2586 (finding that if the Judiciary continued reading an over-expansive Commerce Clause power, "many of the provisions of the constitution would be superfluous.").

[96] *Martignon*, 492 F.3d at 143–44. *See generally Moghadam*, 175 F.3d (did not raise the First Amendment).

Though the issue was not decided, the government's argument that it had the authority under the Necessary and Proper Clause might be in conflict with Chief Justice Roberts' constitutional interpretation.[97] The Supreme Court has held that copyright law itself is not immune to First Amendment scrutiny.[98] However, it also held that if the traditional contours are abided by, then First Amendment scrutiny is unlikely. The traditional contours of copyright include fair use and the idea/expression distinction.[99]

Martignon and *Mogdaham* pick up on a recurring theme in IP law: that international treaties play a significant role in judicial and legislative processes. The bootlegging provisions were one of the enactments of the World Trade Organization's Uruguay Round Trade Agreements.[100] The WTO currently embraces 159 countries as signatories to the agreements.[101] Any international protection of IP must be gained through treaty. Furthermore, treaties are not automatically enacted in the United States. In order for a treaty to obtain the force of law it must also be enacted by Congress. However, treaties find support by those who wish to convince Congress to expand IP protection to that effect, as well as convince the judiciary that an enacted law is legitimate.[102]

---

[97] *Compare Martignon*, 492 F.3d at 143–44, *with Sebelius*, 132 S. Ct. at 2592, 2599 (noting that necessary and proper actually precludes *improper* laws).

[98] Eldred v. Ashcroft, 537 U.S. 186, 219–21 (2003) (copyright acts are not "categorically immune to challenges under the First Amendment.").

[99] 17 U.S.C. §§ 102, 107 (2013). *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 540 (1985) ("[T]he First Amendment's protections [are] embodied in the [Copyright] Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use.").

[100] Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

[101] *Understanding the WTO: The Organization, Members and Observers*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (159 members as of March 2, 2013) (last visited Apr. 19, 2013).

[102] *Moghadam*, 175 F.3d at 1271 (citing Todd D. Patterson, *The Uruguay Round's Anti-Bootlegging Provision: A Victory for Musical Artists and Record Companies*, 15 WIS. INT'L L.J. 371, 380–83 (1997)); *Martignon*, 492 F.3d at 142. *Cf.* Zack Whittaker, *How ACTA Would Affect You: FAQ*, ZDNET (Jan. 29, 2012),

—-

The bootlegging provisions are only one of many ways Copyright law has tried to keep up with the times.[103] Accordingly, a major law enacted to modernize copyright law was the Digital Millennium Copyright Act (DMCA). One of its purposes was to prevent pirates from making perfect copies of works that can be rapidly disseminated on the internet without restriction.[104] Among its provisions, the DMCA states that "[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title."[105]

Since this anti-circumvention provision modified preexisting copyright law, its constitutionality has not been challenged in a way similar to the bootlegging provisions for exceeding the limits in the Copyright Clause. However, since it was presumably enacted under the Copyright Clause without support of the Commerce Clause, the Copyright limits are still in play. Thus, if the underlying copyright being protected by a DMCA anti-circumvention provision fails to meet the copyright goal of creating "progress" in knowledge and learning then anti-circumvention measures should no longer receive DMCA protection.[106]

---

http://www.zdnet.com/blog/london/how-acta-would-affect-you-faq/2773 (explaining the Anti-Counterfeiting Trade Agreement (ACTA) which has not been adopted, but may have had the same effect as legislation in the long run if it were).

[103] S. REP. NO. 105-190, at 2 (1998) ("Copyright laws have struggled through the years to keep pace with emerging technology from the struggle over music placed on a player piano roll in the 1900's to the introduction of the VCR in the 1980's. With this constant evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyright materials."). *See* The Anti-Circumvention Provision 17 U.S.C. § 1201 (2006).

[104] H.R. REP. NO.105-551 (I), at 11 (1998).

[105] 17 U.S.C. § 1201(a)(1)(A) (2006).

[106] *Compare* Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 972 (9th Cir. 1992) (finding that a company that made Game Genies was a fair user, even though their product allowed users to cheat on their Nintendo games without Nintendo's authorization), *with* MDY Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928, 950 (9th Cir. 2010) *opinion amended and superseded on denial of reh'g*, No. 09-15932, 2011 WL 538748 (9th Cir. Feb. 17, 2011)

In fact, property principles have been employed to justify these constitutionally questionable penalties. It seems that an implicit acknowledgement has been adopted by courts that rights to liberty and security in anything that seems like property, including at least one form of online currency,[107] supplements the constitutionality of Congress harshly regulating the so called hackers. Thus traditional works, like literary, audiovisual, and musical works, have been granted broad protection under the anti-circumvention provisions.[108] These protections were justified over public outcry for the protection of free speech when a circumventing hack, made by a Norwegian teenager, had already been distributed widely. In fact, T-shirts bearing the illegal hack were made, distributed and worn by members of the public.[109] Arguably, under the court's decision, the T-shirt wearers could have been rounded up and arrested on criminal charges for distributing the hack.

(deciding that the DMCA anti-circumvention provision could be enforced without considering Game-Genie-like fair uses, and rejecting the Federal Circuit's requirement of a nexus of the circumvention with a substantial underlying copyrighted work).

[107] *Compare MDY Indus.*629 F.3d, at 935 (protecting Blizzard's right to manage its video game's online virtual economy and currency which can be bought and sold for real money and valuated in terms of U.S. dollars), *with* Reuben Grinberg, *Bitcoin: An Innovative Alternative Digital Currency*, 4 HASTINGS SCI. & TECH. L.J. 159, 174 (2012) (describing many online currencies that exist in a grey market and may eventually be found illegal for a number of reasons including tax evasion and counterfeiting).

[108] Universal City Studios, Inc. v. Corley, 273 F.3d 429, 459 (2d Cir. 2001); 321 Studios v. Metro Goldwyn Mayer Studios, Inc., 307 F. Supp. 2d 1085, 1093 (N.D. Cal. 2004). *See, e.g.*, Realnetworks, Inc. v. DVD Copy Control Ass'n, 641 F. Supp. 2d 913, 935 (N.D. Cal. 2009); DirecTV, Inc. v. Randy Borow, No. 03-C-2581, 2005 WL 43261 (N.D. Ill. Jan. 6, 2005); United States v. Whitehead, 532 F.3d 991, 992 (9th Cir. 2008); CoxCom, Inc. v. Chaffee, 536 F.3d 101, 105 (1st Cir. 2008).

[109] Farhad Manjoo, *Court to Address DeCSS T-Shirt*, WIRED (Aug. 2, 2000), http://www.wired.com/science/discoveries/news/2000/08/37941; DVD Copy Control Ass'n, Inc. v. Bunner, 31 Cal. 4th 864, 871 (2003) (describing how a Norwegian teenager was able to reverse engineer DeCSS, write a circumvention code and disseminate it throughout the world on the internet).

The DMCA has not only been raised to protect traditional works, however. One case in the Federal Circuit and another in the Sixth Circuit involved plaintiffs who sought to use the anti-circumvention protections to protect encryptions as copyrighted works in themselves, with no other underlying copyright being protected.[110] One involved garage door openers that had embedded anti-circumvention code to create an obstruction for consumers who tried to purchase used "aftermarket" parts, apparently to increase the sale of new garage door openers.[111] The other involved software embedded in ink cartridges for home printers that counted the number of pages printed and indicated to the printer that the ink was empty before it was actually empty to get consumers to buy more ink cartridges.[112] The page counting program had an encryption that was being circumvented with a hack to allow the user to use all the ink they purchased.[113] Both of these cases decided that there was not a sufficient nexus between these encryptions and copyrighted material to use copyright law to prosecute the "hackers" otherwise known as the plaintiff's customers.[114] The "thin" copyright in the software encryptions protecting the garage door openers and ink cartridges was not enough.[115]

The *Kirtsaeng* decision might extend to support these decisions by balancing ambiguous portions of the anti-circumvention provision with common law rights in physical property.[116] Arguably the garage door and ink cartridge anti-

---

[110] Chamberlain Grp., Inc. v. Skylink Technologies, Inc., 381 F.3d 1178, 1204 (Fed. Cir. 2004) (requiring a "critical nexus between access and protection"); Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 522, 550 (6th Cir. 2004) (all three liability provisions of this section of the DMCA require the claimant to show that the 'technological measure' at issue 'controls access to *a work protected under this title,'* and that the computer code composing the anti-circumvention measure was not one of these protected works).

[111] *Chamberlain*, 381 F.3d at 1183.

[112] *Lexmark*, 387 F.3d at 563.

[113] *Id.* at 564.

[114] *Chamberlain*, 381 F.3d at 1204; *Lexmark*, 387 F.3d at 550.

[115] *Chamberlain*, 381 F.3d at 1186; *Lexmark*, 387 F.3d at 550.

[116] *Kirtsaeng*, No. 11–697, slip op. at 17, 26 (2013) (especially because interpreting "lawfully made under this title" may be similar to interpreting "a

circumvention measures trespassed on the consumer's common law rights to alienate, destroy, and otherwise manage their physical property.[117] Somehow, it seems that the anti-circumvention provision gave printer and garage door opener companies the color of legitimacy when they violated physical property rights. Similarly, in January, 2013 the Librarian of Congress removed the exception to violations of the anti-circumvention provision for unlocking cell phones.[118] Whether there are physical property rights within the purchased machinery of a cell phone for consumers to justify unlocking cell phones to switch service providers is debatable.[119] However, according to the FCC it is likely that Congress will limit the DMCA before the question is submitted to the Court.[120]

The anti-circumvention nexus requirement was rejected by the Ninth Circuit in *MDY Industries* to allow Blizzard's use of the DMCA to protect its management and allocation of digital gold and experience in its popular video game World of Warcraft (WoW).[121]

---

work protected under this title" as *Lexmark* and *Chamberlain* did). *See* 17 U.S.C. § 1201(a)(1)(A) (2006) (Outlawing the circumvention of technological measures used to protect "a work protected under this title.").

[117] *Kirtsaeng*, No. 11–697, slip op. at 17 (Interpreting "lawfully made under this title" so as to "retain the substance of common law." In this case, the lawful consumer's property right to alienation of chattels).

[118] Exemption to Prohibition Against Circumvention, 37 C.F.R. § 201.40 (2013) (no longer including an exemption for unlocking cell phones).

[119] *Kirtsaeng*, No. 11–697, slip op. at 17.

[120] Wireless Device Independence Act of 2013, S. 467, 113th Cong. (2013) (Introduced on March 5, 2013); Statement from FCC Chairman Julius Genachowski on the Copyright Office of the Library of Cong. Position on DMCA & Unlocking New Cell Phones, 2013 WL 812666 (F.C.C. Mar. 4, 2013) (asking the legislature to rethink their stance on default criminalization the jail breaking of cellphones); Statement of Comm'r Ajit Pai on Unlocking Cell Phones, 2013 WL 953595 (F.C.C. Mar. 11, 2013) ("American consumers should not face jail time for unlocking their cell phones." Pai also commended Congress's movement toward adopting the Wireless Device Independence Act of 2013).

[121] MDY Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928, 950 (9th Cir. 2010) *opinion amended and superseded on denial of reh'g*, No. 09-15932, 2011 WL 538748 (9th Cir. Feb. 17, 2011). *See also* Sony Computer Entm't Am., Inc. v.

The constitutionality of the DMCA anti-circumvention provision for adhering to all of the Copyright Clause limits of "writings," "authors," "limited times" and "progress," should arise once a nexus requirement is abandoned.[122] Otherwise, statements such as "the founding social contract of the new millennium [is] the End User License Agreement (EULA), [and] not the U.S. Constitution" will cease to be metaphorical.[123] Blizzard's EULA and Terms of Use agreement (ToU) includes a licensing agreement that regulates "valuable in-game currency."[124] The ToU also bans bots and hacks.[125]

The defendant in *MDYIndustries* created and sold bots that were able to mine digital gold and increase the experience of a WoW character automatically, playing the game on autopilot while the user is away from the game.[126] By September 2008, the

---

Gamemasters, 87 F. Supp. 2d 976, 987 (N.D. Cal. 1999) (using the DMCA anti-circumvention provisions to protect underlying trademark infringement).

[122] *Kirtsaeng*, No. 11–697, slip op. at 17; *Chamberlain*, 381 F.3d at 1186; *Lexmark*, 387 F.3d at 550.

[123] Joshua A.T. Fairfield, *Nexus Crystals: Crystallizing Limits on Contractual Control of Virtual Worlds*, 38 WM. MITCHELL L. REV. 43, 44 (2011).

[124] Blizzard Entertainment, Inc. and Vivendi Games, Inc. Motion for Summary Judgment and Memorandum of Points and Authorities in Support, (March 21, 2008), MDY Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928, 950 (9th Cir. 2010) (No. 206CV02555). *See also* Battle.net, Terms of Use, Blizzard Entertainment, http://us.blizzard.com/en-us/company/about/termsofuse.html (last visited April 20, 2013) (prohibiting users from "gather[ing] in-game currency, items or resources for sale outside of the Game without Blizzard's authorization"); *MDY Indus.*, 624 F.3d at 935 (noting that WoW users gain access to "in-game currency, weapons and armor" including a comprehensive economic system); World of Warcraft, End User License Agreement, Blizzard Entertainment, http://sea.blizzard.com/en-sg/company/legal/wow_eula.html (last visited April 20, 2013).

[125] World of Warcraft, End User License Agreement, Blizzard Entertainment, http://sea.blizzard.com/en-sg/company/legal/wow_eula.html (last visited April 20, 2013); World of Warcraft, Terms of Use, Blizzard Entertainment http://us.blizzard.com/en-us/company/legal/wow_tou.html (last visited April 20, 2013)

[126] Motion for Summary Judgment and Memorandum of Points and Authorities in Support of Blizzard Entertainment, Inc. and Vivendi Games, Inc., MDY

defendant generated $3.5 million gross revenues in sales of these bots.[127] His actions, and the use of the bots by purchasers, may have breached the EULA and ToU. Thus, breach of contract could have decided this case. Nevertheless, the property driven sledgehammer of copyright law was invoked instead.[128] Furthermore, the use and distribution of the bots were found to violate the DMCA even though the Warden program that the bots "circumvented" was created and implemented by Blizzard after the defendant had already created and distributed bots.[129] Thus, not only was there possibly no underlying copyright infringement being protected by this case's finding, but also there was initially no circumvention occurring.

One scholar has counted the dangers of the use of private contract to limit the use of the internet and the DMCA backing up digital rights management [DRM] encryptions.[130] It is said that the effect would be to cast technology as "bad" because it reduces the rents earned by copyright owners, or internet and technology businesses in general if the nexus requirement is abandoned.[131] The

---

Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928, 950 (9th Cir. 2010) (No. 206CV02555) ("Glider users relied on the [MDY bots] to exploit WoW for commercial purposes, namely the 'farming' [sic] of in-game assets for the purpose of selling the assets in real money transactions outside the game.").

[127] *MDY Indus.*, 624 F.3d at 936.

[128] Peter S. Menell, *Governance of Intellectual Resources and Disintegration of Intellectual Property in the Digital Age*, 26 BERKELEY TECH. L.J. 1523, 1531 (2011) ("When the only tool that you have in your box is a hammer, every problem looks like a nail.").

[129] *MDY Indus.*,624 F.3d at 936.

[130] Madhavi Sunder, *IP3*, 59 STAN. L. REV. 257, 280–82 (2006) (seeing the use of "[p]rivate contracts" to enhance the "power of private property holders" to back "digital encryption code" with the legal code to "control the people's access to knowledge" as a special challenge for democracy).

[131] *Id.* (citing Justin Hughes, *"Recoding" Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 940–66 (1999)). *See also* TracFone Wireless, Inc. v. SND Cellular, Inc., 715 F. Supp. 2d 1246, 1252 (S.D. Fla. 2010) (using the DMCA to protect the "goodwill [, trademarks, and other intangible] property" from the resale market awarding damages of over $11 million in statutory damages); Microsoft Corp. v. EEE Bus. Inc., 555 F. Supp. 2d 1051, 1059 (N.D. Cal. 2008) (finding that trafficking counterfeit software licensing

ultimate result of abandoning nexus will limit the democratizing effects of the internet, the success of new authors, and in so doing destroy "the liberation potential for poor underclasses" worldwide.[132] Furthermore, without a nexus requirement, there does not seem to be a meaningful distinction that would keep copyright from protecting other digital currencies, some of which are actually backed by gold and, in the future, could compete with the U.S. dollar.[133] These currencies exist in a grey market that the U.S. government may decide to crack down on for a number of reasons including tax evasion and counterfeiting.[134] Copyright and contract law should not be used to legitimize anti-circumvention protection of content that might be illegal, especially when the protected content bears no nexus with copyrighted works.

As were the bootlegging provisions, the anti-circumvention provisions are a creature of international law.[135] In fact, the

---

keys without authorization is considered a violation of the DMCA); Craigslist, Inc. v. Naturemarket, Inc., 694 F. Supp. 2d 1039, 1046 (N.D. Cal. 2010)(finding that automated website use that circumvents CAPTCHA keys violates the DMCA).

[132] Sunder, *supra* note 130 at 280–82. *Compare* Pearl Invs., LLC v. Standard I/O, Inc., 257 F. Supp. 2d 326, 349 (D. Me. 2003) (finding that using a VPN violates the anti-circumvention provisions), *with* Ai Weiwei's blog, *A Digital Rallying Cry*, THE ECONOMIST, (April 12, 2011) http://www.economist.com/ blogs/prospero/2011/04/ai_weiweis_blog (noting that a contemporary artist and Chinese dissident uses a VPN to disseminate his works and cries for national transparency via twitter. Also China's golden shield law known as "the great firewall" is used to block out western internet businesses to preserve similar Chinese businesses that are highly censored by the Chinese government. For example, Weibo is the Chinese Facebook and Youku is the Chinese YouTube). *See also* Star Chang, *Ai Weiwei's 'Gangnam Style' Video is Banned in China*, M.I.C. GADGET, (Oct. 26, 2012) http://micgadget.com/31151/ai-weiweis-gangnam-style-video-is-banned-in-china/ (something that might fall into the "parody" category protected by fair use in the U.S.).

[133] Grinberg, *supra* note 107, at 174.

[134] *Id.* at 191.

[135] Chamberlain Grp., Inc. v. Skylink Technologies, Inc., 381 F.3d 1178, 1194 (Fed. Cir. 2004) (noting that the DMCA was enacted as a condition of the World Intellectual Property Organization Copyright Treaty) (citing WIPO Treaty, Apr. 12, 1997, art. 11, S. Treaty Doc. No. 105–17 (1997)).

perception that developing nations are not enforcing IP protection enough has inspired global enforcement efforts by Homeland Security.[136] Not only does the movement to globalize intangible property threaten to render "fair use" obsolete and further endanger free expression and the public domain,[137] it might ensure that developing nations never embrace a robust freedom of expression. All this to protect the addictiveness of a video game that is unlikely to create progress in knowledge and learning at all.

The DMCA has not expressly invoked the traditional contours of copyright per se, but it does have some limits that could protect free speech. For example, the Librarian of Congress is allowed to adopt circumvention exceptions every 3 years.[138] The Librarian had adopted exceptions for obsolete software and unlocking cell phones. However, in early 2013 the Librarian removed the cell phone unlocking exception. Under the Ninth Circuit's nexus-less test, and without a constitutional challenge, this could represent a huge antitrust problem in telecommunications that essentially overturns the effect of *Carterfone*.[139] There are also a

---

[136] *Chinese Man Guilty of $100 Million Hi-Tech Software Piracy*, THE ECONOMIC TIMES (Jan. 9, 2013), http://articles.economictimes.indiatimes.com/2013-01-09/news/36237513_1_piracy-operation-software-titles-copyright ("Li mistakenly thought he was safe from the long arm of HSI, hiding halfway around the world in cyberspace anonymity.") (quoting ICE Director John Morton). *But see China's Internet: A Giant Cage*, THE ECONOMIST (April 6, 2013), http://www.economist.com/news/special-report/21574628-internet-was-expected-help-democratise-china-instead-it-has-enabled; *The Machinery of Control: Cat and Mouse*, THE ECONOMIST (April 6, 2013), http://www.economist.com/news/special-report/21574629-how-china-makes-sure-its-internet-abides-rules-cat-and-mouse.

[137] Sunder, *supra* note 130, at 282. *See also* Alessandra Garbagnati, *The Wrath of the Blizz King: How the Ninth Circuit's Decision in Mdy Industries, Inc. v. Blizzard Ent. May Slay the Game Genie*, 34 HASTINGS COMM. & ENT L.J. 313, 314 (2012) (explaining how the *MDY Indus.* decision could overrule the Game Genie decision).

[138] 17 U.S.C. § 1201(a)(1)(C) (2006).

[139] *In re* Use of the Carterfone Device in Message Toll Tel. Serv., 13 F.C.C.2d 420, 424 (1968) (deciding that the Carterfone could compete with the telephone service provider's competing device). *See* F.C.C. Chairman Julius Genachowski Statement on Preserving Internet Freedom & Openness, 2010 WL 5179798

number of limited exceptions to the anti-circumvention provisions enumerated in the DMCA.[140]

Fair use in a DMCA context would go unrecognized without a nexus requirement.[141] In fact, without requiring a nexus there may be no copyrighted material to apply the four-part fair use test to in anti-circumvention cases.[142] Furthermore, a nexus requirement is necessary in order to preserve the required protection of First Amendment free speech. As a part of the nexus test, a court could determine the underlying work's thinness of protection and its situation close to or far from the "core" of copyright protection.[143] This could enable reasonable findings that in some circumstances

---

(F.C.C. Dec. 21, 2010) ("Years after the *Carterfone* decision, as we entered the early days of the Internet age, the Commission reaffirmed its policy of openness and competition by protecting freedom on both the access layer and the architectural layer of the network."). *See also* Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. REV. 1095, 1139 (2003) (arguing that copyright misuse be extended to DMCA violations) (citing Lasercomb America Inc. v. Reynolds 911 F.2d 970 (4th Cir.) (1990)); Statement from F.C.C. Chairman Julius Genachowski on the Copyright Office of the Library of Cong. Position on DMCA & Unlocking New Cell Phones, 2013 WL 812666 (F.C.C. Mar. 4, 2013) ("From a communications policy perspective, this raises serious competition and innovation concerns, and for wireless consumers, it doesn't pass the common sense test.").

[140] 17 U.S.C. § 1201(a)(1)(D), (a)(2)(D), (b), (d)–(k) (2006) (discussing that The Librarian of Congress can publish exceptions to anti-circumvention violation every 3 years, there are a few listed exemptions in (d)–(k) and not prohibiting acts of individual circumvention that protect alleged copyright rights, that are unrelated to access itself).

[141] 17 U.S.C. § 1201 (a)(2)(C) (2006) (stating that the DMCA anti-circumvention provisions should not affect free speech and fair use).

[142] *See* MDY Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928, 950 (9th Cir. 2010) *opinion amended and superseded on denial of reh'g.*, No. 09-15932, 2011 WL 538748 (9th Cir. Feb. 17, 2011) (not requiring nexus and not considering fair use).

[143] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994) (considering whether a work was "closer to the core of intended copyright protection than others."); Feist Publ'n, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 349 (1991) ("[T]he copyright in a factual compilation is thin.").

protecting EULAs and ToUs with copyright statutory damages and criminal punishment may constitute a violation of free speech.

The effect of *Sebelius* on a potential constitutional challenge of the DMCA that it circumvents the Copyright Clause's express limits and the First Amendment is not yet known. However, *Sebelius* has called into question the Supreme Court's past Constitutional reasoning that the Copyright and Patent Clause grants Congress "broad decision-making leeway."[144] Even its recent finding that "[n]othing in the text of the Copyright Clause confines the 'Progress of Science' exclusively to 'incentives for creation'" may require some explaining.[145] In fact, the entire utilitarian regime underpinning the last era of Intellectual Property jurisprudence may rightfully come under attack because the Commerce Clause may no longer supplement the entire Copyright and Patent Clause's grant of power.[146]

A "free-riding" rationale, buttressed by Utilitarian and Lockean thought, has been an essential foundation to the legislation

---

[144] Eldred v. Ashcroft, 537 U.S. 186, 263 (2003) (Breyer, J., dissenting) (recognizing the "the broad decisionmaking leeway that the Copyright Clause grants Congress.").

[145] Golan v. Holder 132 S. Ct. 873, 888 (2012).

[146] *Sebelius*, 132 S. Ct. 2566, 2588, 2643 (dissenting opinion by Chief Justice Roberts and Justice Kennedy, giving a limiting view of the Commerce Clause). *See also* Landes & Posner, *supra* note 17, at 37–70, 166–209, 294–333 (giving a utilitarian rationale for copyright, trademark and patents that works around the constitutional limits on IP rights that relies on the marketplace and freedom to solve the possible problems with exceeding the Constitution's limits); Wendy J. Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1601 (1982). *But see* Sunder, *supra* note 130, at 283; Lemley, *supra* note 22, at 1031 (casting free competition as the norm, and IP rights as an exception to the norm); Letter From Thomas Jefferson to Isaac McPherson, Doc. 12, Writings 13:333--35, (Aug. 13, 1813), *available at* http://presspubs.uchicago.edu/founders/documents/ a1_8_8s12.html ("Stable ownership is the gift of social law, and is given late in the progress of society. It would be curious then, if an idea, the fugitive fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property.").

of an ever-growing body of IP protections.[147] Free-riding was also used in the Ginsberg concurrence in *Sebelius* and was not drawn upon by any of the remaining Justices in *Sebelius*.[148] Thus, free-riding can no longer *per se* justify the constitutionality of federal regulation under the Commerce Clause. As made apparent in *Kirtsaeng*, the Court should finally return to its finding in *Dowling v. U.S.*, that copyright is "subjected to precisely defined limits,"[149] and its decision in *U.S. v. Paramount Pictures* that "the copyright law, like the patent statutes, makes reward to the owner a secondary consideration."[150]

The *Kirtsaeng* Decision

The Supreme Court seems to have finally taken a course of "simplicity and coherence" when interpreting copyright law.[151] The Court decided on a reading of "lawfully made under this title" as a non-geographical phrase, overturning dicta in *Quality King* that suggested the opposite.[152] Thus, the court found that the copyright limit of "first sale" applied to works legally sold or distributed abroad and copyright owners would not be able to police imports of them into the United States.[153] To justify its position, the Supreme Court drew upon the Constitutional limit of "progress,"[154] the

---

[147] Lemley, *supra* note 22, at 1066–67; David McGowan, *Copyright Nonconsequentialism*, 69 MO. L. REV. 1, 2–3, 7, 38, 71–72 (2004).

[148] *Sebelius*, 132 S. Ct. at 2623–24 (Ginsberg, J. concurring in part, concurring in the judgment in part, and dissenting in part); S. REP. NO.105-190, at 2 (1998).

[149] Dowling v. United States, 473 U.S. 207, 216–17 (1985) ("the copyright owner . . . holds no ordinary chattel . . . for the copyright holder's dominion is subjected to precisely defined limits. It follows that interference with copyright does not easily equate with theft, conversion or fraud.").

[150] United States v. Paramount Pictures, 334 U.S. 131, 158 (1948). *C.f. infra* note 255, and accompanying text.

[151] *Kirtsaeng*, No. 11–697, slip op. at 12 (2013).

[152] *Id.* at 24–25, 30, 33 (citing Quality King Distributors, Inc. v. L'anza Research Int'l, Inc., 523 U.S. 135, 143–154 (1998)).

[153] *Id.* at 26.

[154] *Id.* at 19 ("Association of libraries, used-book dealers, technology companies, consumer-goods retailers, and museums point to various ways in which a

founders' arguments for copyright as a "limited monopoly,"[155] and 15th Century property common law.[156] It also noted that Thomas Jefferson and Benjamin Franklin obtained collections of foreign books for personal and commercial use in the manner being challenged by the plaintiff in this case.[157] In fact, this decision avoided branding Jefferson and Franklin "pirates and thieves" by today's low bar copyright infringement standards. It also noted that a wide variety of items resold internationally bear copies of "copyrightable software programs or packaging" and thus copyright law could halt the resale of all sorts of physical property.[158]

Briefs submitted by libraries, museums, used book sellers and technology companies convinced the Supreme Court that limiting the first sale doctrine geographically would not create "progress" as required by the Constitution or be coherent with other Constitutional limits.[159] Thus, Constitutional limits have finally begun to play a role in stopping copyright expansion in appropriate ways. The Court also seemed to hint that readings of "lawfully made under this title" that limited first sale geographically were

---

geographical interpretation would fail to further basic constitutional copyright objectives, in particular 'promot[ing] the Progress of Science and useful Arts.'") (quoting U.S CONST. art. I, § 8 cl. 8).

[155] *Id.* at 31–32 ("The Constitution described the nature of American copyright law by providing Congress with the power to "secur[e] to "[a]uthors" "for limited [t]imes" the "exclusive [r]ight to their . . . [w]ritings." Art. I Section 8 cl. 8. The Founders, too, discussed the need to grant an author a limited right to exclude competition.") (citing Letter from Thomas Jefferson to James Madison (July 31, 1788), *in* 13 PAPERS OF THOMAS JEFFERSON 440, 442–43 (J. Boyd ed. 1956) (arguing against the grant of any monopoly); Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 13 PAPERS OF THOMAS JEFFERSON 14, at 16, 21 (arguing for a limited monopoly to secure production)).

[156] *Id.* at 17 ("In the early 17th century Lord Coke explained the common law's refusal to permit restraints on the alienation of chattels. ") (citing Charles M. Gray, *Two Contributions to Coke Studies*, 72 U. CHI. L. REV. 1127, 1135 (2005)).

[157] *Id.* at 20–21.

[158] *Kirtsaeng*, No. 11–697, slip op. at 21 (2013) (including "automobiles, microwaves, calculators, mobile phones, tablets, and personal computers.").

[159] *Id.*at 23.

either illogical, disingenuous or both.[160] The majority did not mention the importance of honesty and seemed to limit its stance to requiring precedence.[161] Thus it found precedent in a centuries old right to alienate physical property recognized in common law, and rested its opinion there.[162] However, along with the traditional right to alienation of physical property found in common law histories, there also exists a judicial interest in upholding honesty through formalism.[163]

Kirtsaeng's favored canon of statutory interpretation was: "[W]hen a statute covers an issue previously governed by the common law we must presume that Congress intended to retain the substance of the common law."[164] Thus the Court decided that Congress must have meant for the first sale doctrine to limit a copyright holder's ability to police parallel market pricing, in order to preserve the right to alienate chattels.[165] It also noted that no framer mentioned that copyright should confer a right to police parallel market pricing.[166]

Justices Ginsberg, Scalia and Kennedy concurred in a dissent that may be the most telling of how far property principles have gone astray to justify expansive IP protection.[167] The dissent called upon the position the U.S. had taken on international

---

[160] *Id.* at 24 (stating that the other readings "require too many unprecedented jumps over linguistic and other hurdles that in our view are insurmountable.").

[161] *Id.*

[162] *Id.* at 17.

[163] BAKER, *supra* note 12, at 320; 2 WILLIAM BLACKSTONE, COMMENTARIES *449.

[164] *Kirtsaeng*, No. 11–697, slip op. at 17 (citing Samantar v. Yousuf, 130 S. Ct. 2278, 2290 n.13 (2010)).

[165] *Id.* at 31–32.

[166] *Id.* at 32 ("But the Constitution's language nowhere suggests that its limited exclusive right should include a right to divide markets or a concomitant right to charge different purchasers different prices for the same book, say to increase or to maximize gain. Neither, to our knowledge, did any Founder make any such suggestion.").

[167] *Compare Kirtsaeng*, No. 11–697 (Ginsberg, J. dissenting) (2013), *with* Letter from Thomas Jefferson to Isaac McPherson, Aug. 13, 1813, *in* JEFFERSON: WRITINGS, *supra* note 1, at 1291–92.

copyright protection according to TRIPs, the WTO and WIPO.[168] The treaties we have pushed upon most of the developing world do not include the same kind of first sale and fair use exceptions that we allow our own citizens.[169] The treaties have called a cut back on the first sale limitation a solution to international copyright exhaustion.[170] Thus the dissent argued that the copyright act should allow copyright owners to police imports of all copies of copyright protected items, regardless if they were legally or illegally distributed abroad.[171] The dissent's reasons for so arguing rested in applying traditional property law concepts to copyright itself.[172]

The majority only uses the word property once, when quoting the dissent when it argued that "'the sale in one country of a good' does not 'exhaus[t] the intellectual-property owner's right to control the distribution of that good elsewhere.'"[173] The dissent, relying on international agreements and the legislation inspired by them, used the word property 15 times.[174] International treaties have commandeered property law to create an over expansive conception of limited monopoly rights. Having upon international law, the dissent could not avoid legitimizing a copyright-as-property view. The majority found that the dicta of *Quality King*,[175] proposed by the dissent, was incorrect.[176] This decision removes one incentive for sending American manufacturing jobs overseas and protects purchasers of tangible goods from overbroad IP regulation. The result being that the distribution of cheap second hand goods is not

---

[168] *Kirtsaeng*, No. 11–697 (Ginsberg, J. dissenting) slip op. at 18–19.
[169] Chang, *supra* note 132 (something that might clearly fall into the "parody" category protected by fair use in the U.S.).
[170] *Kirtsaeng*, No. 11–697 (Ginsberg, J. dissenting) slip op. at 18–19.
[171] *Id.* at 20.
[172] *Id.*
[173] *Kirtsaeng*, No. 11–697, slip op. at 33.
[174] *Kirtsaeng*, No. 11–697 (Ginsberg, J. dissenting) slip op. at 3, 12, 18–22, 33.
[175] *Kirtsaeng*, No. 11–697 (Ginsberg, J. dissenting) slip op. at 3 (citing Quality King Distributors, Inc. v. L'anza Research Int'l, Inc., 523 U. S. 135, 143–54 (1998)).
[176] *Kirtsaeng*, No. 11–697, slip op. at 30, 33.

kept from American consumers by copyright enforcement at the U.S. boarder.

In fact, it would not be honest to underwrite the view that corporations have the right, due to the copyright in the trademarks affixed to their products, to charge American consumers more money for things they sell to foreigners at a much cheaper price.[177] Nevertheless, the going value of companies that provide copyrighted and patented content is often propped up by a blanket expectation that Americans pay more,[178] they have so global losses for every good or service they provide that had not been paid-in-full at the prices they set.[179] The practice of divvying up the paychecks of Americans (or any foreigner) as a matter of property has created false security in corporate value that distorts the stock market and continues to cause market harm to stock owners.[180] The idea that

---

[177] Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009) (Deciding that China did not breach Article 61 of TRIPs by interpreting "commercial scale" to mean "a significant magnitude of infringement activity." Thus affirming China's limitations on criminal enforcement of copyright infringement. The U.S. sought to leverage China into cracking down on infringement by criminalizing all infringers for the purpose of commercial gain).

[178] Open Letter from Bill Gates to Hobbyists (Feb. 3, 1976), *available at* http://en.wikipedia.org/wiki/File: Bill_Gates_Letter_to_Hobbyists.jpg (calling hobbyists thieves for not paying him for the software his company provided them).

[179] BSA & IDC, *2007 Piracy Study*, BUS. SOFTWARE ALLIANCE (last visited April 21, 2013), *available at* http://globalstudy.bsa.org/2007/studies/ 2007_global_piracy_study.pdf (This study showed higher piracy rates in foreign countries like China at 82% and Armenia at 93%, and the U.S. as participating in the lowest amount of piracy at 20%, but also recording a $1.34 billion more losses in the U.S. as compared to China in 2007). *See* Mike Masnick, *If It's May It's Time for the Press to Parrot Bogus Stats Announcement from the BSA*, TECHDIRT (May, 12 2010), http://www.techdirt.com/articles/20100511/ 1516059386.shtml; Mike Masnick, *BSA's Canadian Piracy Numbers Based on Hunches, Not Actual Surveys*, TECHDIRT (May, 27, 2009), http://www.techdirt. com/articles/20090527/1125035034.shtml.

[180] Letzing, *supra* note 10 ("Google said . . . that $2.9 billion of the purchase price for Motorola was attributable to cash acquired, $2.6 billion was related to goodwill, $730 million for customer relationships and $670 million for 'other net

through going business value and intellectual property one might propertize the future paychecks of others is abominable. This practice garners unauthorized value from consumer bank accounts by taking for granted value that has not yet been granted. It is a lie that lets big business count future business value today, as a matter of property. It is also a lie that pulls the curtain over the fact that modern slavery has infected many of the supply chains that these businesses derive direct benefits from.[181] In the end it lets big business claim untold property value without earning it and subverts the self-evident truth that we are all created equal by objectifying the American public and humanity worldwide. In practical terms, this helps maximize U.S. consumer spending and personal debt even in the wake of a massive debt crisis without addressing the most grotesque part of these intangible property claims: that some of the value claimed is derived from a growing $20 billion global slave trade industry.[182]

The dissent's stance in was that copyright should be imbued with strong property that override even common law property rights in the underlying physical property. From here the dissent concluded that the majority "risks undermining the United States' credibility on the world stage."[183] However, the majority's insistence on "simplicity and coherence" is more likely to vindicate U.S. credibility abroad.[184] The dissent even admitted its argument's "potential inconsistency with United States obligations under

---

assets acquired.'" Google characterized consumer relationships with Motorola and what consumers thought about Motorola as worth billions of dollars when consumer's themselves may own their relationships and thoughts. Thus Google shareholders "purchased" billions of dollars in consumer thoughts and relationships that is not stable property because it probably is actually owned by consumers); Ben Fritz, *Netflix Stock Plunges 25% After Analysts Slash Estimates*, L.A. TIMES (July 25, 2012), http://articles.latimes.com/2012/jul/25/entertainment/la-et-ct-netflix-stock-drop-20120725 (noting that attempts to expand sales globally contributed to losses).

[181] *Supra* note 22.

[182] *Id.*

[183] *Kirtsaeng*, No. 11–697, (Ginsberg, J. dissenting) slip op. at 22.

[184] *Kirtsaeng*, No. 11–697, slip op. at 12.

certain bilateral trade agreements."[185] Disingenuous incoherence and inconsistency are the true culprits here. Emphasizing honesty, coherence and general clarity is the only way to win back credibility on the international stage, or any stage for that matter.[186]

To be clear, the international credibility of the U.S. businessperson is currently deficient. Recently, the U.S. financial sector swindled the American middle class and the American government out of billions of dollars after destroying the global market through dishonest and at least "incoherent" business practices.[187] Then national and global public outcry stopped SOPA, PIPA, and ACTA.[188] Now, major American copyright owners are resorting to self-help measures, blocking and degrading internet access of whomever they find is a copyright infringer.[189] These self-help measures are directly against the interests of most lower and middle class copyright owners,[190] and they are illegal.[191] Even the

---

[185] *Kirtsaeng*, No. 11–697, (Ginsberg, J. dissenting) slip op. at 22.

[186] MODEL RULES OF PROF'L CONDUCT R. 4.1(a), 7.1, 8.1(a), 8.2(a), 8.4(c) (1983).

[187] STOCKMAN, *supra* note 3, at 631–48 ("No Recovery on Main Street") and at 3–5 (calling Wall Street a gambling hall). *See, e.g.*, Gretchen Morgenson & Louise Story, *Banks Bundled Bad Debt, Bet Against It and Won*, N.Y. TIMES (Dec. 23, 2009), *available at* http://www.nytimes.com/2009/12/24/business/24trading.html?pagewanted=all&_r=0 (noting the result of "peddling complex securities" was to cause billions of dollars in losses to "pension funds and insurance companies.").

[188] *See* Magid, *supra* note 19 (noting that the laws pit the tech industry against the entertainment industry); Kain, *supra* note 19 (noting that ACTA would force the DMCA on developing nations and is a dangerous law to pass); Meyer, *supra* note 19 (noting that massive protests in Europe prompted the European parliament to reject the treaty).

[189] *About the Center for Copyright Information*, CENTER FOR COPYRIGHT INFO., http://www.copyrightinformation.org/about-cci/ (last visited Mar. 25, 2013) (CCI is a coalition of major copyright owner interest groups and ISPs, and they are initiating copyright alert systems in violation of net neutrality).

[190] Tarnoff, *supra* note 18; Ernesto, *supra* note 18 ("The MPAA, RIAA and the Internet providers participating in the 'six strikes' anti-piracy scheme have informed the Congressional Internet Caucus Advisory Committee about their plans."). *See also Kneecapping the Future: Comcast's Unjustified Internet Caps and the Plan to Kill Video Competition*, *supra* note 18 (reporting that Comcast

thought of abiding this sort of unilateral, private sector regulation of the internet is the embarrassment here. The FCC has championed net neutrality and internet freedom in developing countries encouraging a serious adoption of free speech globally.[192]In countries where net neutrality and free speech is opposed, the internet has been described as a giant cage—actually enhancing the maneuverability of authoritarian control.[193] By supporting foreign censorship, copyright largess is threatening to delay and destroy the acceptance of freedom and transparency in countries that desperately need it,[194] directly undermining the FCC's international support and encouragement of freedom, and violating net neutrality and free speech itself.[195]

---

has a cap on the data an internet subscriber can download through Comcast, but exempted its video provider Xfinity); *The Facts About AT&T's Facetime Blocking*, *supra* note 18.

[191] Preserving the Open Internet 47 C.F.R. § 8 (2011).

[192] Julius Genachowski, Chairman, F.C.C., Statement on the U.S. Submission of Initial Input into the International Telecommunication Union's World Conference on International Telecommunications (Aug. 3, 2012) (noting a fight for "internet freedom" against "some countries [that] restrict the free flow of information online"); Julius Genachowski, Chairman, F.C.C., Prepared Remarks for the International Telecommunications Union Global Symposium for Regulators in Beirut, Lebanon, *ICT: Global Opportunities and Challenges* (Nov. 10, 2009) (touting the FCC's role to preserve a "free, open and robust Internet" as an example to follow on the world stage).

[193] *China's Internet: A Giant Cage*, *supra* note 136; *The Machinery of Control: Cat and Mouse*, *supra* note 136.

[194] Julius Genachowski, Chairman, F.C.C., Statement on the U.S. Submission of Initial Input into the International Telecommunication Union's World Conference on International Telecommunications (Aug. 3, 2012) (noting a fight for "internet freedom" against "some countries [that] restrict the free flow of information online"); Julius Genachowski, Chairman, F.C.C., Prepared Remarks for the International Telecommunications Union Global Symposium for Regulators in Beirut, Lebanon, *ICT: Global Opportunities and Challenges* (Nov. 10, 2009) (touting the FCC's role to preserve a "free, open and robust Internet" as an example to follow on the world stage).

[195] Genachowski, *supra* note 192, Statement on the U.S. Submission of Initial Input into the International Telecommunication Union's World Conference on International Telecommunications; Genachowski, *supra* note 192, Chairman, Prepared Remarks for the International Telecommunications Union Global

—-

It is unclear how far the inference of real property common law to expand the first sale doctrine will extend. A Ninth Circuit district court did not extend first sale to the resale of digital copies of music in MP3 form.[196] Redigi, an online company that facilitated the resale of digital music at a discounted price, was thus found liable for copyright infringement. The Court did not allow first sale to legitimize this kind of resale of used goods. It is unclear how property common law rights, like a right to alienate, should bear on digital goods. In the wake of the *Redigi* opinion, consumers may opt to purchase physical copies if they wish to have the right to alienate the items they purchase. However, if consumers abandon or destroy their copies of digital music files, they will be asked to purchase a brand new copy at full price. Thus, failing to apply property law concepts to digital copies of music only seems to work in the seller's favor. If digital copies are not "property" then whether consumers have any rights at all in digital copies of music is an open question.

Though copyright-as-chattel is entirely an analogy,[197] the underlying information and knowledge from which patents and copyrights are formed is actually a public good.[198] The project of defining public goods seems to be bound up with First Amendment interpretation.[199] Thus information has a real property explanation that is recognized in the constitution, as relatively bounteous and

---

Symposium for Regulators in Beirut, Lebanon, *ICT: Global Opportunities and Challenges*.

[196] Capitol Records, LLC v. ReDigi Inc., 12 CIV. 95 RJS, 2013 WL 1286134 (S.D.N.Y. Mar. 30, 2013).

[197] Letter from Thomas Jefferson to Isaac McPherson, Aug. 13, 1813, *in* JEFFERSON: WRITINGS, *supra* note 1, at 1291 ("It has been pretended by some, (and in England especially,) that inventors have a natural and exclusive right to their inventions, and not merely for their own lives, but inheritable to their heirs."). *See generally* Bryan Beier, *The Perils of Analogical Reasoning: Joseph William Singer Property and Sovereignty and Property*, 1 GEO. MASON U. L. REV. 33 (1994).

[198] Letter from Thomas Jefferson to Isaac McPherson, Aug. 13, 1813, *in* JEFFERSON: WRITINGS, *supra* note 1, at 1291–92.

[199] U.S. CONST. art. I, § 8, cl. 8.

subject to only momentary possession like air or fire.[200] Thus, a real property (no analogy needed) explanation for copyright and patent is as a limited monopoly right in a public good (i.e. the public good of free flowing information, knowledge and education). If people have a right to alienation of their privately held goods, they might at least have a right to "proliferate" publically owned goods at least as much as they paid a limited monopoly owner in a specific expression of that good in order to use or copy that specific expression. Thus, through a *limited* proliferation right based on the public's underlying rights to foster free flowing knowledge and information, digital copies of copyrighted works sold online should have first sale and other copyright limitations assigned to them.

PART II: THE AMERICAN CONCEPT OF PROPERTY

A conception of property seems to be made of two things. First, property is formed out of a common sense connection with thing-ownership. Things as necessarily physical things once seemed to be inferred into our concept of what property was. Second, property is a highly political creation. In fact it was originally offered as a vehicle to ensure liberty from government and equality of class. After the States won the Revolution, overthrowing English rule in the Americas, the debate over how property should be conceived settled into a struggle between Libertarian and Liberal thought. This section explains how the inherent flaws in the political conception of property have carried us far afield of the common sense idea that property is related to thing-ownership.

---

[200] Letter from Thomas Jefferson to Isaac McPherson, Aug. 13, 1813, *in* JEFFERSON: WRITINGS, *supra* note 1, at 1291–92. *C.f.* Susan P. Crawford, *The Radio and the Internet*, 23 BERKELEY TECH. L.J. 933, 961 (2008) (noting that Congress directed the FCC to auction off licenses to use certain wavelengths of energy that exist in the air naturally and had previously been used by TV broadcasters: "The 700 MHz auction was designed to sell off licenses to valuable beachfront spectrum that television broadcasters have been forced to relinquish.").

Lost in a Struggle Between Liberalism and Libertarianism

Before western law recognized personal property, feudalistic society only recognized property owned by the king. Feudalism was in many ways characterized as a great villain by enlightenment thinkers.[201] The failure of feudalism to recognize the citizenry's natural freedom and equality of class justified not only broad, but absolute rights to personal property in physical things.[202] The dual goals of freedom and equality joined because of a common enemy. Since then, many attempts at casting new villains in our collective American property story to gather political ground have been raised.[203] However, none of these new villains have been able to unify the interests of the people the way the enlightenment's rally against feudalism facilitated the overthrow of many western kingdoms, including the overthrow of England in the Americas.[204]

---

[201] Letter From John Adams to James Sullivan, May 26, 1776, *in* 9 THE WORKS OF JOHN ADAMS *supra* note 6, at 375–78 ("the only moral foundation of government is, the consent of the people"); Grey, *supra* note 60 (These thinkers included Blackstone, Hegel, Adams, Jefferson, Locke and the French and American Revolutionaries. "[T]he concept of property as thing-ownership served important ideological functions. Liberalism was the ideology of the attack on feudalism.").

[202] Grey, *supra* note 60 ("[P]roperty conceived as the control of apiece of the material world by a single individual meant freedom and equality of status.").

[203] Grey, *supra* note 60; William H. Taft, *The Right of Private Property*, 3 MICH. L.J. 215, 233 (1894) (calling for lawyers to rise up and protect property owners against the enflamed and more powerful working class that would otherwise bring the evils of socialism and communism to the U.S.); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 646 (1988) [hereinafter Singer I] (calling for property reform based on the destructive actions of property owners and evil corporations that undermined the free market).

[204] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. . . . But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security."); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) ("The institution called

It would not have been possible to create the broadly accepted convictions necessary to carry out a revolution without the assurances of both liberty from the government and equality of class as a result. In fact, the convictions about "equal liberty" held by the framers, often took shape in discussions over property ownership.[205]

The role of recognizing private property as an essential component to securing freedom and equality quickly settled into a debate that carries on in today's politics.[206] Libertarians and Liberals hold opposite positions over how to conceive of property based on whether freedom or equality is more important.[207] Libertarians maintain that minimizing the government will maximize freedom, and have argued freedom should be prioritized above securing equality.[208] Conversely, Liberals argue that government regulation should be used to secure equality, and that

---

property guards the troubled boundary between individual man and the state. It is not the only guardian; many other institutions, laws, and practices serve as well. But in a society that chiefly values material well-being, the power to control a particular portion of that well-being is the very foundation of individuality.").

[205] Letter From John Adams to James Sullivan, May 26, 1776, *in* 9 THE WORKS OF JOHN ADAMS *supra* note 6, at 375–78.

[206] Joseph William Singer, *The Reliance Interest in Property Revisited*, 7 UNBOUND: HARV. J. LEGAL LEFT 112, 116 (2011) [hereinafter Singer II] ("The defining characteristic of American property law is the abolition of feudalism."). Note that Freedom is "negative" freedom from government control and not a positive conception of freedom to. Taft, *supra* note 203, at 218 ("[W]e inherited from our English ancestors the deep seated conviction that security of property and contract and liberty of the individual are indissolubly linked. . . . The freedom of the citizen is secure. It is the right of private property that now needs supporters and protectors.").

[207] Taft, *supra* note 203, at 218(holding up the villains of anarchy, socialism, and communism to justify high protection of individual and corporate property because it turns individual greed into public benefit).

[208] *Id*. at 233 (commenting on property as a "bulwark of freedom."). *Cf.* RAND, *supra* note 4, at 481 ("I do not seek the good of others as a sanction for my right to exist, nor do I recognize the good of others as a justification for their seizure of my property or their destruction of my life." Eventually Rand's characters compare the public good to "human sacrifices.").

any cost to freedom for the cause of equality is worth it.[209] It seems that the legal discourse about property has devolved into how this liberty-equality disagreement interacts with our fundamental rights to "life, liberty and property."[210]

This article treats a big versus small government conversation as useless. In fact, it is a distraction. The big/small government conversation sheds little truth on the concept of property because both Libertarian and Liberal movements seem to be interested in maximizing property.[211] The ends justify the means

---

[209] Singer I, *supra* note 203, at 690–91. *Cf.* FITZGERALD, *supra* note 4, at 5 (Painting a more aristocratic and idle picture of wealthy, upper-crust Americans: "The Carraways are something of a clan, and we have a tradition that we're descended from the Dukes of Buccleuch, but the actual founder of my line was my grandfather's brother, who came here in fifty-one, sent a substitute to the Civil War, and started the wholesale hardware business that my father carries on to-day.").

[210] U.S. CONST. amend. XIV, § 1 (requiring due process before a government deprives someone of their "life, liberty, or property"); JOHN LOCKE, TWO TREATISES OF GOVERNMENT, ch. II, § 131 (1631) (Claiming that men "give up the equality, liberty, and executive power they had in the state of nature" to "preserve himself, his liberty and property" and thus "the power of the society, or legislative constituted by them, can never be supposed to extend farther, than the common good; but is obliged to secure every one's property, by providing against those three defects above mentioned, that made the state of nature so unsafe and uneasy."). *Compare* Lochner v. New York, 198 U.S. 45, 53–55 (1905) (expanding the Fourteenth Amendment, "life, liberty and property" to invalidate state law that infringes on the individual's right to contract), *with* Goldberg v. Kelly, 397 U.S. 254, 265 (1970) (Also expanding the Fourteenth Amendment, "life, liberty and property," to expand state law, and deciding Fourteenth Amendment rights include welfare in its capacity to "help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community.").

[211] Taft, *supra* note 203, at 231 ("the institution of private property is what has led to the accumulation of capital in the world. . . . Without it the whole world would still be groping in the darkness of the tribe or commune stage of civilization with alternating periods of starvation and plenty, and no happiness by of gorging unrestrained appetite."); Lemley, *supra* note 22, at 1035–36 ("both advocates and critics of antitrust enforcement have adopted the maxim that intellectual property is just like any other form of property, though they draw different conclusions from that assumption") (*comparing* U.S. Dep't of Justice

and the result is a vacuum in discussion about what the ends of society and government in fact are.[212] Both Liberals and Libertarians have been known to raise disingenuous caricatures of the other side, not unlike the anti-feudalism sentiments at our roots.[213] Progressives have even been known to characterize the Liberal/Libertarian rhetoric as a "phase" in our journey toward ever-deepening modernity.[214] However, our conception should not

---

and Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property § 2.2 (1995), *with* Hon. Giles S. Rich, *Are Letters Patent Grants of Monopoly?*, 15 W. NEW ENG. L. REV. 239 (1993)).

[212] *Compare* Isaiah Berlin, *Two Concepts of Liberty*, Berlin, I, 31 (1958) *in* ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY (1969) (concluding that accepting pluralism of values that inform our definition of liberty and equality would be a "truer" approach than "faith in a single criterion."), *with* LOCKE, *supra* note 210 at ch. II, § 9 ("I doubt not but this will seem a very strange doctrine to some men; but before they condemn it, I desire them to resolve me by what right any prince or state can put to death or punish any alien for any crime he commits in their country." Thus, if not by applying some monist principal that actually endeavors to justify the ends of an approach, the social contract cannot be legitimate) *and* G.K. CHESTERTON, HERATICS, 16 (1905) ("Suppose that a great commotion arises in the street about something, let us say a lamp-post, which many influential persons desire to tear down. A grey-clad monk, who is the spirit of the Middle Ages, is approached upon the matter, and begins to say, in the arid manner of the Schoolmen, 'Let us first of all consider, my brethren, the value of Light. If Light be in itself good—.' At this point he is somewhat excusably knocked down. All the people make a rush for the lamp-post, the lamp-post is down in ten minutes, and they go about congratulating each other on their unmedieval practicality. . . . gradually and inevitably, today, tomorrow, or the next day, there comes back the conviction that the monk was right after all, and that all depends on what is the philosophy of Light. Only what we might have discussed under the gas-lamp, we now must discuss in the dark.").

[213] *Compare* Taft, *supra* note 203, at 232 ("The sovereign today is the people, or the majority of people. The poor are the majority. The appeal of the rich to the constitution and courts for protection is still an appeal by the weak against the unjust aggressions of the strong.") (quoting Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U.S. 655, 658 (1874), saying that forcing tax laws to serve the public interest could in fact be a tyranny of the majority), *with* Singer I, *supra* note 203, at 646, *and* Singer II, *supra* note 206, at 112, 114–15 ("I must admit that my argument [in *Singer I*] was more utopian than realistic.").

[214] Grey, *supra* note 60.

be based on political and disingenuous caricatures that easily fall into straw man,[215] and false alternatives fallacies.[216]These fallacies highlight the importance of the natural law and state of nature arguments proposed by enlightenment thinkers.[217] Modern scholars, who either marginalize or mischaracterize the role of natural law and deductive reasoning as old hat, risk falling into nonsense.[218]

Nevertheless, over the past century this seems to be where politics is driving us. For example, Libertarians tend to see property as a way for private interests to be reclaimed from the government.[219] In so doing they pressure the courts to strike state

---

[215] Andrew Jay McClurg, *Logical Fallacies and the Supreme Court: A Critical Examination of Justice Rehnquist's Decisions in Criminal Procedure Cases*, 59 U. COLO. L. REV. 741, 832 (1988). *Compare* Taft, *supra* note 203, at 222, (Taft characterizes the poor as the strong aggressors taking the rich man's property) (citing *City of Topeka*, 87 U.S. at 832 (to bring attention to a tyranny of the majority situation), *with* Singer II, *supra* note 206, at 114 (noting that Tea Party libertarians are dedicated to dismantling the government to increase the constitutional protection for the property of the rich and powerful).

[216] *See* McClurg, *supra* note 215, at 805 (1988) (citing Illinois v. Gates 462 U.S. 213 (1983)). *Compare* Taft, *supra* note 203, at 222 ("It follows as a necessary conclusion that to destroy the guarantees of property is a direct blow at the interests of the working man. . . . Everything which tends to legitimately increase the accumulation of wealth and its use for production will give each laborer larger share of the joint result of capital and his labor."), *with* Singer I, *supra* note 203, at 638 (Singer argued that "*the question* [of ownership] *is meaningless*," trivializing the need to identify "ownership" when talking about property rights in order to create a "reliance interest in property."."(this should pincite to 662) It "encompass[es] the full range of social relationships, from relations among strangers, between neighbors, among long-term contractual partners in the marketplace, among family members and others in intimate relationships, and finally, between citizens and the government." Singer argues for a "property shift" when these relationships split up).

[217] *See, e.g.*, LOCKE, *supra* note 210, at ch. II, § 131.

[218] JOHN RAWLS, A THEORY OF JUSTICE 136 (1971) (The effect of believing Rawls' theory is unearned trust in government decision makers and the basis for Justice as Fairness, though hopeful, is complete nonsense).

[219] Local 1330, United Steel Workers v. United States Steel Corp., 631 F.2d 1264, 1280–81 (6th Cir. 1980); Singer I, *supra* note 203, at 646 (noting that the libertarian "free market" view consists of property being immune from the government, advancing certain sort of chastisement of the poor for not making

and federal law for unconstitutionally violating private property rights.[220] They might even support takings claims in non-existent property that might have existed had the government acted differently.[221] In order to reach the Libertarian ideal of a minimized government, Libertarians have tried to expand the concept of property in order to put pressure on the courts to overturn laws that may redistribute wealth away from property owners.[222]

Conversely, Liberals have tried to redefine property rights in order to redistribute property to the working class and historically disadvantaged classes.[223] In so doing, they have argued for further expansion of the bundle of property rights.[224] Not only would business owners hold property rights in businesses, but so would the workers, the town where the business existed and possibly any other person that had a "fluid relationship" with the business.[225] They also put their trust in legislators to find the right balance to lay claim to a truly egalitarian society.[226] Unfortunately, those

---

themselves rich: "If people are unhappy they only have themselves to blame: Wealth and power are there for the taking.").

[220] Taft, *supra* note 203, at 232.

[221] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 135 (1978).

[222] *Lochner*, 198 U.S. at 53–56 (1905).

[223] *See* Singer I, *supra* note 203, at 750 (Singer himself is an avowed Liberal and advocates this).

[224] *Id.* (arguing for a "reliance interest" in property); Singer II, *supra* note 206, at 114–15 (citing Manufactured Hous. Cmtys. of Wash. v. State, 13 P.3d 183) (noting that the libertarian justices on the Supreme Court has had an effect on state law); Manufactured Hous. Cmtys. of Wash. v. State, 13 P.3d 183 (2000) (granting mobile home owners a right of first refusal when the landward wants to sell their homes was a taking); Sunder, *supra* note 130, at 330 ("[N]ew theories of property, from personhood to social relations, enhanced our ability to explain and justify legal limits on property, even while they served to bolster some property claimants, such as tenants.").

[225] Singer I, *supra* note 203, at 652–53.

[226] *Lochner*, 198 U.S. at 72 (Harlan, J., dissenting) ("the public interests imperatively demand that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably beyond all question in violation of the fundamental law of the Constitution.") (quoting Atkin v. Kansas, 191 U.S. 207, 223 (1903)). *See also*

legislators have actually advanced corporate interests, posturing their causes to be in the name of the poor, blue-collar workers and minorities.[227] As a result of the near complete corporate capture of Congress,[228] the concept of property has been driven to extreme maximization that only a psychopath would find reasonable.[229]

This discussion has continued in the IP field as well. Some have argued for the application of absolute and maximum property protection to IP, as if it were physical property.[230] Others have proposed the adoption of official workarounds of the Constitutional limits on copyright.[231] Some have proposed the adoption of moral rights.[232] Still others have argued that the application of a utilitarian

---

Singer II, *supra* note 206, at 114–15 (voicing a preference that state laws recognizing tenant property interests should not be struck down by courts).

[227] Paul Buchheit, *The Corporate Betrayal of America*, THE CONTRIBUTOR (April 8, 2013, 8:30 AM), http://thecontributor.com/opinion/corporate-betrayal-america.

[228] Mark A. Lemley, *The Constitutionalization of Technology Law*, 15 BERKELEY TECH. L.J. 529, 532 (2000)

("[I]t is far too easy for Congress to fall into a pattern of responding to private demands, rather than thinking proactively about what should be done. To a disturbing extent, Congress . . . seems to have abdicated its role in setting intellectual property policy to the private interests who appear before it."). *See also* Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 860–61 (1987) ("[T]he [copyright] statute's legislative history is troubling because it reveals that most of the statutory language was not drafted by members of Congress or their staffs at all. Instead, the language [of the 1976 Copyright Act] evolved through a process of negotiation among authors, publishers, and other parties with economic interests in the property rights the statute defines."); Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 193–94 (2003) (noting that copyright, once a right, at some point crossed over became an entire regulatory regime).

[229] *See generally* Ian B. Lee, *Is There A Cure for Corporate "Psychopathy"?*, 42 AM. BUS. L.J. 65 (2005) (commenting and legitimizing the indictment of corporate behavior as psychopathic).

[230] Epstein, *supra* note 17, at 455, 482, 520.

[231] Landes & Posner, *supra* note 17, at 517–18.

[232] Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 363 n.314 (1988) (citing Roberta Kwall, *Copyright & the Moral Right: Is an American Marriage Possible?*, 38 VAND. L REV. 1, 69 (1985)) ("Protection for creators' personal rights . . . enables society to preserve the integrity of its cultural

analysis should not simply assume "goodness" in the maximization of creative output.[233] At least one scholar has suggested that IP's economic underpinnings should be balanced with cultural considerations instead of just relying on the marketplace to decide what is best for IP.[234]

In fact, there has been a direct collision of the property concepts underpinning the expansion of IP rights worldwide with culture and identity.[235] Over the last century identity politics have been used by disadvantaged communities to defend and monetize their culture.[236] For example, a New Mexican tribe has sued New Mexico for using its cultural symbol on the state's flag without authorization.[237] They had demanded a million dollars for every year since New Mexico chose its current state flag, which came to 74 million dollars. Moreover, accusations by minority activists using the property term of art "cultural appropriation" is increasing. For instance, Miley Cyrus was accused of cultural appropriation of African American culture after her recent performance on the VMA's.[238] Nike pulled a line of women's exercise clothing because it was accused of cultural appropriation for using exclusively male

---

heritage. The public's right to enjoy the fruits of a creator's labors in original form and to learn cultural heritage from such creations has no time limit.").

[233] Sunder, *supra* note 130, at 283–84 ("At times, utility in the intellectual property context is defined simply as the maximization of creative output. The goal then becomes creating the greatest number of cultural artifacts to be trickled down to the greatest number of people.").

[234] *Id.* at 268–69.

[235] MARILYN STRATHERN, PROPERTY, SUBSTANCE & EFFECT: ANTHROPOLOGICAL ESSAYS ON PERSONS AND THINGS 134, 163 (Athlone Press, 1999) ("Late 20th Century cultural politics makes it impossible to separate issues of identity from claims to the ownership of resources.").

[236] *See* Sunder, *supra* note 130, at 270–71 (noting a number of groups claiming property rights to cultural property that they claim has been or could be misappropriated without their permission).

[237] *Id.*

[238] Hadley Freeman, *Miley Cyrus's Twerking Routine was Cultural Appropriation at its Worst*, THE GUARDIAN (Aug. 27, 2013, 12:00 PM), http://www.theguardian.com/commentisfree/2013/aug/27/miley-cyrus-twerking-cultural-appropriation.

tattoos from Polynesia to inspire the clothing design.[239] Similarly, Forever 21 pulled a line of clothing after a high number of Twitter posts criticized it for cultural appropriation.[240] Some concerned person might ask whether allowing the concept of property to facilitate the commoditization of cultural identity is going too far.

Property maximalists might respond with realism: that property as "thing" ownership itself was always a legal fiction anyway.[241] But it would be disingenuous to stop there and allow this to be the final say. Realism would also conclude that there are limits to expanding the concept of property. One could be the "popular mind['s]" ability to comprehend a property claim as thing ownership.[242] This could be recast as a limit against genuine dishonesty about property that the average taxpaying American would see as incomprehensible.[243] At its broadest stroke, realism can only give credence to property claims that are not unconstitutional and that do not put undue pressure on the judiciary.[244]

***

Blackstone recognized that all property was necessarily physical and absolute.[245] In other words, there was no such thing as

---

[239] Vaimoana Tapaleao, *Nike Commits Cultural Faux Pas*, THE NEW ZEALAND HERALD (Aug. 14, 2013, 5:30 AM), http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10912088.

[240] Alexis Kleinman, *Forever 21 Apparently has Pulled its Controversial Compton Shirts*, THE HUFFINGTON POST (Sept. 25, 2013) available at http://www.huffingtonpost.com/2013/09/25/forever-21-compton_n_3988643.html.

[241] Vandevelde, *supra* note 13, at 332.

[242] Grey, *supra* note 60.

[243] *Kirtsaeng*, No. 11–697, slip op. at 12 (2013) (favoring "simplicity and coherence" by refusing to allow American copyright law to continue underwriting multiple streams of commerce worldwide).

[244] *Lochner*, 198 U.S. at 72 (1905) (Harlan, J., dissenting) ("the public interests imperatively demand that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably beyond all question in violation of the fundamental law of the Constitution.") (quoting Atkin v. Kansas, 191 U.S. 207, 223 (1903)).

[245] *Id.*

intangible, limited property. This way property itself would be clearly defined and not limited by the government. Also, property would actually be connected to a physical "thing," whose existence itself was not necessarily dependent on the market or politics. This conception of property as thing-ownership is not only clear; it is also what the framers were thinking of when they put property into our Constitution.[246]

In 1913, Hohfeld proposed the adoption of a positivist conception of property.[247] The positivists conceived of property as anything from which value could be derived.[248] Scholars in turn began to refer to Hohfeld's conception of property as the "new property."[249] However, the Brandeis-Holmes minority view at that time noted that positivism was not a new idea and thus its general acceptance by law makers was the only "new" thing about it.[250] In

---

[246] Letter from Thomas Jefferson to Isaac McPherson, Aug. 13, 1813, *in* JEFFERSON: WRITINGS, *supra* note 1, at 1291–92.

[247] Hohfeld I, *supra* note 13, at 19; Hohfeld II, *supra* note 13, at 712–13.

[248] Hohfeld I, *supra* note 13, at 58 (Hohfeld based his conception on eight legal relations that he claimed were "the lowest common denominators of the law" basically allowing any legal relationship to be expressed as property. The eight legal relations are rights, duties, privileges, no rights, powers, liabilities, immunities and disabilities).

[249] Vandevelde, *supra* note 13, at 361.

[250] Int'l News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) ("But the fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property. The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions and ideas—become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it."). *Id.* at 246 (Holmes, J., dissenting) ("Property, a creation of law, does not arise from value, although exchangeable—a matter of fact. Many exchangeable values may be destroyed intentionally without compensation. Property depends upon exclusion by a law from interference."); *Lochner*, 198 U.S. at 75–76 (1905) (Holmes, J., dissenting) ("[A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain

fact, "the all-absorbing legal conception of the [19th] Century [was] that of the property right. Everything was thought of in terms of property."[251] Nevertheless, Hohfeld's "new" property seemed to have allowed lawmakers to break free of Blackstone's requirement that property be physical. In fact, scholars have noted that Hohfeld characterized Blackstone's conception of property to be an "obsession with things."[252] Positivists also proposed that property was not to be absolute or fixed. In Hohfeld's words: "Since all legal interests are 'incorporeal'—consisting, as they do, of more or less limited aggregates of abstract legal relations—such a supposed contrast as that sought to be drawn by Blackstone can but serve to mislead."[253] Complete acceptance of a Hohfeldian concept of property happened when the American Law Institute's Restatement of Property in 1936 included Hohfeld's eight legal relations as the elements and correlatives of property instead of a definition of property. These elements and correlatives included potentially every valuable interest.[254]

---

opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."). *See also* Vandevelde, *supra* note 13, at 333–34 (discussing an expansion of dephysicalized property in the nineteenth century). *But see* Entick v. Carrington, 19 Howell State Trial 1029, 1066 (K.B. 1765) ("[T]he eye cannot by the laws of England be guilty of a trespass."); Boyd v. United States, 116 U.S. 616, 628 (1886) (adopting the English view).

[251] Dean G. Acheson, Book Note, 33 HARV. L. REV. 329, 330 (1919) (reviewing MALCOLM H. LAUCHHEIMER, THE LABOR LAW OF MARYLAND BY MALCOLM H. LAUCHHEIMER. JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORY AND POLITICAL SCIENCE. SERIES XXXVII, NO. 2. BALTIMORE: JOHNS HOPKINS PRESS. PP. 163 (1919)) (including: "reputation, privacy, domestic relations, and as new interests called for protection their success depended upon their ability to take on the protective coloring of property.").

[252] Vandevelde, *supra* note 13, at 360.

[253] Hohfeld I, *supra* note 13, at 24.

[254] Vandevelde, *supra* note 13, at 330 (By the beginning of the twentieth century, the Blackstonian conception of property was no longer credible. A new conception emerged and was stated in its definitive form by Wesley Newcomb Hohfeld. This new property was defined as a set of legal relations among persons. Property was no longer defined as dominion over only physical things).

As positivism began to run its course, critics lambasted the Hohfeldian conception because it threatened to render "property" itself meaningless. If all legal relations were given the attribution of property, then property "could no longer serve to distinguish one set of legal relations from another."[255] It also would no longer prescribe a degree of protection for different types of legal relations.[256] The resulting broad legal acceptance of the "dephysicalization of property" expanded property law exponentially.[257] It seemed that property law was to become all encompassing.[258] Swayze correctly guessed that business goodwill, trademarks, common law copyright, going value of businesses, franchises, and equitable easements would finally be included within the ambit of "property."[259] Still, mainstream legal thought resisted these critiques in the misguided belief that intangible property would remain limited, by not including the Blackstonian absolutist bundle of rights.[260] However, clear limits to modern property law have not yet been implemented and many intangible right owners have only pushed for the highest protection of intangibles as if they were tangible.[261]

In fact, as a result of positivism's apparent success Grey declared the disintegration of property itself.[262] "The dissolution of the traditional conception of property erode[d] the moral basis of capitalism."[263] Thus Grey proposed that social evolution explained that in our country's current developmental phase the old ethical

---

[255] *Id.* at 362.
[256] *Id.*
[257] *Id.* at 359–61.
[258] *Id.* at 329 ("Any valuable interest potentially could be declared the object of property rights.").
[259] Francis J. Swayze, *The Growing Law*, 25 YALE L.J. 1, 10 (1915).
[260] Vandevelde, *supra* note 13, at 340–57 (however, admitting that trademarks were recognized to be absolute rights because of their necessary connection with physical property in In re Trade-Mark Cases, 100 U.S. 82, 89 (1879) that extend everywhere).
[261] *See supra* note 17 and accompanying text.
[262] Grey, *supra* note 60.
[263] *Id.*

justifications for our property system are no longer needed.[264] Grey saw the problem clearly: that positivism had generally reduced property to an issue of politics.[265] However, his comfort with a concept of property that is neither ethically nor morally justified is disturbing and general acceptance of such a system would be absolutely inappropriate.[266]

It seems that after nearly a century of being declared obsolete,[267] the marketplace still indicates that Blackstone is relevant. Take the price of gold for example.[268] Historically, in times of economic uncertainty consumers have literally stopped trading intangibles like stock and actually bought up large amounts of physical property. This phenomenon explains why the price of gold soared in the wake of the 1930's stock market crash, the 9/11 terrorist attacks, the dot.com bubble, and the 2008 mortgage crisis.[269] Thus, common sense or at least human instinct recognized

---

[264] *Id.* ("Modern capitalist property must be seen as a web of state-enforced relations of entitlement and duty between persons.").

[265] *Id.*

[266] *See, e.g.*, SIR WILLIAM DAVID ROSS, THE RIGHT AND THE GOOD (1877) (presenting a moral deontological theory based on relationships which might fit the social relations conception of property better than simply no moral underpinning).

[267] Vandevelde, *supra* note 13, at 359 (noting that Blackstone was rendered obsolete because of his physicalism and absolutism).

[268] *Gold Prices as it Relates to the Global Economy*, ITM TRADING, http://www.itmtrading.com/gold_global_economy/ (last visited March 27, 2013) ("Gold is considered an asset more than an investment as you have *physical* ownership of it . . . .") (italics added); Jacob Goldstein & David Kestenbaum, *A Chemist Explains Why Gold Beat Out Lithium, Osmium, Einsteinium* . . . . NPR (Nov. 19, 2010, 12:01 AM), http://www.npr.org/blogs/money/2011/02/15/131430755/a-chemist-explains-why-gold-beat-out-lithium-osmium-einsteinium (explaining that Gold and Silver are the only elements in enough abundance to be traded that are not a gas, and that doesn't corrode or burst into flames and doesn't kill you).

[269] Jacob Goldstein, *The Gold Bubble Is 4,000 Years Old, And It Won't End Now*, NPR (Apr. 15, 2013, 3:31 PM), http://www.npr.org/blogs/money/2013/04/15/177340213/the-gold-bubble-is-4-000-years-old-and-it-wont-end-now (noting that Gold demand boomed during the dot.com crash and the housing crisis); Floyd Norris & Jonathan Fuerbringer, *A DAY OF TERROR: THE*

that tangible property is more stable than intangible property.[270] Grey noted that the concept of property in "the popular mind" can limit the extent lawmakers are willing to extend property rights to intangibles.[271] Even if we are to fully accept positivism, property reification into something "thing-like," that average commonsense citizens can accept as property, still matters to our legal analysis.[272] In fact, there are "dozens of gold-backed digital currencies" in existence today including GoldMoney and Pecunix.[273] Bitcoin, a more popularly known digital currency is not gold-backed but claims to be inflation-resistant because there are a fixed number of Bitcoins in existence.[274] These digital currencies are traded by people that may not trust the U.S. dollar that is subject to inflation and fluctuation due to decisions made by a central banking system. Digital currencies exist in a grey market partly because the U.S. government has a constitutional monopoly on minting currency.[275] However, digital currencies have not yet been subjected to a government crackdown, and in fact may be protected by copyright

---

MARKETS; Stocks Tumble Abroad; Exchanges in New York Never Opened for the Day, NEW YORK TIMES (Sept. 12, 2001), http://www.nytimes.com/2001/09/12/business/day-terror-markets-stocks-tumble-abroad-exchanges-new-york-never-opened-for-day.html (noting that gold and crude oil prices leaped after the 9/11 attacks); Casey Research, *How do Gold Stocks Perform in a Depression?*, INFLATIONDATA.COM (June 5, 2009), http://inflationdata.com/articles/2009/06/05/how-do-gold-stocks-perform-in-a-depression (noting that gold stocks didn't drop during the great depression).

[270] Grey, *supra* note 60 (In the face of positivism, "[m]ost people [still] . . . conceive of property as things that are owned by persons.").

[271] Grey, *supra* note 60 (when commenting on Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978), "The kind of property that can be taken is confined to those conglomerations of rights that, in the popular mind, have been reified into 'things' or 'pieces of property.'").

[272] *Id.*

[273] Grinberg, *supra* note 107, at 174 (noting gold-backed digital currencies like Pecunix and GoldMoney compete with non-backed digital currencies like Bitcoin).

[274] *Id.*

[275] U.S. CONST. art. I §§ 8, 10.

law.[276] Some digital currencies have been criticized as a means to avoid law enforcement for everything from tax evasion and securities fraud to paying for drugs and hit men.[277] Others defend digital currencies as a commodity itself.[278] As one spectator said: "A Bitcoin is something that simply exists like gold. . . . Of course, it's not entirely like gold because it also, well, doesn't [physically exist]."[279]

Similarly, IP strategists have campaigned tirelessly to convince Americans that copyright is also like gold in that infringement is piracy and that file sharing is stealing. If a significant base of average commonsense Americans accepts a concept of absolute intangible property rights, major content owners could win ever-increasing protections to their copyrights, patents, trademarks, trade secrets and publicity rights.[280] In fact, stock prices and the going value of businesses are currently being

---

[276] *Compare* MDY Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928, 935 (9th Cir. 2010) *opinion amended and superseded on denial of reh'g*, No. 09-15932, 2011 WL 538748 (9th Cir. Feb. 17, 2011) (This case protected Blizzard's right to manage its video game's online virtual economy and currency which can be bought and sold for real money and valuated in terms of U.S. dollars), *with* Grinberg, *supra* note 107, at 174 (describing many online currencies that exist in a grey market and may eventually be found illegal for a number of reasons including tax evasion and counterfeiting).

[277] Alex Konrad, *Feds Say They've Arrested 'Dread Pirate Roberts,' Shut Down His Black Market 'The Silk Road,'* FORBES (Oct. 2, 2013, 12:08 PM), http://www.forbes.com/sites/alexkonrad/2013/10/02/feds-shut-down-silk-road-owner-known-as-dread-pirate-roberts-arrested/.

[278] Sean Vitka, *Bitcoin: I'm Not Dead Yet!*, SLATE (Oct. 16, 2013, 4:45 PM), http://www.slate.com/articles/technology/future_tense/2013/10/silk_road_shutdown_does_not_spell_the_end_for_bitcoin.html.

[279] Hugo Rifkind, *How Bitcoin Could Destroy the State (And Perhaps Make me a Bit of Money)*, THE SPECTATOR (Mar. 30, 2013), http://www.spectator.co.uk/columnists/hugo-rifkind/8874321/how-bitcoin-could-destroy-the-state-and-perhaps-make-me-a-bit-of-money/.

[280] H.R. REP. NO. 112-128, at 21 (2012) (Patent owners "need protection in Europe, they need protection in China, they need protection in Korea and Japan and other parts of Asia. And to do that, they are incredibly hampered by patent systems that are totally misaligned. The AIA [America Invents Act] creates a new *gold standard* for patent systems that has been the U.S. system.") (italics added).

inflated by these intangibles which can have a negative effect on pensions and innocent purchasers of intangibles that have no tangible property backing. When suspect contracts involving intangible property had fallen under the purview of the Court, as pay-for-delay contracts recently have, the interested parties have told the Court to look the other way.[281]

Furthermore, public outcry has stifled the growth of government protection of IP rights.[282] Thus, it seems that the commonsense American layperson had not been tracking the government's gradual expansion of intangible property rights. Positioned as a modern and progressive trend, property concepts have been applied to entitlements,[283] the IP field, human rights, in personam rights, contract rights, bodily security, liberty and life itself.[284] The public will not accept all these property interests as legitimate, and may reject some property rights as immoral.[285] This

---

[281] Brief of Antitrust Economists as Amici Curiae in Support of Respondents at 23-24, Fed. Trade Comm'n v. Actavis, Inc., 133 S. Ct. 2223 (2013) (No. 12-416) 2013 WL 836946; Hazen, *supra* note 10, at 795 (1987); Friedman, *supra* note 16, at 636; Hirschler, *supra* note 14.

[282] *See supra* note 19 and accompanying text.

[283] Goldberg v. Kelly, 397 U.S. 254, 265 (1970); Reich, *supra* note 204, at 785–86 (arguing that property exists to serve security and independence and since entitlements have been used to protect these values in modern times, entitlements should also be included in the new property: "The presumption should be that the professional man will keep his license, and the welfare recipient his pension.").

[284] Grey, *supra* note 60 ("[M]ost property in a modern capitalist economy is intangible. Consider the commercial paper, bank accounts, insurance policies—not to mention more arcane intangibles such as trademarks, patents, copyrights, franchises, and business goodwill."); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090 (1972) ("life itself will be decided on the basis of 'might makes right.'"). *See* Bowman v. Monsanto Co. No. 11-796, slip op. at 1 (U.S. May 13, 2013) (deciding that a farmer is liable for patent infringement if soybeans that have patented DNA reproduce naturally).

[285] Clinton, *supra* note 22, at 20 (noting that many corporate supply chains have been found to have been tainted with slavery, also noting that an estimated 20.9 million modern slaves exist today and that it constitutes an estimated $20 billion dollar industry globally). *See also* Obama, *supra* note 22 (President Obama said that "[i]t ought to concern every person, because it's a debasement of our

has become clear as intangibles have threatened the public's economic and speech interests,[286] and physical property rights themselves.[287] The People may declare these rights disingenuous and dishonest for being nonphysical and completely un-thing-like.

Therefore, the judiciary should return to Blackstone's definition of property as necessarily *physical* property for purposes of constitutional interpretation. The judiciary cannot continue to entertain the positivist conception of property as anything from which value can be derived because it fails to be constitutionally sound. It fails because according to the positivist regime the Copyright and Patent acts may be enacted entirely pursuant to the interstate commerce power.[288] Thus, positivism renders the Copyright and Patent Clause superfluous and meaningless. Accordingly, the limits expressed in the Copyright and Patent Clause have been circumvented, eroding the traditional contours of copyright. Despite this the Supreme Court had continued to rely on these limits to ensure that IP rights do not impede the free speech rights of the First Amendment.[289]

Furthermore, the utilitarian analysis inferred by courts into the word "progress" in the Copyright and Patent Clause should be considered a limit to the preemptory effect of copyright to state granted rights inspired by privacy, tort or Hegelian personhood theory. Margaret Radin has argued that we make a fundamental

---

common humanity. It ought to concern every community, because it tears at the social fabric. It ought to concern every business, because it distorts markets. It ought to concern every nation, because it endangers public health and fuels violence and organized crime. I'm talking about the injustice, the outrage, of human trafficking, which must be called by its true name—modern slavery. Our fight against human trafficking is one of the great human rights causes of our time and the United States will continue to lead it.").

[286] *See supra* note 19 and accompanying text.

[287] *Kirtsaeng*, No. 11–697, slip op. at 21 (noting that a copyright in software could even halt the sale of a used car).

[288] United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) ("Things in interstate commerce" and substantial effects tests).

[289] Eldred v. Ashcroft, 537 U.S. 186, 191 (2003) ("When, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.").

moral distinction between fungible and personal property.[290] She also argued that fungible property, property that is held for its exchange value, should be given less protection than personal property, property that is held primarily because it is necessary to our sense of self. However, the only kind of property recognized by the Court's current interpretation of the Copyright and Patent Clause is "fungible."[291] Thus, property of the "personhood" type should be left to the states to regulate.

The Courts should adopt a more serious conception of public property to temper private property claims using Carol Rose's "comedy of the commons" rationale.[292] Some property uses work in the opposite direction from a "tragedy"[293] when it is left to public use including public roads, bridges and the Internet.[294] Through custom, prescription and trust, the government has recognized a public interest or right in some sorts of property that constitute the "social glue" of a society.[295] Rose noted that our society's social glue might be our right to free speech and the social

---

[290] Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957–60 (1982).

[291] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.").

[292] Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 723 (1986) [hereinafter Rose: *The Comedy*].

[293] Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968) (Negative externalities are the economic problem. Property rights internalize those externalities by allowing private internalization of the some of the positive externalities as well).

[294] Rose: *The Comedy*, *supra* note 292, at 768 ("In a sense, this is the reverse of the 'tragedy of the commons': it is a 'comedy of the commons,' as is so felicitously expressed in the phrase, 'the more the merrier.'").

[295] *Id.* at 778 ("[T]he Romans had a category of public property for religious structures and places; this makes sense in a society that regards religions as a 'social glue' that holds the whole together.").

activity brought about by commerce itself.[296] In fact there is compelling historical evidence that the First Amendment was crafted to protect public goods.[297] Finally, she noted the dangers of failing to temper grants of private property with the public interest. Rose's concern was that in cases of holdouts and monopolies, unreasonably high rents would be sought in the form of prohibitively high prices. She noted that a cause for the higher rents may have been brought about by the public's participation, and not the property owner's personal investment in the property.[298]

To this end, intangible property claims should be subjected to a strict ethical standard of honesty during creation, allocation and valuation.[299] This standard would require intangible property claims

---

[296] *Id.* ("Perhaps an important social glue in our own society is free speech rather than religion."). *See also* Thomas Jefferson, A Bill for Establishing Religious Freedom, enacted on January 16, 1786, *in* JEFFERSON: WRITINGS, *supra* note 1, at 347 (This bill was enacted by the Virginia General Assembly with the support of James Madison. It vindicates religious and intellectual freedom and was one of the sources that Congress drew upon when drafting the First Amendment in 1789, illustrating the symbiotic relationship freedom of speech and freedom of religion in the United States). *Cf. Genesis* 1:3 ("And God said, 'Let there be light,' and there was light."); *John* 1:1, 14 ("In the beginning was the Word, and the Word was with God, and the Word was God . . . . The Word became flesh and made his dwelling among us."). For a Judeo-Christian society like the United States, creation and authorship itself may clearly be seen as an act of free speech, thus Rose's quip that our social glue might be free speech may not be as far from the religious values that Ancient Rome based its public right on for the founders.

[297] Roger Williams (1603–1683), *A Plea for Religious Liberty*, excerpt from THE BLOUDY TENENT OF PERSECUTION, FOR CAUSE OF CONSCIENCE (1644), *available at* http://www.constitution.org/bcp/religlib.htm ("[I]t is the will and command of God that (since the coming of his Son the Lord Jesus) a permission of the most paganish, Jewish, Turkish, or antichristian consciences and worships, be granted to all men in all nations and countries; and they are only to be fought against with that sword which is only (in soul matters) able to conquer, to wit, the sword of God's Spirit, the Word of God.").

[298] Rose: *The Comedy*, *supra* note 292, at 749–50.

[299] Singer II, *supra* note 206, at 113–14 (Courts "have felt that companies are 'owned' by the shareholders and that the main purpose of a corporation is to maximize profits. If that depends on shedding workers, so be it." However, "both common law and statutory law impose minimum standards on all K relationships to ensure contracting parties do not engage in fraudulent, deceptive or unfair

to have a sufficient nexus with actual value backing that does not simply arise from a "comedy of the commons."[300] If a property claim were to fail this strict honesty standard, then the claim or right would be stripped of the legal attribute of property. This honesty standard could preserve efforts at the state level to regulate fields of law that would otherwise have been swallowed by an over-expansive concept of property. Adopting these changes to the concept of property is the most reasonable way to limit the expansion of the Commerce Clause so as to protect the Copyright and Patent Clause from being rendered meaningless.

Some may not believe that we need to enforce honesty in the creation, allocation and valuation of intangible property. However, in the name of the waning middle class of America, this article disagrees vehemently. We are in the wake of a housing crisis, a massive corporate buyout by the government, a resulting world economic crisis and now an attitude that banks are not only too big to fail but also too big to be held accountable. The unabashed demand for maximized enforcement of IP rights throughout the entire world has only recently been challenged by public outcry and the Supreme Court.[301] In response, the content industry and internet service providers engage in self-help measures by slowing or blocking the internet to individuals they perceive are violating their economic interest in property rights.[302] Such measures are a direct violation of FCC net neutrality rules which

---

practices and to ensure that the relationship is subject to minimum standards designed to recognize the dignity and humanity of the parties.").

[300] Rose: *The Comedy*, *supra* note 292, at 723; Benjamin G. Damstedt, *Limiting Locke: A Natural Law Justification for the Fair Use Doctrine* 112 YALE L.J. 1179, 1182–83 (2003) (suggesting that public goods are in danger of waste by way of underuse instead of waste by overuse. This conception could fit the Comedy of the Commons idea into Lockean labor theory).

[301] *See supra* note 19 and accompanying text.

[302] About the Center for Copyright Information, http://www.copyrightinformation.org/about-cci/ (last visited Mar. 25, 2013) (CCI is a coalition of major copyright owner interest groups and ISPs, and they are initiating copyright alert systems in violation of net neutrality).

internet service providers are comfortable flouting,[303] calling upon a conception of copyright-as-property. Furthermore, many U.S. Circuits validated the use of self-help measures by patent owners who are granted an "almost unrebuttable presumption of patent validity."[304] These trends indicate that the dangers to consumers, of the unbridled and arbitrary grant of intangible property ownership, is great and thus a higher standard of honesty in intangible property ownership should be enforced.

Property Maximization, Public Outcry and the Constitution

[T]he current subprime crisis has made it abundantly clear that the creation of a property right is not a self-regarding act. The banking and mortgage industries created & marketed subprime mortgages which they then securitized and insured with credit default swaps lacking any backing. When the housing bubble burst, these property rights wrecked the world economy.[305]

Despite this conclusion about the dangers of granting property rights, Joseph William Singer embraced the classic Liberal answer that recognizes yet more property rights in intangibles.[306] However, his call for increased diversity in intangible property rights through a social relations conception of property only legitimizes the creation and marketing of destructive intangible property in the first place. To stem the tides of the great injustice of

---

[303] Preserving the Open Internet, 47 C.F.R. § 8 (2011).

[304] In re K-Dur Antitrust Litig., 686 F.3d 197, 214 (3d Cir. 2012) ("First, we take issue with the scope of the patent test's almost unrebuttable presumption of patent validity."). *See also* Brief of Antitrust Economists as Amici Curiae in Support of Respondents at 23-24, Fed. Trade Comm'n v. Actavis, Inc., 133 S. Ct. 2223 (2013) (No. 12-416) 2013 WL 836946 (this issue is being heard by the U.S. Supreme Court).

[305] Singer II, *supra* note 206, at 114 (His solution, which is actually *not* apparent to all, is to give the legislature a wider leeway to regulate: "It is apparent to all that regulations of property are needed to prevent and respond to the externalities associated with arrangements that are indifferent to the rights and needs of third parties and to the nation as a whole.").

[306] Singer I, *supra* note 203, at 742–43.

opportunism preying upon the middle class, lawmakers must recognize the dishonest creation and marketing of intangible property for what it is: a lie. Preserving the ability for businesses to cloak lies in property in order to shift losses to the weaker classes is destructive and purposeless.

Grey saw the problem perhaps in its most clear form—disintegration.[307] The problem became unavoidable when we began recognizing intangibles as property. Short of Blackstonian physicalism, there is no bright line to keep property a "distinct legal category from other legal rights, in that they pertain to things."[308] Grey said that this is true because "most property in a modern capitalist economy is intangible."[309] What he didn't foresee was that lawmakers would begin to conceptualize intangibles as "things" simply because they were given the attribute of property and not because they are physical, or even detectable with any of our five senses.[310] Simply applied to constitutional law before *Sebelius*, "things" in interstate commerce became all encompassing. Thus, the effect of the positivist movement on federalism, state

---

[307] Grey, *supra* note 60.

[308] *Id.*

[309] *Id.* ("Consider the common forms of wealth: shares of stock in corporations, bonds, various kinds of commercial paper, bank accounts, insurance policies--not to mention the arcane intangibles such as trademarks, patents, copyrights, franchises and business good will.").

[310] Lemley, *supra* note 22, at 1071 ("My worry is that the rhetoric of property has a clear meaning in the minds of courts, lawyers, and commentators as 'things that are owned by persons' and that fixed meaning will make it all too tempting to fall into the trap of treating intellectual property as an absolute right to exclude."). *See also* Grey, *supra* note 60; BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 74 (1967) (noting that perhaps it would be okay to call copyright property as long as we think of property as a general concept); Stewart E. Sterk, *What's in a name? The Troublesome Analogies Between Real and Intellectual Property*, Cardozo Law Legal Studies Research, Working Paper No. 88, 43 (2004), http://papers.ssrn.com/abstract=575121 (arguing that "[i]t is far too late to expunge the rhetoric of property from dialogue about copyright."); Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 631 (1998) [hereinafter Rose: *Canons*] (despotic dominion is a caricature of property rights rather than an accurate description of them).

sovereignty and human rights that were once seen as free from federal limitation is nothing short of eclipsing.

There is ample historical evidence to conclude that robust protection of intangible property does not result in the "substantial direct effect[s] on economic growth" that enforcement of general property rights do.[311] Furthermore, granting overbroad IP rights have been criticized for having the effect of incentivizing too much investment into innovation as compared to "other forms of production."[312] This "distort[ion of] the general economic equilibrium"[313] may be seen best in the current business decisions made by the telecommunications titan known as Comcast.[314]

---

[311] JAMES BESSEN & MICHAEL J. MEURER, PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK 92–93 (2008) ("The historical evidence, the cross-country evidence, and the evidence from economic experiments all point to a marked difference between the economic importance of general property rights more generally. With the cross-country studies in particular, the quality of general property rights institutions has a substantial direct effect on economic growth. Using the same methodology and in the same studies, intellectual property rights have at best only a weak and indirect effect on economic growth . . . . [T]he empirical evidence strongly rejects simplistic arguments that patents universally spur innovation and economic growth. 'Property' is not a ritual incantation that blesses the anointed with the fruits of innovation; legislation of 'stronger' patent rights does not automatically mean greater innovation. Instead, the effectiveness of patents as a form of property depends critically on the institutions that implement the law. And there appear to be important differences in the effectiveness of implementation across different technologies and industries."). *But see* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 379 (2003) ("making intellectual property excludable creates value.").

[312] Lemley, *supra* note 22, at 1064.

[313] *Id.* at 1062, 1064. *See also* Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 491–92 (1996); Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 931 (2005) ("[E]conomic analysis of many infrastructure resources fails to fully account for how the resources are used as inputs to create social benefits and thus fails to fully account for the social demand for the resources.").

[314] Sam Gustin, *Is Broadband Internet Access a Public Utility?*, TIME (Jan. 9, 2013), http://business.time.com/2013/01/09/is-broadband-internet-access-a-public-utility/ ("Because the U.S. government has allowed a small group of giant,

In the past five years, Comcast has purchased NBC/Universal, a company that creates and owns copyrighted content, and established Xfinity, an Internet video distribution company that competes with Hulu and Netflix.[315] In fact, Comcast's subsidiary NBC was the sole distributor of the 2012 Olympics in the United States.[316] These projects represent tens of billions of dollars devoted to the involvement of Comcast in copyright ownership and distribution. Meanwhile, 30% of America is not connected to the Internet at all, and only 8% has an updated fiber optic connection.[317] Everyone else is still connecting to the Internet via copper wiring, and we are quickly losing the global race to high speed Internet.[318] In fact, because of Comcast's lackluster investment in the utility it oversees, some towns have rolled out their own last mile fiber optic networks using public funds.[319]

The FCC's net neutrality rules require transparency, no blocking and no favoring of Internet traffic by internet providers.

---

highly profitable companies to dominate the broadband market, Crawford argues, American consumers have fewer choices for broadband service, at higher prices but lower speeds, compared to dozens of other developed countries, including throughout Europe and Asia."). *See also* Crawford, *supra* note 200 ("[T]he U.S. is rapidly losing the global race for high-speed connectivity, as fewer than 8 percent of households have fiber service. And almost 30 percent of the country still isn't connected to the internet at all . . . . All Americans need high-speed access, just as they need water, clean air and electricity. But they have allowed a naive belief in the power and beneficence of the free market to cloud their vision. As things stand, the U.S. has the worst of both worlds: no competition and no regulation.").

[315] Gustin, *supra* note 314.

[316] *Id.*

[317] Crawford, *supra* note 200.

[318] *Id. See also* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 193 (1973) (Brennan, J., dissenting) ("For in the absence of an effective means of communication, the right to speak would ring hollow indeed. And, in recognition of these principles, we have consistently held that the First Amendment embodies, not only the abstract right to be free from censorship, but also the right of an individual to utilize an appropriate and effective medium for the expression of his views.").

[319] *See* Crawford, *supra* note 200.

Verizon has challenged these rules in the Federal Circuit.[320] Without these rules nothing will stand in the way of telecommunications companies becoming the largest beneficiaries of copyright protection.[321] Comcast has every incentive to and actively favors traffic in Xfinity's favor.[322] Since Comcast naturally pays the exact minimum rate for connecting itself to the Internet, it will be able to offer predatory prices to consumers for similar video services provided by Netflix, Apple, Amazon and Google.[323] The chosen Trojan horse for Internet service providers like Comcast is

---

[320] Brief of Respondent-Appellee at 14, 15, 50, 57, 75, Verizon v. Fed. Commc'n Comm'n, No. 11-1355 (D.C. Cir. Jan. 16, 2013). *See also* FEDERAL COMMUNICATIONS COMMISSION, *FCC Grants Approval of Comcast-NBCU Transaction* (Jan. 18, 2011), *available at* http://transition.fcc.gov/transaction/comcast-nbcu.html#orders (noting that FCC approval of the Comcast/NBC merger was made on the condition that Comcast would fulfill a number of public interest commitments including "Protecting the Development of Online Competition." Comcast/NBC's exclusive grant of the copyright in the Olympics arguably violates a number of these conditions including "unreasonably withhold[ing] programming from Hulu."); *Who Owns the Media?*, FREE PRESS, http://www.freepress.net/ownership/chart (last visited on Dec. 2, 2013) (showing the high consolidation of media industries).

[321] Brief of Respondent-Appellee at 14, 15, 50, 57, 75, Verizon v. FCC, No. 11-1355 (D.C. Cir. Jan. 16, 2013). *See also* Marguerite Reardon, *Franken: Comcast Thumbs Nose at Net Neutrality Rules*, CNET (May 7, 2012, 12:20 PM), http://news.cnet.com/8301-13578_3-57429373-38/franken-comcast-thumbs-nose-at-net-neutrality-rules/ (noting that Comcast might be violating net neutrality rules by exempting its Xfinity video service from monthly data caps). *But see* Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 973 (4th Cir. 1990) (finding that there is a copyright misuse defense inherent to copyright by interpreting English common law history of copyright into U.S. CONST. art. I, § 8, cl. 8. This defense is rarely raised, even more rarely applied, and yet it is the antitrust release valve for copyright).

[322] Reardon, *supra* note 321.

[323] *See* Tony Bradley, *Comcast Toll on Netflix Screams for Net Neutrality*, PC WORLD (Nov. 30, 2010, 5:57 AM), http://www.pcworld.com/article/211964/comcast_toll_on_netflix_screams_for_net_neutrality.html (explaining how Comcast's non-neutral stance toward Netflix stems from its apparent moral ground in blocking peer-to-peer file sharing services).

copyright because lawmakers have cloaked copyright in property so well, even the Supreme Court has acknowledged it.[324]

IP's complete transformation into a form of property is partly due to an outright failure of courts to properly apply a utilitarian economic analysis to IP rights.[325] Because of the difficulties in properly applying a utilitarian analysis, lawmakers have fallen to their assumptions while couching those arguments in utilitarian terms.[326] Some rely on Locke, granting higher protection to reward labor.[327] Others lean on Mill's marketplace of ideas, limiting grants of IP according to the free-market.[328] Thus, courts fail to address what incentives are appropriate in order to spark creation and innovation and have presented a smattering of inconsistent and conflicting outcomes.[329] This is an indication that the current framework underpinning IP law is ineffective.

---

[324] Grey, *supra* note 60 ("To own property is to have exclusive control over something . . . Legal restraints on the free use of one's property are conceived as departures from an ideal conception of full ownership."); United States v. Moghadam, 175 F.3d 1269, 1280 (11th Cir. 1999) ("The [Copyright Clause] grant [of legislative power] itself is stated in positive terms, and does not imply any negative pregnant that suggests the term 'writings' operates as a ceiling on Congress' ability to legislate pursuant to other grants. Extending quasi-copyright protection also furthers the purpose of the Copyright Clause to promote progress of the useful arts by securing some exclusive rights to the creative author.").

[325] Lemley, *supra* note 22, at 1057 (noting that IP rights are justifiable only to the extent that excludability does in fact create value necessary to incentivize creation and innovation). *See also* Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 638 (2003) ("[T]he unauthorized use of another's IP, unlike unauthorized use of another's physical property, lacks clear normative significance.").

[326] McGowan, *supra* note 147, at 2–3, 7, 38, 71–72.

[327] Lemley, *supra* note 22, at 1066–67.

[328] *Id.*

[329] DAVID D. FRIEDMAN, LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS 135 (2000) (We have missed the boat, because "what we want . . . is not merely an incentive but the right incentive."). *See also* Lawrence Lessig, *Intellectual Property and Code*, 11 ST. JOHN'S J. LEGAL COMM. 635, 638–39 (1996) ("'Sufficient incentive,' however, is something less than 'perfect control.' The question we must ask is what kind of control the Net should yield to owners of intellectual property."); Lemley, *supra* note 22, at 1059

Two shortcomings of a legal utilitarian analysis have been recognized by IP scholars. First, it is difficult to impossible to define utility or even to determine which types of utility are favored.[330] This adds to the difficulty of applying a utilitarian analysis. Second, it lacks a mechanism to encourage dissemination of copyrighted and patented materials especially to women and the poor.[331] In fact, philosophical ethicists have long criticized Mill and Bentham for merely supporting a form of Hedonism.[332] Other critics have found utilitarianism hopelessly inapplicable and fatally undefined.[333] *Sebelius* could represent a necessary shift in

---

(enumerating the costs of overbroad grant of IP rights as: 1, IP rights distort markets away from the competitive nom by creating static inefficiencies and deadweight losses, 2, it interferes with other creators' to work (dynamic inefficiencies), 3, it creates rent-seeking behavior that is socially wasteful, 4, they have high administrative costs and 5, the cause overinvestment in research and development itself that is distortionary). *Cf.* The Sony Bono Copyright Extension Act 17 U.S.C. § 302(a) (The retroactive provisions gave no new incentive to authors to create and yet was not unconstitutional).

[330] Sunder, *supra* note 130, at 284. *See also* JOHN STUART MILL, UTILITARIANISM, ch. 2 (referring to high and low pleasures, some being worth more than others); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 5 (1974) ("Indeed, no proposed decision making criterion for choice under uncertainty carries conviction here, nor does maximizing expected utility on the basis of such frail probabilities.").

[331] Sunder, *supra* note 130, at 284 (citing AMARTYA SEN, EQUALITY OF WHAT? *in* CHOICE, WELFARE, AND MEASUREMENT 353, 354, 356 (1982)).

[332] Walter Sinnott-Armstrong, *Consequentialism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, ed. 2012), http://plato.stanford.edu/archives/win2012/entries/consequentialism/ ("Classic utilitarians held hedonistic act consequentialism."); Andrew Moore, *Hedonism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, ed. 2011), http://plato.stanford.edu/archives/win2011/entries/hedonism/ (noting that Bentham's utilitarianism was regarded as a "pig philosophy.").

[333] *See, e.g.*, Sinnott-Armstrong, *supra* note 332 (For example, utilitarianism has a hard time explaining why one must tell the truth, or otherwise not lie, if telling the truth will cause the teller pain. Utilitarians claim that when there are no negative factors against telling the truth, the theory requires one to tell the truth. But even here, they cannot say why one should tell the truth if it does neither generates nor costs utility to lie. Other criticisms include its failure to clearly define the factors measured in a cost and benefit utility analysis).

Constitutional interpretation for courts to adopt a more limited and practicable underpinning for IP law.[334] Utilitarianism may in fact be unworkable. But unless and until the federal government recognizes this, the power to regulate by more limited non-utilitarian justifications should be left to the states.

The benefits gained from abandoning utilitarianism would be felt on a worldwide level.[335] Democracy could spread through the Internet to the four corners of the earth. Democracy could spread across the globe not through government propaganda or war, but by the simple fact that everyone, regardless of class, can equally express themselves online. In fact, other values that do not easily fit into a utilitarian framework should be considered including individual autonomy, sovereign autonomy, culture, equality and development.[336] Values that we may take for granted in the U.S. should not go unconsidered by TRIPs. Nor should they be lost on us here at home.

In fact, the result of continuing to press a utilitarian, maximized IP regime onto the world may not be higher profits for western IP owners. It will actually end similar to the current position of the U.S. in the world economy for merchandise. In 2001, President Clinton and Congress opened our markets with

---

[334] *Sebelius*, 132 S. Ct. at 2644.

[335] Sunder, *supra* note 130, at 280 (The Internet facilitates a "semiotic democracy" by handing us the tools of creation and dissemination). *See also* ERIC VON HIPPEL, DEMOCRATIZING INNOVATION 123–24 (2005) ("democratization of the opportunity to create is important beyond giving more users the ability to make exactly the right products for themselves . . . [T]he joy and the learning associated with creativity and membership in creative communities is also important, and these experiences too are made more widely available as innovation is democratized."). *But see China's Internet: A Giant Cage*, *supra* note 136 (noting that the current Chinese government has been able to leverage internet tools to actually further authoritarian interests); Nicole Perlroth, *Hackers in China Attacked The Times for Last 4 Months*, NEW YORK TIMES (Jan. 30, 2013), http://www.nytimes.com/2013/01/31/technology/chinese-hackers-infiltrate-new-york-times-computers.html?pagewanted=all (Chinese hackers actually cyberattacked the New York Times when they had published political criticism of the Chinese government).

[336] Sunder, *supra* note 130, at 324–25.

China so that we could sell them products,[337] and we actually ended up having them sell us toothbrushes, pencils, knick-knacks, etc.[338] As a result we are losing jobs and billions of dollars of our GDP because of the lack of forethought that went into our trade agreements with China. Now, one of the reasons we passed the America Invents Act (AIA) was to meet China's rise in patent grants.[339]

If we keep reacting to countries that do not believe in equality, transparency or human rights in general we will lose our higher ground not only economically but also ethically. Not only

---

[337] Letter to Congress from President Clinton (May 23, 2000), *available at* http://clinton6.nara.gov/2000/05/2000-05-23-letter-from-the-president-to-speaker-hastert.html ("China—with more than a billion people—is home to the largest potential market in the world. To enter the WTO, China has agreed to open that market to everything from American wheat to cars to computers . . . If Congress makes the right decision, our companies will be able to sell and distribute products in China made by American workers on American soil, without being forced to relocate manufacturing to China, or to sell through the Chinese government, or to transfer valuable technology. We will be able to export products without exporting jobs."); Press Release, *WTO Successfully Concludes Negotiations on China's Entry*, WTO NEWS (Sept. 17, 2001), http://www.wto.org/english/news_e/pres01_e/pr243_e.htm (Most of the agreement was focused on opening China's doors to American businesspeople and investors, including in telecom. Not one politician seemed to guess that market pressures would facilitate the near opposite result).

[338] U.S. Department of Commerce, *Foreign Trade: Trade in Goods with China*, UNITED STATES CENSUS BUREAU, *available at* http://www.census.gov/foreign-trade/balance/c5700.html (showing that the U.S. has only purchased more Chinese goods every year, far surpassing our exports to China. In 2012 we bought $315 billion more in Chinese goods than we exported to China).

[339] Floor Statement of Judiciary Committee Chairman Lamar Smith, The America Invents Act, H.R. 1249, (June 22, 2011), *available at* http://judiciary.house.gov/issues/issues_patentreformact2011.html ("And while America's innovators are forced to spend time and resources defending their patents, our competitors are busy developing new products that expand their businesses and their economies. According to a recent media report, China is expected to surpass the United States for the first time this year as the world's leading patent publisher."). *See also* Lee Chyen Yee, *China tops U.S., Japan to become top patent filer*, REUTERS (Dec. 21, 2011), http://www.reuters.com/article/2011/12/21/us-china-patents-idUSTRE7BK0LQ20111221.

will others' upper classes be the greatest beneficiaries of our IP laws,[340] but our IP laws will also justify the silencing and enslavement of their lower classes.[341] As Wal-Mart has proven with their record of predatory pricing,[342] Main Street America can't compete with businesses that contract with countries that do not believe in equality of class.[343] EBay has already sold off a portion of its company to Alibaba, a similar company that sells cheap products direct from Chinese factories to western consumers.[344] The

---

[340] *Kirtsaeng*, No. 11–697, slip op. at 22-23 (Ginsberg, J., dissenting) ("[T]he Court embraces an international-exhaustion rule that could benefit U.S. consumers but would likely disadvantage foreign holders of U.S. Copyrights.").

[341] Clinton, *supra* note 22, at 20. *See also* Obama, *supra* note 22 ("It ought to concern every person, because it's a debasement of our common humanity. It ought to concern every community, because it tears at the social fabric. It ought to concern every business, because it distorts markets. It ought to concern every nation, because it endangers public health and fuels violence and organized crime. I'm talking about the injustice, the outrage, of human trafficking, which must be called by its true name—modern slavery. Our fight against human trafficking is one of the great human rights causes of our time and the United States will continue to lead it.").

[342] Wal-Mart Stores, Inc. v. Am. Drugs, Inc., 319 Ark. 214, 234 (1995) (ultimately ruling in favor of Wal-Mart, and deciding that selling goods below market value was not predatory or illegal); Edmund L. Andrews, *International Business; Germany Says Wal-Mart Must Raise Prices*, NEW YORK TIMES (Sept. 9, 2000), http://www.nytimes.com/2000/09/09/business/international-business-germany-says-wal-mart-must-raise-prices.html; *Wal-Mart to Sell 85 Stores in Germany*, LOS ANGELES TIMES (July 29, 2006), http://articles.latimes.com/2006/jul/29/business/fi-walmart29.

[343] Sam Hornblower, *Wal-Mart & China: A Joint Venture*, FRONTLINE (Nov. 23, 2004), http://www.pbs.org/wgbh/pages/frontline/shows/walmart/secrets/wmchina.html; Tiejun Cheng & Mark Selden, *The Origins and Social Consequences of China's Hukou System*, 139 THE CHINA QUARTERLY 644 (1994) (Those who have a hukou in Beijing or Shanghai receive social benefits like healthcare and welfare, while those in the countryside do not).

[344] *Alibaba.com Strengthens Position as Go-To Supply Source for U.S. E-commerce Entrepreneurs with Acquisition of Auctiva*, BUSINESS WIRE (Aug. 24, 2010), http://www.businesswire.com/news/home/20100824006735/en. *See also* Sayantani Ghosh & Aurindom Mukherjee, *China's Alibaba Buys Back Half of Yahoo's Stake*, REUTERS (Sept. 18, 2012, 4:02 PM) http://www.reuters.com/

need for companies like Costco and Wal-Mart could be undermined entirely by the development of international business models that they pioneered.

Non-alienable termination rights may be perceived as a safety-valve for unfairness traditionally found in entertainment contracts of adhesion that make non-authors the beneficial owner of copyrights.[345] For instance, original authors of musical works can reclaim their copyright "after thirty-five years (in some cases), after fifty-six years (in other cases), and sometimes even after seventy-five years" have passed since the grant was first executed,[346] as long as it was executed on or after January 1, 1978.[347] In this way major musical hits can be reclaimed, like the Village People's *YMCA* song, which was reclaimed in 2012.[348] However, termination rights do nothing for those who transferred their copyright before 1978,[349] and termination rights do not extend to works "made for hire."[350] Even though termination rights may help even out the balance between starving artists and big business, TRIPs continues to leave

---

article/2012/09/18/us-alibaba-buyback-yahoo-idUSBRE88H0Y520120918 (if Alibaba buys Yahoo!, they will be completely tapped into the American consumer base).

[345] 17 U.S.C. §§ 203, 304 (2013).

[346] Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the "Inalienable" Right to Terminate*, 62 FLA. L. REV. 1329 (2010).

[347] 17 U.S.C. §§ 203(a)(3), 304 (2013).

[348] Scorpio Music S.A. v. Willis, No. 11CV1557 BTM(RBB), 2012 WL 1598043 (S.D. Cal. May 7, 2012).

[349] Don Snowden, *Fighting for Artists' Publishing Rights*, LOS ANGELES TIMES (Mar. 1, 1987), http://articles.latimes.com/1987-03-01/entertainment/ca-6711_1_artists-rights (noting that Richard Berry reached an amicable settlement for half of the publishing rights in the song *Louie Louie* after he had sold it for $750 30 years earlier).

[350] 17 U.S.C. §§ 203, 304 (2013); Michael Cieply, *Court Ruling Says Marvel Holds Rights, Not an Artist*, THE NEW YORK TIMES (July 28, 2011), http://www.nytimes.com/2011/07/29/business/media/disney-wins-marvel-comics-copyright-case.html?_r=0 (Disney owns Marvel Comics).

out lower and middle class rights holders from consideration altogether.[351]

The failure of international IP law to capture the interests of the lower and middle classes was masterfully illustrated in the 2013 Academy Award winning documentary *Searching for Sugar Man*.[352] American artist Sixto Rodriguez's work rose to fame in South Africa without him ever getting paid and without him ever knowing until Rodriguez's eldest daughter happened upon a website dedicated to him in 1998. In South Africa his songs had become the rally cry for Afrikaner apartheid protesters. For years, record companies cut and sold his records sending royalties to the record company that dropped Rodriguez after his records flopped in the United States. Meanwhile, Rodriguez and his family returned to their humble beginnings to live out their days in the rough neighborhoods of Detroit.

What's more, TRIPs leverages IP regulation in developing nations that haven't embraced rights to property, security and liberty regarding physical property.[353] The resulting new regime stifles the expansion of the "self-evident" truth that all men are created equal.[354] Along these lines, Doctors Without Borders reported that patent protection at the level TRIPs requires can kill.[355] Thus some developing countries are acting to limit TRIPs

---

[351] Sunder, *supra* note 130, at 264-65 (noting that the composer of *The Lion Sleeps Tonight*, never benefited economically from its use in Disney's *The Lion King*).

[352] *About Rodriguez*, Rodriguez Official Website, http://www.rodriguez-music.com/about/ (last visited Apr. 24, 2013).

[353] Sunder, *supra* note 130, at 291.

[354] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."). *See also* Zach Carter, *WikiLeaks Reveals Secret Obama Deal*, HUFFINGTON POST (Nov. 13, 2013, 5:54 PM), http://www.huffingtonpost.com/2013/11/13/wikileaks-global-health_n_4269337.html.

[355] *See also* Zach Carter, *WikiLeaks Reveals Secret Obama Deal*, HUFFINGTON POST (Nov. 13, 2013, 5:54 PM), http://www.huffingtonpost.com/2013/11/13/

patent protection to preserve human rights and life.[356] In general, developing countries are under pressure to adopt defensive IP policies to protect "poor people's knowledge."[357] This includes traditional knowledge, geographical indications, and biodiversity. Finally, Creative Commons offers a Developing Nations Creative Commons License. This license is designed to allow third world citizens to release artistic expression in the developing world without also releasing their work in the developed world.[358] Utilitarianism as a regime that reduces the conception of IP to a matter of wealth maximization without considering the costs tomorrow has stood in the way of these sorts of efforts to protect the poor under classes of the world.

Abandoning utilitarianism would also create positive benefits domestically. First, it would at the very least allow us to limit the trend of commoditization and propertization of anything from which value can be derived. Scholars have warned that the current IP regime is a threat to free speech and the public domain.[359] IP could finally be aligned with the finding in State v. Shack, that "[p]roperty rights serve human values."[360] The current trend of commoditization of culture already threatens local foreign cultures, and could end with aspects of our identities (religious, racial and cultural) bought and sold worldwide.[361] If IP is a

---

wikileaks-global-health_n_4269337.html, *Cf.* Amicus Brief of Antitrust Economists, Fed. Trade Comm'n v. Actavis, Inc., No. 12-416, 2013 WL 836946 (U.S. Feb. 28, 2013); Hazen, *supra* note 10, at 795; Hirschler, *supra* note 14.

[356] Sunder, *supra* note 130, at 291.

[357] *Id.* at 298.

[358] *Id.* at 288–89.

[359] MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 90 (2003). *See* Golan v. Holder, 132 S. Ct. 873, 894 (2012) (finding it constitutional for Congress to take things that once fell into the public domain and returning them to foreign private ownership according to international trade agreements under the Uruguay Round Agreements).

[360] State v. Shack, 58 N.J. 297, 304 (1971) (finding that a landowner could not "stand between the migrant workers and those who would aid them.").

[361] Sunder, *supra* note 130, at 275 (noting IP measures taken in India to protect Indian candies made at a religious site and uniquely woven sarees). *See also* Zoe Alsop, *Pictures: China's Fake Disneyland, Overgrown and Ghostly*, NATIONAL

worldwide "struggle over social relations" we must also count the cost to our own culture if major content owners prevail in achieving absolute global IP protection.[362] As Professor Sunder has remarked:

In the Participation Age, people with access to a computer and relatively cheap but powerful digital hardware challenge the hegemony of traditional cultural authorities and create new cultural meanings from the bottom up. . .. Make no mistake: intellectual property law is no mere bystander in this culture war. It both empowers and disempowers individuals and groups when recognizing (or misrecognizing) authors and inventors, pirates and thieves.[363]

Perhaps we don't need to analogize to property's "pirates and thieves"[364] at all. We could just call IP law what it is, statutory law.[365] Those who don't follow the rules are what the statutes call them: *infringers*. However, in the U.S., this is unlikely because pro-regulation versus de-regulation is a highly politicized aspect of the

---

GEOGRAPHIC (Dec. 22, 2011), http://news.nationalgeographic.com/news/travelnews/2011/12/pictures/111222-china-fake-disneyland-disney-world-travel/#close-modal (Someone actually tried to recreate America's main street, the way Disneyland did, in China, and now Disney is opening a "legitimate" theme park in Shanghai. That is our main street being flung out on the world stage).

[362] Sunder, *supra* note 130, at 274–75.

[363] *Id.* at 322–23.

[364] Kaplan, *supra* note 310, at 74 ("[C]haracterization in grand terms then seems of little value: we may as well go directly to the policies activating or justifying the particular determinations.").

[365] Compco v. Blue Crest [1980] S.C.R. 357, 372–73 (Can.) ("[C]opyright law is neither tort law nor property law in classification, but is statutory law. It neither cuts across existing rights in property or conduct nor falls in between rights and obligations heretofore existing in common law. Copyright legislation simply creates rights and obligations upon the terms and in the circumstances set out in the statute."). *See also* Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 COLUM. BUS. L. REV. 335, 336–37 (2004) ("Anyone who does not believe that the IP laws are a form of regulation has not read the [statutes] and the maze of technical rules promulgated under them. . . . The range of government estimation that goes on in the IP system is certainly as great as in regulation of, say, retail electricity or telephone service.").

struggle between Libertarians and Liberals.[366] The attribute of property gives IP rights just the kind of natural rights legitimacy that both Libertarians and Liberals seem to want. Imagine if we leveraged poorer, less fortunate nations into adopting strict IP laws for anything less.[367] The reality is that we probably have. Some are certainly dedicated to an IP-as-property-law regime simply because it would be embarrassing to go back now. Justices Ginsberg, Kennedy and Scalia in their joint dissent in *Kirtsaeng* seemed to think it was an embarrassment to the American government to back out of a maximized regime.[368] However, the majority found that the Constitution called for something more limited, and they had thus avoided the more destructive and, as Jefferson recognized it,[369] more *embarrassing* result of preserving a double standard of freedom globally.[370]

---

[366] Lemley, *supra* note 22, at 1074 ("Regulation is out of vogue, and those who talk about IP as regulation usually do so to denigrate it.") (citing Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272 (2004) ("In the end, 'exclusive rights' are merely another form of regulation that Congress may, and frequently does, use to confer economic rents on favored special interests.")).

[367] Lemley, *supra* note 22, at 1074 ("the problem with the property story [is that] it brings with it too much baggage."); Graham v. John Deere Co. of Kan. City, 383 U.S. 1, 8–9, n.2 (1966) ("Inventions . . . cannot, in nature, be a subject of property.") (quoting Letter from Thomas Jefferson to Isaac McPherson, Aug. 13, 1813, *in* JEFFERSON: WRITINGS, *supra* note 1, at 1291–92 (Jefferson thought giving inventions a limited, exclusive right was an embarrassment, and giving inventions the attribute of property was an impossibility)).

[368] *Kirtsaeng*, No. 11–697, slip op. (Ginsberg, J., dissenting).

[369] Letter from Thomas Jefferson to Isaac McPherson, Aug. 13, 1813, *in* JEFFERSON: WRITINGS, *supra* note 1, at 1291–92 ("That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature.").

[370] *Compare Kirtsaeng*, No. 11–697, slip op. (Ginsberg, J., dissenting) ("The Court's bold departure from Congress' design is all the more stunning, for it places the United States at the vanguard of the movement for 'international exhaustion' of copyrights—a movement the United States has steadfastly resisted on the world stage."), *with* Julius Genachowski, Chairman, FCC, Statement on the U.S. Submission of Initial Input into the International Telecommunication

There has been a lively discussion about what to call IP if not property.[371] Some are concerned that "it is all too common to assume that because something is property, only private and not public rights are implicated."[372] This is to call into question the traditional concept of patents and copyrights as grants of *limited* monopoly in an otherwise public good. Public goods are non-rivalrous and non-excludable. The idea is that if we do not grant some excludability in creative invention and expression, we will not achieve the mandate of "progress" called for in the Copyright and

---

Union's World Conference on International Telecommunications (Aug. 3, 2012) (noting a fight for "Internet freedom" against "some countries [that] restrict the free flow of information online."), *and* Julius Genachowski, Chairman, FCC, Prepared Remarks for the International Telecommunications Union Global Symposium for Regulators in Beirut, Lebanon, *ICT: Global Opportunities and Challenges* (Nov. 10, 2009) (touting the FCC's role to preserve a "free, open and robust Internet" as an example to follow on the world stage).

[371] Lemley, *supra* note 22, at 1074–75 ("My fear is that a focus on analogies will mislead more than it enlightens. If there are sufficient dissimilarities between IP and other areas of law, drawing analogies becomes problematic, not only because of the caveats that are required ('IP is like any other tort, except in the following ways . . . .'), but because those caveats have a way of getting lost over time. This may be what has happened with efforts to talk about IP as a form of property: over time, it is too easy to rely on the shorthand reference to property and come to believe that IP really is like other kinds of property."); Tom W. Bell, *Authors' Welfare: Copyright As A Statutory Mechanism for Redistributing Rights*, 69 BROOK. L. REV. 229, 235–67, 273–74 (2003); Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295, 1306 (1998); Wendy J. Gordon, *Copyright As Tort Law's Mirror Image: "Harms," "Benefits," and the Uses and Limits of Analogy*, 34 MCGEORGE L. REV. 533 (2003); Bruce P. Keller, *Condemned to Repeat the Past: The Reemergence of Misappropriation and Other Common Law Theories of Protection for Intellectual Property*, 11 HARV. J.L. & TECH. 401, 402 (1998); A. Samuel Oddi, *Product Simulation: From Tort to Intellectual Property*, 88 TRADEMARK REP. 101, 107–08 (1998); KAPLAN, *supra* note 310, at 74; Sterk, *supra* note 310, at 43. *See also* Rose: *Canons*, *supra* note 310, at 631.

[372] Lemley, *supra* note 22, at 1071. *But see* Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387, 389 (2003) (noting a debate over whether "copyright law serves to protect certain essential private property interests or whether copyright law is informed by public, regulatory values.").

Patent Clause. However, once the attribute of property began mixing with this conception of IP law, the question has been flipped on its head. We went all the way from asking how limited we can make the grant of these "monopolies" to how broadly we can construe progress to grant ever-increasing "private property" protection to IP rights.[373]

—-

The cost of allowing dishonesty in the marketplace to continue in the area of intangibles is much greater than anyone seems to realize. As our global economies continue to intertwine, it is obvious that market failures can lead to global crisis. The current property and IP regimes contributed to cycles of market failure by allowing and encouraging widespread promises of value in intangible property that may or may not exist. Then when the pension, insurance or stock should pay out, there is little or nothing there. These dead weight losses are most frequently endured by the middle class.

There is hope. Unbeknownst to most property legal scholars,[374] the average American layperson still knows the difference between physical property and intangible property. To put it in context, the average American individual knows the difference between a bar of gold and a promise from their employer that they will receive the value of bar of gold in company shares after many years of faithful service. When they were forced to default on a mortgage that was fatally structured for an economy that only ever grew skyward, they kicked themselves and finally remembered the story of Babel.[375] Now with perfect hindsight, it is

---

[373] Richard Craswell, *How We Got This Way: Further Thoughts on Fuller and Perdue*, 1 ISSUES IN LEGAL SCHOLARSHIP 1, 12 (2001) (warning that thinking of rights as property rights may "exert a sort of psychological force that makes some remedies seem more plausible than others.").

[374] Grey, *supra* note 60 ("[T]he theory of property rights held by the modern specialist tends both to dissolve the notion of ownership and to eliminate any necessary connection between property rights and things.").

[375] *Genesis* 11:1–9; Yalman Onaran, *Basel Becomes Babel as Conflicting Rules Undermine Safety*, BLOOMBERG (Jan. 2, 2013, 6:01 PM), http://www.

shocking that any of us could have believed a lie that the housing market only ever would increase in value. But most Americans did. The housing market crisis represents the greatest redistribution of wealth in our country and it was to the rich upper class. Introducing new limits to the regulatory power of Congress and modifications to our underlying concept of property are not only in order, but according to *Sebelius* these changes are finally underway.

A Note about Bitcoin and Other Digital Currencies

Increasing trust in Bitcoin and other digital currencies because they are gold-backed, inflation resistant or superior to owning a U.S. dollar in any way should be an important signal to law makers. Ever since we decided not to back our currency with gold, favoring regulation through a centralized banking authority, our currency has become worth as much as the U.S. government's word is worth.[376] Thus, the success of our economic system rests on

---

bloomberg.com/news/2013-01-03/basel-becomes-babel-as-conflicting-rules-undermine-safety.html (describing how the international banking rules make no sense, noting that a $639 trillion dollar derivatives market has been forced in to clearinghouses where transactions are backed by collateral). *See also* Bruce I. Jacobs, *Tumbling Tower of Babel: Subprime Securitization and the Credit Crisis*, FINANCIAL ANALYSTS JOURNAL, 17 (2009), http://top1000funds.com/attachments/234_Tumbling%20Tower%20of%20Babel-%20%20Subprime%20Securitization%20and%20the%20Credit%20Crisis.pdf.

[376] Friedman, *supra* note 16, at 637–38 ("Traditional floats [of currencies] have now become respectable." Calling the preserving of gold backing a high price for a "trivial . . . gain." Also grounding his argument for debasing world currencies and developing a futures market in the U.S. on the belief that "[e]xchange rates will almost surely continue to be stated in terms of the dollar. In addition, the U.S. has the largest stock in the world of liquid wealth on which the market can draw for support. It has a legal structure and a financial stability that will attract funds from abroad. It has a long tradition of free, open, and fair markets."); STOCKMAN, *supra* note 3, at 5, 282–83, 290–91 ("Wall Street has become a vast casino where leveraged speculation and rent seeking have displaced its vital function of price discovery and capital allocation. The September 2008 financial crisis, therefore, was about the need to drastically deflate the Wall Street behemoths—that is, dangerous and unstable gambling houses—fostered by decades of money printing and market rigging by the Fed. Yet policy veered in

the honesty of our government in the creation, allocation and valuation of currency. Congress has generally trusted in Friedman and others who blindly hoped that the free market would protect the U.S. government from "errors" in the creation, allocation and valuation of the U.S. dollar.[377] This ultimately resulted in the U.S. treasury and Standard and Poor's having had a disagreement in valuation within the trillions of dollars.[378] Similarly, there is a connection with errors in the creation, allocation and valuation of intangible property that leads to astronomical dead weight losses that are disproportionately endured by the American middle class.[379]

PART III: RECLAIMING A PRINCIPLE OF HONESTY

Returning to requirements of honesty and truthfulness is the appropriate answer to our recent market failures. History has long held that the public has a right to an open and honest marketplace.[380] Every common American deserves a marketplace where the rules are clearly presented and enforced. Deceitfulness should not be read into a nature of some forms of property,[381] and the risks of trading in such property should not be foisted onto purchasers as buyer's remorse. This would undermine contract law's centuries old prohibition of "false purveyor[s]."[382] Instead,

---

the opposite direction, propping them up and thereby perpetuating their baleful effects, owing to a predicate that was dead wrong.").

[377] *See* David Corn, *Alan Shrugged*, MOTHER JONES (Oct. 23, 2008), http://www.motherjones.com/politics/2008/10/alan-shrugged.

[378] Katz & Del Giudice, *supra* note 36.

[379] Tami Luhby, *Why America's Middle Class is Losing Ground*, CNN MONEY (Mar. 5, 2013, 11:51 AM), http://money.cnn.com/2013/03/05/news/economy/middle-class-wages/index.html. *See generally*, Szeltner et al, *supra* note 3.

[380] BAKER, *supra* note 12, at 320. *See also* 2 WILLIAM BLACKSTONE, COMMENTARIES *449.

[381] Amicus Brief of Antitrust Economists, Fed. Trade Comm'n v. Actavis, Inc., No. 12-416, 2013 WL 836946, at *23-24 (U.S. Feb. 28, 2013); Hazen, *supra* note 10, at 795; Hirschler, *supra* note 14.

[382] U.C.C. § 2-103(b) (2001) ("'Good faith' in the case of a merchant means *honesty in fact* and the observance of reasonable commercial standards of fair

the courts should adopt honesty as a formality similar to the form of "special case" which once removed an "unsatisfactory fiction," which equated non-forcible wrongs with wrongs committed with "the force of arms."[383] Intangible property claims being defended as if they are physical property is a similar unsatisfactory fiction. Courts should reclaim the ability to nuance the formal judicial consideration of intangibles so as to recognize the deceitful creation, allocation and valuation of intangibles. After all, establishing the truth is necessary to carrying out justice.[384]

In fact, Thomas Jefferson and James Madison so inspired Congress to draft the First Amendment based on a vigorous defense of religious and intellectual freedom adopted in the Virginia Act for Religious Freedom.[385] The conflict between the puritans and anyone who held different religious beliefs about God inspired the founders to join religious freedom with the freedom of assembly

---

dealing in the trade.") (italics added); BAKER, *supra* note 12, at 278. *See* Somerton v. Colles (1433), *in* C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 343 (1949).

[383] BAKER, *supra* note 12, at 329.

[384] U.C.C. § 2-103(b) (2001) ("'Good faith' in the case of a merchant means *honesty in fact* and the observance of reasonable commercial standards of fair dealing in the trade.") (italics added); MODEL RULES OF PROF'L CONDUCT R. 4.1(a), 7.1, 8.1(a), 8.2(a), 8.4(c) (1983) (saying lawyers may be disciplined if they lie).

[385] Thomas Jefferson, A Bill for Establishing Religious Freedom, enacted on Jan. 16, 1786, *in* JEFFERSON: WRITINGS, *supra* note 1, at 347 (This bill was enacted with the support of James Madison. It vindicates religious and intellectual freedom and was one of the sources that Congress drew upon when drafting the Bill of Rights in 1789: "[T]he truth is great and will prevail if left to herself, [] she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons free argument and debate, errors ceasing to be dangerous when it is permitted freely to contradict them."). *Cf.* Rose: *The Comedy*, *supra* note 292, at 778 (noting that the Roman Empire recognized public property in connection with a society's social glue, which for Rome was religion and noting that our social glue might be free speech); *Genesis* 1:3 ("And God said, 'Let there be light,' and there was light."); *John* 1:1, 14 ("In the beginning was the Word, and the Word was with God, and the Word was God . . . The Word became flesh and made his dwelling among us.").

and the freedom of speech in the First Amendment.[386] This decidedly aligned the United States with the views of Roger Williams, the founder of Rhode Island, who argued that the sword of spirit did not hang "at the loins or side, but at the lips."[387] In fact, the arguments of theologians like Williams may not have carried the day against the puritans were his vision for the colonies without free speech. In fact, the decision to keep the Church and State separate was based on the condition that a robust freedom of speech would be enforced, because the founders trusted the people to seek out the truth for themselves and that if the truth was "left to herself" she could naturally defeat lies, seditiousness and untruth. Thus, free speech would be protected and the truth would fend for herself. However, positivist property concepts have threatened to box in the truth, strip her of her "natural weapons,"[388] and repurpose them to serve private and special interests.

Dishonesty, Market Failure and IP

Property law has long been deferent to the common practices of the marketplace and society's accepted communications "to the universe."[389] This deference seems to turn

---

[386] U.S. CONST. amend. I.

[387] Williams, *supra* note 297.

[388] Thomas Jefferson, *A Bill for Establishing Religious Freedom, enacted on January 16, 1786, in* JEFFERSON: WRITINGS, *supra* note 1, at 347.

[389] Pierson v. Post, 3 Cai. R. 175 (N.Y. 1805) ("If any thing, therefore, in the digests or pandects shall appear to militate against the defendant in error, who, on this occasion, was the foxhunter, we have only to say *tempora mutantur;* and if men themselves change with the times, why should not laws also undergo an alteration?"); Swift v. Gifford, 23 F. Cas. 558, 559 (D. Mass. 1872) ("The cases cited in the argument prove a growing disposition on the part of the courts to reject local usages when they tend to control or vary an explicit contract or a fixed rule of law."); Heppingstone v. Mammen, 2 Haw. 707, 712 (1863) ("According to the usage which prevails among whalemen, as I understand it from the evidence, if the 'Richmond' had fallen in with the whale dead, having died of the wounds inflicted on it by the 'Oregon's' men the previous evening, and the respondent had arrived and asserted his claim to it, before it was 'cut in,' the libellant must have given it up.").

property cases into a yelling match.[390] Courts are often ill-equipped to make a fair determination about the specific factual circumstances pertaining to who owns what.[391] If a party gave up possession a court may take it as evidence of a common practice indication that party never had ownership, or abandoned ownership.[392] Thus the court may decide against, as many courts have, the allegations of those who let go of physical possession. Those who refuse to give away their possession, even if they are acting against the common practice and contrary to the public interest itself, have a much better chance of holding onto their property.[393] Often the quickest and loudest person to stake a claim by yelling the mainstream culture's property jargon will prevail.

In the case of the Blackstonian conception of physical property, labor theory and utilitarianism's phobia of inefficiency had convinced us to essentially endure the yelling match, so to speak, in order to avoid a tragedy of the commons.[394] However, the underlying equation that once negative externalities become large enough that the transaction costs for creating a property rights

---

[390] Carol Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 81 (1985) ("Possession as the basis of property ownership, then, seems to amount to something like yelling loudly enough to all who may be interested. The first to say, 'This is mine,' in a way that the public understands, gets the prize, and the law will help him keep it against someone else who says, 'No, it is *mine*.'").

[391] 2 WILLIAM BLACKSTONE, COMMENTARIES *406–07 (Even Blackstone wouldn't admit there was any property in a book once it had been communicated to the world, but for the Statute of Anne which solved his problem).

[392] *Compare Swift* 23 F. Cas. 558 at 560 ("In this case the parties all understood the custom, and the libellants' master yielded the whale in conformity to it.") *with Heppingstone*, 2 Haw. 707 at 710, 713 ("Libellant went on board and saw the respondent, who refused to give him half the whale, whereupon libellant left, saying he would see about it at Honolulu . . . It seems to me, that, under all the circumstances of the case, the whale may fairly be considered the joint prize of both ships.").

[393] Thomson v. Larson, 147 F.3d 195, 202–03 (2d Cir. 1998) (noting that an "important indicator" of copyright authorship, which is necessary for owning a copyright, is discerning who exercised "decision-making authority" over the creation of the work).

[394] Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. PAPERS AND PROCESS 347, 350–53 (1967).

regime is justified cannot support all property claims as positivism suggested it should.[395] Some scholars fear that copyright and patent is no longer creating progress in knowledge and learning as lawmakers have seemingly abandoned a conception of a public good underlying the grant of copyright and patent rights.[396] Accordingly, they note that lawmakers have stopped considering the social costs of granting copyright and patent rights—that these rights actually can exclude the public from important information and opinions. Information is something Carol Rose might call an "inherently public good."[397] Nevertheless, copyright and patent rights and remedies seem to have been given the color of private property, and has accordingly been used to cast a "tragic" light on the public interest in information.

Other sorts of public goods, like bridges, navigable waterways, and access to public roadways tend not to be privatized because of the ever-increasing positive externalities they create.[398] This has been called an inverse "comedy" from the generally discussed tragedy of the commons.[399] Public rights in property have been recognized since Roman times, and had persisted until they were picked up again by the framers, to protect goods that consist of a society's "social glue."[400] What's more is that the framers

---

[395] *Id.*; Lemley, *supra* note 22, at n.38–42, 44, 46–47. *But see* Landes & Posner, *supra* note 17, at 475.

[396] Peter S. Menell, *Tailoring Legal Protection for Computer Software*, 39 STAN. L. REV. 1329, 1337 (1987).

[397] Rose: *The Comedy*, *supra* note 244, at 723; Sunder, *supra* note 129, at 262–63 (legal scholars continue to understand IP as solely a tool to solve an economic "public goods" problem).

[398] Rose: *The Comedy*, *supra* note 292, at 768–69; Frischmann, *supra* note 313, at 931.

[399] Lemley, *supra* note 22, at 1051 ("The result [of copying and disseminating ideas] is that rather than a tragedy, an information commons is a 'comedy' in which everyone benefits. The notion that information will be depleted by overuse simply ignores basic economics."); DAVID BOLLIER, SILENT THEFT: THE PRIVATE PLUNDER OF OUR COMMON WEALTH 37 (2003) (reverse to "comedy" or "cornucopia" or "inverse" commons that occurs with non-depletable information); Rose: *The Comedy*, *supra* note 292, at 768–69.

[400] Rose: *The Comedy*, *supra* note 292, at 777–78.

believed that the minimization of costs to the public for access to public goods was necessary to foster the socialization that occurs in a healthy marketplace.[401] This socialization was essential for continued peace because "a nation of merchants would scarcely reach for its weapons."[402] Thus, the First Amendment protection of free speech, the freedom of assembly and the freedom of religion is the appropriate place to house the American concept of public goods.

In fact, the interaction of copyrights and patents with information and free speech is inverted from the way real property interacts with a commons. This highlights an information common's comedic nature. Instead of being a response to "the allocative distortions resulting from scarcity . . . it is a conscious decision to create scarcity in a type of good in which it is ordinarily absent."[403] Without these rights, a public good would remain relatively non-excludable and thus, difficult to monetize.[404] Public goods are also non-rivalrous. Thus, no matter how many times they are used, they simply never get used up. In contrast, physical goods like apples are rivalrous because they can only be used up once. Thus, there is no tragedy of the commons problem solved by copyright or patent law. Nevertheless, copyright and patent holders have won more protection of their rights than a free market would protect scarce physical property.[405] It follows that today's copyright and patent rights are too robust.[406]

---

[401] *Id.*

[402] *Id.* n.300, 301.

[403] Lemley, *supra* note 22, at 1055.

[404] *See generally Kirtsaeng*, No. 11–697, slip op. (Ginsberg, J., dissenting).

[405] Lemley, *supra* note 22, at 1055.

[406] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved."); Festo Corp. v Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722, 736 (2002) ("[P]atent rights are given in exchange for disclosing the invention to the public."); W.L. Gore & Assocs., Inc. v. Garlock, Inc., 721 F.2d 1540, 1550 (1983) ("Early public disclosure is a linchpin in the [patent] system."); Lemley, *supra* note 22, at 1052 ("[T]here is no general reason to worry about uncompensated positive

Part of the reason why is that copyright and patent rights are being conceived of as private property. The term "intellectual property" itself may have fueled this shift, a term which became a common descriptor in the field when the World Intellectual Property Organization (WIPO) was established.[407] It seems that international interests and a broad concept of property have gone hand in hand. WIPO and TRIPs have thus continued to buttress our acceptance of Patent, Copyright, Trademark, Trade Secret and Publicity Rights as a collective "Intellectual Property" field. The Ginsberg dissent in *Kirtsaeng* argued that U.S. supported TRIPs agreements strengthened international copyright to a point where it overpowered common law alienation rights to physical property.[408] The majority relied on the Constitution and common law to arrive at a much more reasonable solution that did not draw upon an "intellectual property" rationale.[409]

The *Kirtsaeng* majority's reliance on a constitutional foundation and reluctance to apply property jurisprudence was proper. It was proper because it sought to define copyrights by the

---

externalities. Indeed, part of the point of intellectual property law is to promote uncompensated positive externalities, by ensuring that ideas and works that might otherwise be kept secret are widely disseminated."); Bell, *supra* note 371, at 231 ("[C]opyright focuses on generating positive externalities . . . [C]opyright concentrates on increasing the public good afforded by expressive works."); Robert A. Kreiss, *Accessibility and Commercialization in Copyright Theory*, 43 UCLA L. REV. 1, 7 (1995) ("[T]he more works that are disseminated, the more [copyright's] goal is advanced.").

[407] Lemley, *supra* note 22, at 1034 (At the very least, the rise of using the term "intellectual property" coincided with the rise of the "property rights" view of IP. Prior to the 1960's, the term "intellectual property" also showed up in European literature) (citing A. NION, DROIT CIVILS DES AUTEURS, Artistes ET Inventeurs (1846) (referring to "proriete intellectuelle.")); WIPO Convention Establishing the World Intellectual Property Organization, July 14, 1967, art. 2 (viii), 6 I. L. M. 782, 784 (WIPO defined intellectual property as including "rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.").

[408] *Kirtsaeng*, No. 11–697, slip op. at 33 ("Moreover, the exhaustion regime the dissent apparently favors would provide that 'the sale in one country of a good' does not 'exhaus[t] the intellectual-property owner's right to control the distribution of that good elsewhere.'").

[409] *Id.*

grant of power by which they were created. In the United States, copyrights were not created through common law property principles, and in fact they are not meant to interfere with the legal alienation of tangible property. Similarly, all intangible property claims should be tested in court to make sure they fit within the bounds of the law that granted them.

In the age of information, when intangibles from digital currencies to a business's goodwill are being traded on the open market globally, courts need a test to guarantee the honest creation, allocation and valuation of these "items."[410] These intangibles cannot be inspected because they are not detectable by our senses. In fact, intangibles can only be comprehended as placeholders for something else, like physical property or other valuable backing. Thus, the lack of a sufficient nexus with a physical thing should indicate that there is no property right in the intangible in question.

De-cloaking intangibles with no actual "thing" backing up its value will create a more stable market. The public, main street America and the marketplace itself can no longer abide dishonest or reckless property claims in intangibles. Furthermore, the blanket recognition of the movement of intangibles over state lines to justify expansive federal regulation violates the co-existence of the grants of legislative power, and federalism. Entertaining regulation based on intangible movement creates undue pressure on the judiciary to explain how intangibles move or exist relative to state geography. In fact, it would be easier for a court to describe the

---

[410] *See, e.g.*, Elizabeth Hester & Erik Holm, *Citigroup to Sell Umbrella Logo to St. Paul Travelers (Update 7)*, BLOOMBERG, (Feb. 13, 2007, 6:44 PM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aAsp4RJRDG7w (After a series of corporate purchases and sales Citibank found that a TM that is extremely valuable to Travelers was not valuable to Citi which should raise questions about the 'value' of these items, and to what extent intangibles can be conceived of as 'items': "The biggest U.S. bank plans to sell its red umbrella trademark to St. Paul Travelers Cos. and operate under the 'Citi' name after failing to get most consumers to think of anything except insurance when they saw the 137-year-old symbol.").

movements of God.[411] The impossibility of describing how non-things move is why we have "arising under" jurisdiction through a separate grant of constitutional power for copyright and patent laws. Nothing would be rejected by the popular mind so quickly as how the movement of a non-thing intangible allows long arm federal regulation that interferes with the interests of most Americans. This was most clearly seen when public outcry shut down SOPA, PIPA and ACTA.

Thus, judicial forbearance requires the Supreme Court to continue its revision of Constitutional interpretation. Affirming a free-riding problem and an expansive view of medical licenses as carrying with them property rights will not do. Allowing the Commerce Clause to continue facilitating the circumvention of the limits of the other grants of legislative power cannot continue. The Court needs to adopt an honest and truthful approach to intangible property that reasonably limits its endorsement of highly political issues best left to other branches. This should include a closer eye on the honest creation, allocation and valuation of intangible property rights.

Honesty as a Procedural Formality

Formalism was generally abandoned when the Federal Rules of Civil Procedure were adopted stating, "there is but one form of action, the civil action."[412] Thus, as long as a plaintiff was able to plead in their facts a cause of action a court could hear their case, no matter the form in which the facts were pled. A result of the shift away from formalism has been that the courts no longer are able to develop new causes of action through formalistic

---

[411] *Sebelius*, 132 S. Ct. at 2589 (The Framers "were 'practical statesmen' and not metaphysical philosophers."). *See, e.g.*, Kidd v. Johnson, 100 U.S. 617, 619 (1879) ("The right to use the trade-mark is not limited to any place, city, or State, and, therefore, must be deemed to extend everywhere.").

[412] FED. R. CIV. P. 2.; *Cf.* BAKER, *supra* note 12, at 60 ("redistribution of so much of the law under one 'form' [trespass on the case] introduced a good measure of procedural uniformity" which eventually facilitated the abolishment of the legal forms in England).

"evolution."[413] Nevertheless, those causes of action that existed when the forms were closed still must be pled, even if informally. In this way "the forms of action . . . still rule us from their graves."[414] Even so, it was seen as a step forward to cast off formalism and allow parties to move U.S. Courts as long as a colorable action had been pled in whatever form.[415] This practice purportedly removed almost any formalistic requirement on a court to discuss whether the form of action brought was proper. It is precisely because formality has been abandoned that spectators have been able to claim "contract is the new copyright"[416] and that EULA's are "the new millennium's founding social contract."[417]

Conversely, *Ichbal* and *Twombly* arguably have re-adopted a formalism in Federal Courts that could straighten out these

---

[413] BAKER, *supra* note 12, at 58–60, 264, 303 ("Most of the law as we know it was shaped by this process. Trespass on the case brought new areas of jurisdiction to the royal courts, such as defamation; it filled gaps in the *praecipe* actions, by enabling damages to be awarded for breach of parol contracts, for past nuisances, and for conversion of goods; and finally it enabled the *praecipe* actions themselves to be replaced."); FIFOOT, *supra* note 382, at 77.

[414] BAKER, *supra* note 12, at 61 (quoting Young v. Queensland Trustees 99 CLR 560(1956) (Eng)).

[415] FED. R. CIV. P. 8 (only requiring pleadings to contain a short and plain statement of the claim). *But see* Bly-Magee v. California, 236 F.3d 1014, 1018 (9th Cir. 2001) (citing FED. R. CIV. P. 9(b) that claims of fraud must be plead with particularity to dismiss a claim for lack of particularity in the pleading).

[416] Lydia Pallas Loren, Professor, Lewis & Clark Law School, Classroom Lecture on Copyright and Contract (Mar. 20, 2012). *See also* Marshall v. New Kids On The Block P'ship, 780 F. Supp. 1005, 1008 (S.D.N.Y. 1991) ("The line between cases that 'arise under' the copyright laws, as contemplated by § 1338(a), and those that present only state law contract issues, is a very subtle one and the question leads down 'one of the darkest corridors of the law of federal courts and federal jurisdiction.'") (quoting Arthur Young & Co. v. City of Richmond, 895 F.2d 967, 968-69 (4th Cir. 1990)); Orit Fischman Afori, *Implied License: An Emerging New Standard in Copyright Law*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 275, 294 (2009) ("There is a need for developing a non-contractual new standard in copyright law, rather that the proposed development of the implied license doctrine would not be a total deviation from legal fundamentals.").

[417] Fairfield, *supra* note 123, at 44.

confusions.[418] Where once a plaintiff needed only to plead the elements of a cause of action that were possible, the Supreme Court has increased the formality required by dismissing claims that are not "plausible" on the facts. As the Supreme Court explained, plausibility lies somewhere between possibility and probability. Similarly, minimum formalistic safeguards should be instituted so that dishonest creation, allocation and valuation of intangible property is not *de facto* underwritten by the general informality of today's age.[419] Requiring truthful claims of intangible property would be so small a burden for the Court and so central to its project of administering justice under rule 1 that it could fit under the plausibility standard put forth in *Ichbal* and *Twombly* without rising to the type of formalism ousted by rules 2 & 8.[420] The heightened pleading requirements in Rule 9(b) requiring "particularity" in certain circumstances had not seemed to run afoul our preference of informal procedure.[421] Perjury laws, designed to ensure the truthfulness of a Court's findings, could also harbor a procedural enquiry as to an intangible's honest creation, marketing and valuation.[422] The definition of "good faith," including "honesty in fact" under the Universal Commercial Code and rules4.1, 7.1 and 8.4 of the Model Rules of Professional Conduct also support such a simple and virtually costless prophylactic formality.[423]

---

[418] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (This was a criminal case that seems to require a formal standard that a cause of action be pled plausibly on its face. This is more than mere possibility); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 546 (2007) (This was a civil case that also heightened formal standards to "plausible" from possible on its face); FED. R. CIV. P. 2.

[419] *See, e.g.*, Gretchen Morgenson, *Arcane Market is Next to Face Big Credit Test*, THE NEW YORK TIMES (Feb. 17, 2008), http://www.nytimes.com/2008/02/17/business/17swap.html?ref=creditdefaultswaps&_r=0 (Credit default swaps, for instance, could be cabined away from the institution of property when being reviewed in court by formalistically deciding they are purely an animal of contract law).

[420] FED. R. CIV. P. 1, 2, 8.

[421] FED. R. CIV. P. 9(b).

[422] 18 U.S.C. § 1621.

[423] U.C.C. § 2-103(b); MODEL RULES OF PROF'L CONDUCT R. 4.1(a), 7.1, 8.1(a), 8.2(a), 8.4(c) (1983). *See also* BAKER, *supra* note 12, at 306 (noting that actions

Honesty as a formal requirement is minimalist by nature, and would quickly ferret out cases on the outset that were not properly brought. This is so because the truth is necessary for carrying out the administration of justice and without it half-truths and lies will slow down the judicial process.[424] If someone claims to have acquired some newfangled property right, they should be obliged to explain on the outset of a case how this right was created, who owns it, and the basis of its worth or value. Once this is established to the court's satisfaction they would be allowed to proceed under a theory of property. If a party failed to satisfy a court's inquiry into the honesty of their property claims, any claim under a property theory should be dismissed. The tradition of discussing whether a proper claim had been brought was long practiced in English Courts as a matter of procedure.

Take for instance *The Shepherd's Case*, heard in 1486 by an English court.[425] A writ of *trespass on the case* was brought against a negligent shepherd that let 100 sheep drown of which he was entrusted to watch. Before the case could be heard, the judges had to discuss whether an "*action sur le cas* lie[d]" or whether it was more appropriately an "action of Covenant."[426] Unfortunately, modern judges have been stripped of this tool to parse between whether a case was properly brought under contract or property. Thus, intangible property claims have been allowed to give cases the color of legitimacy without question. In this way copyright has been used to infuse contracts with heavy remedies that contract law was not made to carry.[427]

The form of action called "trespass on the case"[428] was adopted into American common law most famously in *Pierson v.*

---

on the case inspired statutes of frauds to ensure more honesty in contracting for property).

[424] 18 U.S.C. § 1621.

[425] The Shepherd's Case Y.B. 2 Hen.7, Hil. f. 11, pl. 9 *in* FIFOOT, *supra* note 382, at 86–87.

[426] *Id.*

[427] *See* Afori, *supra* note 416, at 294.

[428] BAKER, *supra* note 12, at 59 ("The nature of the distinction [between trespass and case] was arbitrary and difficult to appreciate. Eighteenth-century

Post.[429] According to a required formality, the court considered how a property right in a wild animal may be properly claimed.[430] Similarly, courts should require an explanation as to how property rights are created in intangibles. The forms were not federally abandoned until the adoption of the Federal Rules of Civil Procedure in 1938.[431] The states that had not yet abolished the forms of action in 1938 eventually followed suit and today the forms of action have been closed in every U.S. jurisdiction as a matter of procedure. Nonetheless, in property law actual possession continues to be the rule for claiming property in *ferae naturae* and similar cases, as the Second Circuit has found that the application of a foreign sovereign's patrimony laws required that they had actually exercised a possessory interest in the items being claimed.[432] Thus, abandonment of the forms has only limited the Court's prerogative to reconsider established rules of law.[433] It has not, however, limited the rules that were once established by the formal practices of our history or their formal application to the facts.

The closing of the forms of action purportedly took law reform out of judicial review.[434] Accordingly, legal scholars have

---

rationalisation made the test one of directness: 'in trespass the plaintiff complains of an immediate wrong, and in case of a wrong that is the consequence of another act.' An action of trespass for fixing a spout so that it directed rainwater onto the plaintiff's house was therefore struck down by the King's Bench on the ground that the proper action was case.").

[429] Pierson v. Post, 3 Cai. R. 175 (N.Y. 1805).

[430] *Id.*

[431] The Rules Enabling Act, 28 U.S.C. § 2072 (2012).

[432] United States v. Schultz, 333 F.3d 393, 405 (2d Cir. 2003) (deciding that Egypt had to have taken possessory interest over the artifacts to claim them under its patrimony law—this is the same as the old rules for hunting wild animals).

[433] BAKER, *supra* note 12, at 61 ("[T]he posthumous rule of the forms of action has tended towards a tyranny which in life they were never permitted. The categories of legal thought were closed in 1832 [in England], and where once the law might have developed through the recognition of new writs it is now left at the mercy of commissions and an overworked parliament. Law reform is no longer subject to judicial review [in England].").

[434] *Id.*

cited *numerus clausus*[435] and announced that we should not fear an expansion of legally accepted property rights, despite the rise of positivism. Property rights in intangibles and the positivist movement would be a limited one, by this very principle. However, the result seems to have been quite the opposite. Positivism is the legal norm, and property rights in intangibles are being claimed with a renewed fervor. And now, without the help of an open ended formality like trespass on the case—which formally allowed a court to consider for example how a property right is created in wild animals—courts may be unable to review whether an intangible property claim has been properly brought. Requiring honesty in intangible property creation, allocation and valuation will take at the least, a minimum amount of formalism in requiring plaintiffs to plead "honest" property claims, or to call out dishonest property claims. Disputes like the one in *Pierson v. Post* about the nature of property rights in a wild fox should be heard in court regarding intangibles. Otherwise, the nature of intangibles will be decided by old rules that do not fit and the information age will continue to binge on the over-allocation, over-creation and over-valuation of intangibles.

CONCLUSION: APPLYING THE TRUTH TO INTANGIBLES

The concept of property envisioned by the framers and embodied in our constitution was necessarily physical property. Thus the Constitutional provisions that protect our property and security need not usher in a positivist conception of property without a heightened scrutiny standard that requires some connection to physical property. A standard of honesty seems up to the job and should be applied to intangibles by the Court before it allocates the color of property. The Court seems an ideal place to adjudicate the truth of a matter and it should not shy away from its duty to do so.

---

[435] Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 19 (2000) ("The numerus clausus is probably at its weakest in the area of intellectual property.").

The effects of this policy on markets for physical property, intangibles valued accurately by real property backing and honest business practices will be minimal to none. Only dishonest practices that pull value out of nowhere, or that depend on the winds of chance for payout, will be removed from the property regime. They may continue to subsist under contract law provided they do not untruthfully hold themselves out to be trading in a form of property. But they will no longer get the implicit approval conferred by the attribution of property through the judicial branch.

It may seem subtle at first, but the de-cloaking of dishonest creation, valuation, and allocation of intangible property rights will make them much less mobile. Contracts that include intangibles that are not cloaked in property would not be subject to buyer's remorse.[436] Instead they would be subjected to contract law's good faith and fair dealing requirements.[437] The result if a violation is found would be to set the parties back to their original position had the contract been fair and honest. This would be much more desirable than the current default of buyer and seller's remorse regarding intangible property transfers.[438]

Such a policy would preserve the judiciary and the credibility of the U.S. government in general. Imbuing intangibles with the attribute of property is risky because it implies judicial approval of market practices. The members of the other branches of government cannot expect to underwrite too many liars and scandals without risking peaceful overthrow by their constituents during election time. The politics involved therein demand that the judiciary settle a safe distance from the fray.

Furthermore, our continued credibility on the world's stage depends on a closer eye on marketplace honesty and fairness. All cultures and all nations recognize lying as an undesirable if not

---

[436] Sherwood v. Walker, 66 Mich. 568, 577, 33 N.W. 919, 923 (1887); Wood v. Boynton, 64 Wis. 265, 25 N.W. 42, 44 (1885).

[437] U.C.C. § 2-103(b) ("'Good faith' in the case of a merchant means *honesty in fact* and the observance of reasonable commercial standards of fair dealing in the trade.") (emphasis added).

[438] Hunt, *supra* note 31, at 713 ("Fraud inevitably increases during a bubble."), and at 743 (describing ways a court can rescind "bubble contracts.").

outright unacceptable character trait in a business partner. The current trend of underwriting property regimes that aid American corporations in the non-truthful creation, valuation, and allocation of intangible property is a sure way to destroy our credibility on the international market.

The Supreme Court and all lawmakers should continue to recognize information as an inherently public good, and freedom and equality as a baseline for the future of IP regulation and regulation of intangible property in general. In order to achieve this, the Court should adopt a conception of honesty in creation, allocation and valuation of intangible property. Reclaiming a principle of honesty will ensure that market failures are staved off and will protect a continued growth to the American economy and the middle class. Furthermore it will safeguard American business abroad from being branded dishonest and thus not trusted. Whether we see Jay Gatsby or Robin Hood as a greater evil is irrelevant. Everyone, including the founders and framers of the U.S. Constitution,[439] has agreed that dishonesty is disfavored, destructive

---

[439] THE FEDERALIST NO. 78 (Alexander Hamilton) ("It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law."), *available at* http://thomas.loc.gov/home/histdox/fed_78.html. *See also* THE FEDERALIST NO. 1 (Alexander Hamilton) ("In the course of the preceding observations, I have had an eye, my fellow-citizens, to putting you upon your guard against all attempts, from whatever quarter, to influence your decision in a matter of the utmost moment to your welfare, by any impressions other than those which may result from the evidence of truth.") *available at* http://thomas.loc.gov/home/histdox/fed_01.html; THE FEDERALIST NO. 2 (John Jay) ("Whatever may be the arguments or inducements which have wrought this change in the sentiments and declarations of these gentlemen, it certainly would not be wise in the people at large to adopt these new political tenets without being fully convinced that they are founded in truth and sound policy.") *available at* http://thomas.loc.gov/home/histdox/fed_02.html; THE FEDERALIST NO. 10 (James Madison) ("The instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished.") *available at* http://thomas.loc.gov/home/histdox/fed_10.html; THE FEDERALIST NO. 85 (Alexander Hamilton) ("The perpetual changes which have been rung upon the wealthy, the well-born, and the great, have been such as to inspire the disgust of all sensible men. And the

and an obstruction to the administration of justice. Thus, subjecting claims of intangible property to a standard of honesty as a matter of formal procedure in court is in the best interest of everyone.

---

unwarrantable concealments and misrepresentations which have been in various ways practiced to keep the truth from the public eye, have been of a nature to demand the reprobation of all honest men.") *available at* http://thomas.loc.gov/home/histdox/fed_85.html.