

A COMMENT ON INFORMATION PROPERTIZATION AND ITS LEGAL MILIEU

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My main purpose in this essay is to urge that policy arguments about property in the digital environment take explicit cognizance of other policy considerations that tend to bound propertization: contractual ordering, competition, and freedom of expression. These policy considerations form the legal milieu in which propertization is situated.

I am hoping that a metaphor will help illuminate this point. Imagine propertization is a legal neighborhood. In that neighborhood, at least when we are talking about intellectual property, we tend to argue about the level of control necessary to incentivize appropriately those who invest in and create information. In other words, this neighborhood corresponds to a certain type of discourse. The property neighborhood is bounded by other neighborhoods, and other characteristic policy discourses. In the contract neighborhood, we tend to talk about voluntary interactions resulting in gains from trade, sometimes speaking in terms of individual autonomy and sometimes in terms of efficiency. In the competition neighborhood, we tend to talk about efficient markets unhampered by cartelization or other market failures, and about the fostering of consumers' autonomy through ability to obtain goods and services in free markets. In the free expression neighborhood, we tend to talk about both individual autonomy and the structuring of the polity in terms of expressive range and lack of constraint. These discourses all relate to core commitments of political liberalism, and they are all quite traditional in common-law adjudication and in policy arguments underlying various legal doctrines. They all operate to shape and limit propertization. It has seemed to me, however, that to a large extent this tradition has been submerged when it comes to intellectual property, especially when propertization is connected to new practices in the digital networked environment; so my rather modest goal in this essay is simply to remind commentators and decision makers of the larger context in which arguments about propertization should be considered. The propertization neighborhood should be always aware of its function within the city as a whole.

I.

I am using the word "propertization" instead of "property" to draw attention to the fact that what counts as property is malleable. An investigation of whether or not something is or ought to be property or a property right often has five features.

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This Comment began as a lecture given at Cardozo Law School in March 2004, and later at Indiana University/Indianapolis (IU/PUI) School of Law, University of Maine School of Law, and Cleveland-Marshall Law School. Thoughtful comments from colleagues at each of these institutions were very helpful in developing the ideas in this Comment; thanks to all of you.

First, what counts as property is under our—the society’s, the law’s—control. Of course, some things might be property in a natural-law sense whether or not recognized by society or the law. But the federal regimes of intellectual property, which are my primary concern here, are regimes of positive law, at least in the U.S.

Second, what counts as property can change. Property is not static. New property rights come into being (such as the digital audio transmission right¹) and others decay or are cancelled (such as the rights of users to re-use works that would have entered the public domain but for the Copyright Term Extension Act²). Of course, if changing of property rights infringes other rights, then compensation might be required.

Third, becoming property is a process. A property right might have a definite point of birth, such as the date legislation is passed, though it is preceded by an indefinite period of gestation; legislation can occur in response to public debate which generates or recognizes expectations that gradually coalesce. A line of court decisions can reveal that something has become a property right even if the date of birth is not pinpointed.³

Fourth, property is scalar, not either/or or zero sum. Things can be more or less propertized. A resource can be subject to a narrower or wider scope of owner control; the sticks in the bundle can be few or many.

Fifth, some aspects or zones of property are contested, or in a grey area. The outer boundaries of trademark dilution or copyright enforcement against third parties are blurry and shifting.

These features of property investigations point up property’s evolutionary and contested character. With this perspective, let’s focus on information propertization. With respect to information, many have observed that propertization is increasing. The Copyright Term Extension Act added 20 years to the term of the owner’s control.⁴ Because some courts have held that retaining information in a computer’s short-term memory is a copy, the definition of “copy” has greatly expanded in the digital environment, and along with it the scope of copyright propertization.⁵ The validation of business method patents in the U.S. has brought procedures such as one-click ordering⁶ and online reverse auctions⁷ into the realm of propertization. The

¹17 U.S.C. § 106(6)(1995).

²Pub. L. No. 105-298, 112 Stat. 2827 (codified as amended in scattered sections of 17 U.S.C.).

³MARGARET JANE RADIN, REINTERPRETING PROPERTY 166-90 (1993).

⁴Pub. L. No. 105-298, 112 Stat. 2827.

⁵MAI Sys. Corp. v. Peak Computer, Inc. 991 F.2d 511 (9th Cir. 1993); R. Anthony Reese, *The Public Display Right: The Copyright Act’s Neglected Solution to the Controversy Over RAM “Copies,”* 2001 U. ILL. L. REV. 83, 138-41 (2001).

⁶See Method and System for Placing a Purchase Order Via a Communications Network, U.S. Patent No. 5,960,411 (filed Sep. 12, 1997) (Amazon.com “one-click” ordering patent), *construed in* Amazon.com, Inc. v. Barnesandnoble.com, Inc. 239 F.3d 1343 (Fed. Cir. 2001).

⁷U.S. Patent No. 5,794,207 (filed Sep. 4, 1996) (Walker Digital online “reverse auction” patent), *examined in* Marketel Intern., Inc. v. Priceline.com, 138 F.Supp.2d 1210 (N.D. Cal. 2001).

scope of trademark protection was augmented by the Trademark Dilution Act⁸ and by judicial extension of dilution to cover control of certain Internet domain names (dilution by “cybersquatting”)⁹ followed by legislation solidifying control over domain names in certain circumstances¹⁰. The scope of control over non-copyrighted information by firms has been augmented by judicial implementation of a resurrected version of the doctrine of trespass to chattels, and by judicial validation of contractual expansion of firms’ rights beyond the scope of background intellectual property rights.¹¹ My view is that debates on all of these matters would have been improved by the focus on legal milieu that I am recommending.

II.

Let me explain my view by backing up to reconsider property theory. We can see propertization of information (or of anything) as inherently limited or conflicted. Propertization of anything must be limited because property is a scheme of mutual cooperation: if any individual’s control over an object or other resource gives her control over the rest of the objects or resources in the world, and everyone needs to use more than one object or resource, then no one can do anything in the world. More practically, if each individual’s control over an object or resource gives her control over “too much” in the rest of the world, then “too little” scope of activity and freedom in the world is left for others. This principle is ancient and well known: it is the reason why traditional property law limits dead hand control, and it is the reason why nuisance law is an ad hoc balancing activity.

To see this principle at work in information propertization, we can line up the reasons why information should be controlled by an owner (locked up) in one column (Column A), and the reasons why information should be not under an owner’s control (open for use by others) in another column (Column B). This exercise will be a very rough sketch for heuristic purposes. Nevertheless, three observations emerge. First, we can observe that at a high enough level of abstraction, the same normative rationales appear in both columns. Second, information propertization regimes have traditionally implemented Column B considerations with doctrines of defenses and limitations. Third, this policy structure produced a traditional discourse of balancing.

In Column A (information should be locked up) we can list two clusters of rationales: (1) protect personal privacy, enable persons to make their own decisions about publication of their works and how they are disseminated and used, enable persons to make their own decisions about use by others of their names and likenesses. [This cluster relates primarily to protecting personhood and self-constitution; and also to fostering market liberty.] (2) protect creation and maintenance of brand identities, protect development and dissemination of commercial works, protect development and maintenance of advances in technology

⁸15 U.S.C. §1125(c) (2004).

⁹*See, e.g.,* Panavision v. Toeppen, 945 F.Supp. 1296 (C.D. Cal. 1996).

¹⁰Anticybersquatting Consumer Protection Act of 1999, 15 U.S.C. §1125(d) (2000).

¹¹*See, e.g.,* eBay v. Bidder’s Edge, 100 F. Supp. 2d 1058 (N.D. Cal. 2000) (*see infra* text accompanying note 40); Bowers v. Baystate Tech., Inc., 320 F.3d 1317 (Fed. Cir. 2003); ProCD v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).

and specific kinds of know-how. [This cluster relates primarily to fostering economic efficiency by protecting investment-backed expectations and incentivizing creation of knowledge.]

In Column B (information should be open to use by others without permission of an owner, sometimes called “public domain”), we can also list two clusters of rationales: (1) enable freedom of expression, and maintain a robust and open social/political order of discourse. [This cluster relates primarily to protecting personhood and self-constitution, and maintaining a democratic political order.] (2) enable entry of new firms into markets for information goods and services, enable competition among firms in these markets. [This cluster relates primarily to fostering economic efficiency by protecting the functioning of competitive markets, in the service of consumer preference satisfaction, and also relates to the market liberty of competitors.]

Of course, the point of this exercise is to see that in deciding whether to increase propertization we would always be weighing considerations in Column A against considerations in Column B. And of course, I set up these columns so that the most general rationales—economic efficiency, fostering of the free market, protecting personhood and self-constitution within a democratic polity—apply to both columns. This shows what I think we all intuitively know: one cannot decide propertization questions at this high level of abstraction. We have to look more concretely at circumstances to decide which Column is more important under the circumstances. This results in the characteristic traditional balancing tests; it also has the result that the choice can change over time with changing circumstances.

In this exercise it is obvious that many legal protection doctrines look to one or more items in Column A as their basis: right of privacy, right of publicity, trademark, copyright, patent, trade secret, misappropriation and unfair competition Whereas many legal defenses and limitations on those doctrines look to Column B: copyright and patent term limits, non-patentability of obvious or useless inventions, non-copyrightability of ideas, facts, and functional items, endorsement of reverse engineering to acquire trade secrets Thus, this model of reasoning can be thought of as “information wants to be locked up” versus “information wants to be free,” or “ownership” versus “the public domain.”

Under this model, reasoning looks like balancing; that is, trying to dig more deeply into the applicable underlying principle(s) under the concrete circumstances at hand. For example, if efficiency is the underlying rationale for propertization, society should increase propertization up to the point where more propertization would be inefficient (that is, the point where the costs begin to outweigh the benefits), then stop. From an economic reasoner’s point of view, over-propertization is as bad as under-propertization; they both cause inefficient costs. What are the costs of propertization? Administrative enforcement, plus “too much” incursion into Column B (i.e., limits on personal freedom, foreclosure of market competition, etc.)

There is nothing inherently wrong with this balancing picture of information propertization and how to engage with its underlying policies; but recently it has seemed that some interest groups, some legislators, some litigants, some scholars, and some judges have not been engaged with Column B at all clearly. They see the benefits of propertization more clearly than its limitations. As a result, sometimes we are seeing decisions that look like per se rules generated by looking only at Column A. In addition, the category of “public domain” (“wants to be free”) is perhaps too broad and general, and it also seems to make some people think there is

something socialistic about it.¹² Therefore I ask you not necessarily to discard this balancing picture, but to consider another picture as well.

III.

My suggestion is that decisions increasing information propretization should take more explicit account of information propretization's legal milieu. This is a heuristic suggestion, which I am proposing in order to try to improve our reasoning about these matters. (It is a metaphor, and metaphors should not be pushed too far; but I believe it can be helpful as far as it goes.) Legal milieu, roughly, refers to surrounding legal arenas of thought and political struggle that have bearing on the one we are considering. Imagine that the law can be divided into a set of complex modules or neighborhoods. In each legal neighborhood, a set of cases and statutes expresses and further a particular set of policies and commitments, such that they can be seen to hang together as a field. Property, broadly considered, is one neighborhood in this sense, one complex area or field of law together with its underlying commitments of policy and value, its normative avenues. The underlying creed of this neighborhood is roughly the list in Column A. Where propretization has come about, the basis, and therefore the prevailing discourse or rhetoric, is the general idea that control will incentivize more creation, that benefits internalized to an owner will be efficient, that control will foster freedom and self-constitution; and sometimes that control is natural or metaphysically required, or culturally embedded. (The latter is natural rights talk. It is more important for the regimes of tangible property than for intellectual property, but works its way into information propretization when the rhetoric of tangible property is borrowed.)

The legal neighborhoods adjacent to information propretization that I want to focus on here are competition law and policy, and free speech law and policy. It is also important to consider consensual exchange transactions (contract), which I consider in other work and will therefore mention only briefly here.¹³ I believe that attention to legal milieu is needed for coherence across doctrinal, policy, and practical boundaries; in other words, to achieve sound economic and social policy as expressed and implemented through the law as a whole. To continue the metaphor, we should ask legislators, judges, and scholars (and even litigants and interest groups) who consider propretization to consider the whole city of the law, explicitly, and not just one neighborhood. For example, the cases establishing that certain domain names came into being already owned by trademark owners (an extension of propretization) would have been more satisfactory had they taken into account other

¹²James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (Winter/Spring 2003); Pamela Samuelson, *Enriching Discourse on Public Domains*, DUKE L. J. (forthcoming 2006).

¹³See Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 IND. L.J. 1125, 1129 (2000) [hereinafter Radin, *Binding Commitment*]; Margaret Jane Radin, *Online Standardization and the Integration of Text and Machine*, 70 FORDHAM L. REV. 1125, 1138-46 (2002) [hereinafter Radin, *Online Standardization*]; Margaret Jane Radin, *Regulation by Contract, Regulation by Machine*, 160 J. THEORETICAL & INST. ECON. 1 (2004) [hereinafter Radin, *Regulation by Contract*]; Margaret Jane Radin, *Regime Change in Intellectual Property Law: Superseding the Law of the State with the "Law" of the Firm*, 1 U. OTTAWA L. & TECH. J. 173 (2003-2004); Margaret Jane Radin, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223 (2006).

parts of the city, even if the result would have been the same. (I will return to this example.)

Because information propertization is designed to restrict competition, if not always by creating economic “monopolies,” at least by enhancing the position of one competitor vis-à-vis others, it is apparent that the competition neighborhood is adjacent to the propertization neighborhood. Competition law and policy expresses, roughly, the general idea that a free market level playing field should exist and be supported. Some of its premises are equal access to customers, competitive price, ease of entry, existence of many different firms and choices, free movement of labor. It is important to recognize that the competition neighborhood includes not just antitrust law, but also many other legal doctrines and considerations. For example, limitations on covenants not to compete rest on the desirability of free markets in labor and on ease of entry for new competitors. So do limits on specific performance of employment contracts, some limits on land servitudes, and limits on trade secret scope.

Information propertization gives an owner control over what others may express, so its boundary with the freedom of expression neighborhood is also apparent. Free speech law and policy expresses, roughly, the general idea that free and robust communication and debate is good and censorship is bad, for persons, communities and the polity, for reasons relating to personal liberty, market liberty, and functioning of the free market and of democracy. Again, these considerations are not limited to the explicit purview of the First Amendment, but rather permeate other fields as well.

IV.

Where propertization is brought into confrontation with competition policy and free speech policy, we are continually faced with boundary skirmishes. We continually need to work out the scope of rights and defenses: how to balance interests of intellectual property owners, would-be competitors, and third parties like would-be protesters, parodists, and political speakers. Many proponents of information propertization have pushed an analogy with real property. (It is written into the legislative history of the Digital Millennium Copyright Act that disabling a technological protection measure is equivalent to breaking into a locked room to steal a book.¹⁴) We do not need to—and should not—accept the analogy that information propertization is equivalent to land propertization.¹⁵ But the comparison is interesting anyway. More than with information propertization, when we think about land propertization, we have already been trained by the common law and long

¹⁴H.R. Rep. No. 105-551, pt.1, at 17 (1998) (“The act of circumventing a technological protection measure put in place by a copyright owner to control access to a copyrighted work is the electronic equivalent of breaking into a locked room in order to obtain a copy of a book.”).

¹⁵As many have noted, possession and use of information is non-rivalrous as possession and use of physical resources is not. *See, e.g.*, Seth Robert Belzley, *Grokster and Efficiency in Music*, 10 VA. J.L. & TECH. 10, 15 (2005); Niva Elkin-Koren & Eli M. Salzberger, *Law and Economics in Cyberspace*, 19 INT’L REV. L. & ECON. 553, 559 (1999).

tradition to take the adjacent areas of competition policy, contractual ordering, and free speech policy into account.¹⁶

Consider real property and competition policy, for example. The land owner's bundle of sticks does not include a right to control or exclude competitive activities on neighboring parcels. When Starbucks sets up shop next to the long-time local coffee shop, the local coffee shop ownership bundle of sticks does not include a stick that would give it control over competitive activities on neighboring parcels. "Stealing" a firm's customers by setting up a competing business next door is not actionable. Of course, there could be a zoning ordinance that legislated otherwise in certain situations, or covenants not to compete could mandate otherwise in certain situations. But these exceptions are exceptions; reasoning starts from the premise that no such control right is inherent in the standard bundle of sticks accruing to an owner under the background legal definition of the scope of propertization.

The land owner's bundle of sticks also does not include the right to leverage control in certain other ways that are hostile to free market competition and ease of entry by new firms. Limits on covenants running with the land, for example, would prevent a developer from selling plots with the proviso that all groceries must be bought at the company store. These limits implicate both the neighboring realm of competition policy and the neighboring realm of contractual ordering. The land owner's bundle of sticks also does not include a general right to prevent nearby owners from making her parcel less attractive, but rather only an exception in cases where those owners' activities are deemed to rise to the level of nuisance. If a land owner wants the land next door to aid in expansion of her business, or to remain open space, or not to have unaesthetic architecture or landscaping, in general the owner must purchase that right rather than merely arguing that it is already included in her bundle. Where zoning may change this general background limitation on the scope of propertization, it does so as an exception to the background definition of scope, and subject to various controls.

Also consider real property and free speech policy. An owner's bundle of sticks does not include a general right to silence people who speak in such a way that sound waves go onto her property; though the speakers may be subject to accommodation measures (the result of balancing arguments). An owner's bundle of sticks also does not include a general right to keep out visual images that are visible from her property. Perhaps she can get a zoning restriction, or a set of covenants in some kinds of cases, but, again, these start from the no-right baselines, and are contextually limited; political signs might well come out differently from adult entertainment. An owner's right may include a general right to foreclose physical invasion, but long history of balancing and political evolution results in a more nuanced picture: the exclusion right does not include easements by necessity, airplane overflights, and (in some places and situations) entry of labor organizers or rights workers.

Of course, property owners object to these limits on their bundles of sticks. In many situations, the property owner will say that he (or it) feels entitled to control the offending activities. That argument does not regularly win when juxtaposed to

¹⁶In the following discussion I am indebted to the insights of Professor Kevin Emerson Collins, whose work challenged me to think more deeply about the comparison of real property law and discourse with information property law and discourse. See Kevin Emerson Collins, *Cybertrespass and Trespass to Documents*, 54 CLEV. ST. L. REV. 41 (2006).

competition policy and free speech policy. The property owner will also say that control over the offending activities is inherent in the definition of its property rights. Or that if it cannot control the offending activities it will lose profits. Or that it made investments believing that it had the right to control the offending activities. None of these protestations is dispositive. The fact that entry of a competitor next door causes a landowner to lose profit does not mean that the landowner is entitled to force the competitor to shut up shop, even if the competitor is “stealing” customers. The fact that a landowner feels offended by the content of expression that can be heard or seen on her land does not of itself mean that she can shut the speakers up. In sculpting the parameters of land propertization, these arguments may have some force in the traditional balancing of Column A versus Column B, but none of them is dispositive or applicable as a per se rule. Still less should they be dispositive in cases involving propertization of information. My complaint, in a nutshell, is that sometimes they are; sometimes, for example, mere lost profit—or even mere potential lost profit—seems to lose a case for a defendant.¹⁷ As is better understood in real property debates than in information property debates, that is simply to beg the baseline question.¹⁸

Traditionally, as I mentioned earlier, intellectual property regimes have been designed to take account of the counter-policies that represent the creeds of the neighborhoods adjacent to the propertization neighborhood. Here are some examples (not meant to be an exhaustive catalogue, by any means). Trade secret law is responsive to competition policy in the requirement that information is only owned while the owner puts appropriate effort into maintaining secrecy, and in trade secrets’ vulnerability to reverse engineering. Traditional trademark law is responsive to competition policy in foreclosing propertization of “naked” trademarks and trademarks in generic words, and the non-propertization of generic words is responsive to free speech policy as well. The scheme of copyright law responds to both free speech concerns and competitive concerns by limiting propertization to expression (excluding ideas, facts, functionalities), by having a limited term, by limiting coverage to copying and to distribution of objects that are copies, and by retaining the defense of fair use. The “holes” in copyright control can be understood as perhaps an efficient solution to a coordination problem, and therefore not lightly to be overridden.¹⁹ The scheme of patent law responds to competition policy with the requirements of limited term, non-obviousness, and adequate disclosure.

¹⁷*See, e.g.,* UMG Recordings, Inc. v. MP3.Com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000). The court seemed to assume that all future markets for a copyrighted work were owned by plaintiff, where instead the scope of propertization should have been investigated in light of copyright’s policies, and that nothing is a fair use unless it is shown to be non-infringing, whereas, of course, fair use appropriately functions to immunize infringement in certain cases where competition policy and free speech policy would so recommend.

¹⁸The baseline question refers to how an owner’s rights are initially defined, how many sticks there are in her bundle. If she does not have a certain stick in her bundle in the first place, then she has no cause of action to complain that she has been deprived of it by someone else.

¹⁹*See* Margaret Jane Radin, *Copyright Defection*, J. INDUS. & CORP. CHANGE (forthcoming Dec. 2006); Radin, *Regulation by Contract*, *supra* note 13, at 9.

V.

In some recent cases and legislative developments increasing information propertization, it seems that we have sometimes forgotten our roots, and forgotten to look at the whole city rather than just one neighborhood. One example to consider is the expansion of trademark propertization in the digital environment. Recently the pendulum may be swinging back to some extent, as various U.S. courts are taking free speech policy and competition policy into account in denying expansive claims of trademark owners. Yet it may still be instructive to consider the early caselaw involving the activity that was dubbed cybersquatting by plaintiffs, as well as the situation characterized as initial interest confusion.

Before the dot-com boom, domain names were being given out first-come first-served to applicants who paid the then sole registrar, NSI, a small fee. Some speculators registered domain names corresponding to “generic” words that cannot be trademarks (owing to limits based upon competition policy), such as cars.com, loans.com, and so forth, with of course sex.com being a great prize.²⁰ Other speculators registered domain names corresponding to words that were used in existing trademarks, such as mcdonalds.com,²¹ panavision.com,²² and intermatic.com.²³ Possibly it could have been of some concern that competition policy forecloses trademarks in “generic” words because of the risks of monopolizing words needed by competitors, yet that concern did not surface in the trade of unique generic-word domain names, and the speculators have won big.²⁴ On the other hand, speculators who registered domain names corresponding to some trademark were labeled bad guys and had to give up this asset for free to some trademark owner; whereas had they been real property speculators who bought up cheap land in the path of development they would have been lauded as good capitalists, and the neighboring firms whose value would be enhanced by the land would have acquired it by purchase rather than by litigation. Partly through the nifty rhetorical device of labeling defendants as “cybersquatters,” plaintiffs were able to get courts to beg the baseline question of who owned this new asset—the registrant or some trademark owner whose trademark corresponds to the registered name.²⁵ (“Some” trademark owner and not “the” trademark owner, because trademark law permits the same word to be claimed by different users in different industries or geographical locations, such as Apple Bank, Apple Computer, and Apple Records.) Decisions against “cybersquatters” assume that these domain names came into being already pre-owned by some trademark owner; that this new asset was somehow

²⁰See Anupam Chander, *The New, New Property* 81 TEX. L. REV. 715, 717, 724-28 (2003).

²¹See Joshua Quittner, *Billions Registered*, WIRED, Oct. 1994, at 50, available at <http://www.wired.com/wired/archive/2.10/mcdonalds.html>.

²²See *Panavision Int'l, L.P. v. Toepfen*, 141 F. 3d 1316, 1319 (9th Cir. 1998).

²³See *Intermatic Inc. v. Toepfen*, 947 F. Supp. 1227 (N.D. Ill. 1996).

²⁴See, e.g., GreatDomains, greatdomains.com (listing over 1000 domain names for sale).

²⁵See Margaret Jane Radin, *Information Tangibility*, in *ECONOMICS, LAW AND INTELLECTUAL PROPERTY* 395, 405 (Ove Granstrand ed., 2003).

inevitably part of the bundle of sticks of some trademark owner.²⁶ If courts had explicitly referred to competition policy and free speech policy in these cases, we might have gotten better reasoned decisions, with more explicit consideration of competing free speech policies in the case of parody and protest sites, more explicit consideration of the needs of competitors of the plaintiff, and some exploration of the baseline question of who initially owns this new asset (even though trade would send it to the company that values it the most, as happened with the generic-word domain names). Is it so clear that some trademark owner (the first one to bring suit) should get the domain name without paying? Maybe after analysis it would have been, but it would have been better for the issue to have gotten the thorough analysis it deserved.

To some extent this is ancient history because the Lanham Act now contains the Anti-Cybersquatting Consumer Protection Act, which prohibits bad-faith intent to profit by registering a domain name identical or confusingly similar to someone's trademark.²⁷ But what is bad faith? If bad faith simply means competitive strategies that are considered unfair—after all, every competitor wants to “kill” the competition, but that motive is not necessarily going to be labeled “bad faith”—then competition policy is implicated and should be explicitly considered. Moreover, a better analysis at the outset of this development might have helped us figure out who should have priority when two trademark owners are disputing over the same domain name, and under what circumstances one trademark owner can sell a domain name to another, and, indeed, whether we want to condone the trade in names appropriating generic words.

Another trademark doctrine that would have benefited from a more explicit analysis of its neighboring policies is initial interest confusion. The Ninth Circuit has endorsed a conception that increases proprietization for trademark owners by reasoning that the trademark owner's control extends to foreclosing a competitor from using its rival's trademark's words in metatags in order to get its own product to show up on a search results page along with the trademarked product the user was searching for.²⁸ If the customer does purchase the rival's product, it will not be because of confusion about source or sponsorship, the traditional scope of the trademark right, but because the customer makes an unconfused decision to buy the rival's product, perhaps because once the customer pays attention to it, it seems cheaper or more attractive. The Ninth Circuit went further and endorsed a doctrine of contributory initial interest confusion: a search engine might be held liable for making deals with competitors of a trademark owner which would cause banner ads for a rival product to appear on the customer's screen along with the site of the product the customer was searching for.²⁹ These opinions would have been greatly

²⁶See, e.g., *Panavision*, 141 F. 3d 1316.

²⁷15 U.S.C. §1125(d) (2000).

²⁸*Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp.* 174 F.3d 1036 (9th Cir. 1999).

²⁹*Playboy Enter., Inc. v. Netscape Commc'ns, Corp.* 354 F.3d 1020 (9th Cir. 2004) (affirming that plaintiff has a cause of action, based either on direct or contributory infringement). The opinion implied that disclaimers in banner ads would help defendant, although, as Judge Berzon noted in concurrence, that would be inconsistent with the broad view of initial interest confusion adopted in *Brookfield*, 174 F.3d at 1036. After this opinion

improved, I believe, by attention to competition policy. Judge Berzon in a concurring opinion made some analogies to real space, in which competition policy apparently has more scope and propertization correspondingly less:

[S]uppose a customer walks into a bookstore and asks for Playboy magazine and is then directed to the adult magazine section, where he or she sees Penthouse or Hustler up front on the rack while Playboy is buried in back. One would not say that Penthouse or Hustler had violated Playboy's trademark. This conclusion holds true even if Hustler paid the store owner to put its magazines in front of Playboy's.³⁰

Another appellate court, apparently finding Judge Berzon's reasoning more cogent than the majority's, noted that in real space it is not considered a trademark violation for Walgreen's cheaper aspirin to be put on the shelf right next to Bayer's trademarked product, even though Walgreen's is thereby taking advantage of the fact that the customer is searching for Bayer's brand.³¹ Trademark owners tend to call this free-riding on their goodwill, and therefore actionable, but that begs the baseline question. The question is whether the scope of the owner's property right actually does include the big stick whereby the owner has the right to internalize every last smidgen of the value of its brand in supplying information to customers, as trademark owners would like, or at any rate the stick corresponding to control over customers' ability to see competing products at the point of sale, which is at issue in these situations.

Note that this is ultimately a question of competition policy: To what extent and under what circumstances do we want to allow would-be competitors to gain access to customers of rival companies and try to persuade them to buy competing goods and services? The answer cannot be, Never!—even though incumbent companies would like that answer. If incumbent companies own access to their customers, there can be no entry of competitors and no flourishing of a competitive market. There is still a question about where legitimate competition ends and bad-faith trickery begins, but if we want to have free markets, firms have to have access to customers of rivals. We seem to be clearer about this for tangible property than for information property, as Judge Berzon's examples reveal.

We also seem to have been clearer about this in less novel areas of information propertization. Many trade secret cases have considered the boundary between appropriate methods of gaining access to competitors' trade secrets and those methods that are considered disruptive or inefficient or otherwise harmful.³² Not all of those cases take competition policy into account as explicitly as might be ideal, but they don't collapse into the trap of believing that any time a firm previously possessed a secret that has been lost, that firm necessarily had a right to control it

issued, the parties settled the case, to the disappointment of those who would have liked to see a rehearing en banc to clarify the reasoning.

³⁰*Playboy Enter., Inc.*, 354 F.3d at 1035 (Berzon, J., concurring).

³¹*1-800 Contacts, Inc. v. WhenU.Com, Inc.*, 414 F.3d 400, 411 (2d Cir. 2005).

³²*See, e.g., E.I. duPont deNemours & Co. v. Christopher*, 431 F.2d 1012, 1016 (5th Cir. 1970) (“[F]or our industrial competition to remain healthy there must be breathing room for observing a competing industrialist. . . . [B]ut we need not require the discoverer of a trade secret to guard against the unanticipated, the undetectable, or the unpreventable . . .”).

against that form of loss. Trademark cases will improve when everyone understands that protestations of free-riding or lost profits by trademark owners do not decide the cases, even in novel digital contexts. I believe that process has begun. In *Ty v. Perryman*,³³ for example, Judge Posner reversed a summary judgment for plaintiff and said it should have been a summary judgment for defendant. Judge Posner said that defendant was within its rights in using a domain name similar to plaintiff's trademark because defendant was selling plaintiff's product in an aftermarket; nobody was confused, and trademark ownership does not extend to ownership of the aftermarket.³⁴

VI.

As many have noted, the scope of copyright propertization has continually increased over time, usually with little explicit attention during the legislative process to neighboring policies.³⁵ The caselaw has also been expansive. Since this is a comment and not a long article, I will not attempt to elaborate the situations in which copyright decisions have failed to be as explicit as would be ideal with regard to the neighboring realms of contractual ordering, competition policy, and free speech policy. I will mention here instead examples of expanding propertization in a copyright-like way by means of the Digital Millennium Copyright Act and the doctrine of trespass to chattels.

Although the DMCA is part of the Copyright Act, many copyright experts consider it not copyright but paracopyright, because it does not prevent non-owners from certain uses of works themselves, as does copyright, but rather prevents non-owners from certain activities related to technological locks that copyright owners deploy in conjunction with works.³⁶ The DMCA states that it is not intended to add sticks to the copyright owner's bundle, but many have complained that it does do so. Because it is prohibited to disable a technological lock that controls a protected work, it also becomes impossible in a practical sense to access other unprotected works (for example those that are beyond the copyright term, or consist of facts) under the same lock, or to engage in legally permissible fair use.

Thus the bundle of the copyright owner has been expanded. What is the effect of this expansion of propertization on competition policy? Troubling cases in lower courts showed that producers of any product with an embedded computing component would take advantage of the DMCA to try to foreclose competitors from the aftermarket of replacement parts. A printer company used an embedded program to identify its own replacement cartridges and made the printer non-functional if the

³³306 F.3d 509 (7th Cir. 2002).

³⁴*Id.* at 513 ("We do not think that by virtue of trademark law producers own their aftermarkets . . .").

³⁵*See, e.g.*, JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001); R. Anthony Reese, *The History of Innocent Infringement in U.S. Copyright Law* (May 2005) (unpublished manuscript, on file with the author).

³⁶*See* Dan L. Burk, *Anticircumvention Misuse*, 50 U.C.L.A. L. REV. 1095, 1096 (2003); Daniel A. Farber, *Conflicting Visions and Contested Baselines: Intellectual Property and Free Speech in the "Digital Millennium,"* 89 MINN. L. REV. 1318, 1329 (2005); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 24 (2001).

user tried to replace the cartridge with one made by a competitor. The competitor made its cartridges disable the program so they would function in the printer, and was sued for violating the DMCA.³⁷ The injunction granted by the trial court was reversed on appeal, as also happened in a similar case involving garage door openers.³⁸ We can only hope that trial judges will henceforth be sensitive to how competition policy must limit paracopyright, even if the statute was not written clearly enough to include this limitation.

Propertization of information not included in copyright has been significantly expanded through resurrection of a metamorphosed version of the common-law doctrine of trespass to chattels. Plaintiffs who want to prevent others from computerized copying of information that is not protected by copyright, and plaintiffs who want to prevent others from conveying messages whose content they disapprove of, have avoided traditional principles of information law and have instead used the idea that they are experiencing tangible harm to an object, their computer system. (The agent of harm is those pesky incoming electrons bombarding their tangible object.)

In *eBay v. Bidder's Edge*,³⁹ the plaintiff won an injunction preventing its competitor from copying its auction database that it put online for its own users. The information was not protected by trade secret, since it was made public, and it was not protected by copyright, since it was factual data. Nevertheless, of course, eBay did not want its competitor to be able to use this information for its own competing comparative auction service. The injunction, which explicitly referred to copying, was an end run around *Feist*,⁴⁰ the U.S. constitutional holding that facts are not copyrightable. That is, the plaintiff managed in effect to propertize its factual database by enjoining defendant from copying it, a property right that plaintiff did not possess under copyright, and under *Feist* cannot possess under copyright.

The injunction was also an end run around the fact that federal copyright law would normally preempt attempts to protect this kind of information by means of state tort doctrines of unfair competition and misappropriation.⁴¹ Ironically, if the state unfair competition cause of action were allowable and not preempted by copyright, perhaps some reasoning would have taken place about whether it was or was not appropriate under competition policy for eBay's competitor to collect factual data from eBay's site and use it on its own site (juxtaposing it to data from other auction sites so consumers could choose which auction to go to). As it was, invoking the doctrine of trespass to chattels—taking literally the metaphor of small tangible objects invading a big tangible object—avoided preemption because of the added element of physical invasion,⁴² and no serious reasoning about competition policy took place.

³⁷*Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 529-31 (6th Cir. 2004).

³⁸*Chamberlain Group, Inc. v. Skylink Tech., Inc.*, 381 F.3d 1178 (Fed. Cir. 2004).

³⁹100 F.Supp.2d 1058 (N.D. Cal. 2000).

⁴⁰*Feist Publ'n, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340 (1991).

⁴¹*Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997).

⁴²17 U.S.C. § 301(a) preempts any “legal or equitable rights [under state law] that are equivalent to any of the exclusive rights within the general scope of [federal] copyright.”

What would be the result if this reasoning had taken place? This is the same kind of reasoning that must take place regarding enactment of a database protection statute. In the U.S. no database protection statute has been enacted, even though those who produce databases have been urgently calling for propertization for some time. Such a statute would have to be enacted under the Commerce Clause because the clause that enables copyright has been held not to extend to enabling protection of facts. But leaving aside constitutional considerations, the question is, to what extent do we want to protect competition, and to what extent do we want to protect individual competitors? We may protect individual competitors at the expense of competition when we allow them to extend propertization to factual collections. On the other hand, in certain circumstances it may be true that competition is ultimately harmed if someone does not aggregate those facts, and an incentive in the form of propertization is needed to get the right amount of data collection and aggregation for society. A statute that took this calculus seriously might well require a plaintiff to show that in its circumstances such incentives are needed, rather than just presuming it, or might well allow a defendant to show that it needed access to plaintiff's collection of facts to engage in competition, or might write in defenses that allow certain kinds or amounts of facts to be freely used by others in general.⁴³ In another words, such a statute might in some manner recapitulate, or ask the court to recapitulate, the typical kind of calculus that ideally takes place in considering the tort of unfair competition.

My own opinion is that under a reasonable database protection statute, what defendant did in *eBay* would probably be permissible. Defendant was copying facts in order to engage in normal competition, and was not appropriating eBay's goodwill by creating source or sponsorship confusion, nor was defendant making it impossible or substantially more difficult for eBay to remain a strong competitor. Nevertheless, even if I'm wrong about this, it would be helpful to see the actual reasoning, rather than a lot of misplaced discussion of physical invasion. The injunction found irreparable harm in the notion that if this competitor were permitted to access the site with its data-collection program, others would no doubt do so too, and if enough others did this, it could cause the system to cease functioning properly.⁴⁴ That is pretty speculative for irreparable harm. Sometimes it is difficult for a judge to realize that even if a plaintiff is being harmed by competition, that is a type of harm that we as a market society condone and encourage. Decisions increasing propertization cannot rest solely on an owner's complaint of lost profit or expectation that it owns a certain stick in the bundle. Lost customers and lost market share do not automatically amount to a cause of action. As we recognize more

Judicial interpretation of this provision holds that where there is an added element, a cause of action is not "equivalent to" copyright. *See, e.g., Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 456 (6th Cir. 2001).

⁴³*See, e.g.,* Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKLEY TECH. L. J. 535 (2000); Pamela Sameulson, *Mapping the Digital Public Domain*, 60 L. & CONTEMP. PROBS. 147 (2003); James Boyle, *A Natural Experiment*, FIN. TIMES (London), Nov. 22, 2004, available at <http://news.ft.com/cms/s/4cd4941e-3cab-11d9-bb7b00000e2511c8.html>.

⁴⁴*eBay*, 100 F.Supp.2d at 1071-72.

readily in the context of land ownership, decisions delineating the scope of plaintiff's property rights must take account of the principles in adjoining legal neighborhoods.

Consider a different example. Should a corporation's property right be expanded to include censorship of incoming e-mail to employees? In *Intel v. Hamidi*, the California intermediate court of appeal decided that six broadside e-mails sent to Intel's employees by a disgruntled former employee could be enjoined as trespass to Intel's computer system, even though no harm to the system was shown.⁴⁵ (There were not enough of those pesky electrons to bring down the system or make it slower. The sender also allowed recipients to opt out of receiving further messages from him.) Intel said instead that it was harmed by the information because its employees spent a few minutes of non-productive time reading the messages; but I think we can infer that Intel felt harmed by the information in a different way that it did not choose to plead, or at least wanted to silence Hamidi for reasons it did not choose to plead. On appeal the California Supreme Court said that trespass to chattels should not extend so far as to eliminate the physical harm requirement.⁴⁶ Thus, in the future, a corporation that wants to enjoin e-mail whose content it does not like will have to show that its computer system was somehow harmed. What sense does it make to sidestep in this way the issues of free speech policy and competition policy raised by this kind of conflict?

The intermediate court dismissed the free speech question simply by saying there was no state action here,⁴⁷ and, presumably agreeing, the California Supreme Court did not take up the question of how far rights of corporate property owners might be limited (if at all) by free speech policy. In my opinion there should be more significant debate on this issue. The days of expansive state-action doctrine are no longer with us,⁴⁸ and defendants will usually be unsuccessful in claiming that court enforcement of firms' actions restricting their speech invokes the First Amendment. Nevertheless, free speech policy if not the actual First Amendment has often played a part in legislative and judicial decision making, and it is beginning to play a part in disputes about the scope of cyberspace propertization, at least in the field of trademark.⁴⁹ Once we recognize that the issue in cases like *Intel v. Hamidi* is what

⁴⁵*Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d 244 (Cal. Ct. App. 2001). This decision was reviewed and the reasoning modified by the California Supreme Court. *Intel Corp. v. Hamidi*, 71 P.3d 296 (Cal. 2003).

⁴⁶*Intel*, 71 P.3d at 309-11.

⁴⁷*Intel*, 114 Cal. Rptr. 2d at 253-55.

⁴⁸The high water mark was *Shelley v. Kraemer*, 334 U.S. 1 (1948). Since then the courts have significantly retrenched. Perhaps the primary opinion heralding retrenchment was *Moose Lodge v. Irvis*, 407 U.S. 163 (1972). The California Supreme Court opinion in *Intel v. Hamidi*, 71 P.3d 296, revealed some distaste for its earlier holding in *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980), allowing reasonable access to a privately owned shopping center for purposes of political speech. The U.S. Supreme Court, of course, had long since replaced the doctrine of *Marsh v. Alabama*, 326 U.S. 501 (1946) with the doctrine of *Lloyd Corp. v. Tanner* 407 U.S. 551 (1972) and *Hudgens v. NLRB*, 424 U.S. 507 (1976).

⁴⁹*See, e.g.*, *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672 (9th Cir. 2005); *Taubman Co. v. Webfeats*, 319 F.3d 770 (6th Cir. 2003); *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573 (2d Cir. 2000).

kind of mail interdiction (whether e- or snail-) a corporation's property right should include, and whether that interdiction can be selective and content-based, we will get more satisfactory reasoning. For example, competition policy as well as free speech policy would be in issue if the interdicted messages involved offers to the employees to employ them elsewhere at higher wages. The question whether the corporation's property right includes the right to interdict these messages selectively might be answered differently from the question whether the corporation's property right includes the right to interdict distracting pornographic messages selectively. It is going to be difficult to get to the satisfactory kind of analysis if we have to keep talking about electrons invading hard drives.

Obviously, the whole debate about spam—unwanted commercial e-mail—ought to take into account competition policy and free speech policy (both the personal liberty branch and the market liberty branch). We need to figure out how to ensure that political speakers are free to speak and companies are free to communicate with potential customers while taking into account the recipient's desire not to receive so many junk messages. It will be difficult to reason adequately about this problem without thinking about more than propertization. If spam is trespass, why isn't unwanted snail mail trespass? It takes up more physical room in my physical mail box and physical hall table than those electrons do on my computer, and carrying them to the trash takes a lot more physical effort than hitting the delete button or installing a program that shunts them to deletion. No doubt subsidies to junk snail mail, supported by strong interest group pressure, are considered to be pro-competitive (allowing sellers to communicate with potential customers) and a form of commercial speech. The reason why we are subsidizing junk snail mail and trying (unsuccessfully) to get rid of spam has yet to be clearly articulated.⁵⁰

VII.

It is not the case, of course, that no attention is paid by scholars and decisionmakers to these interfaces between propertization and the countervailing policies I have discussed here, competitive markets and free speech, and the one I haven't, contractual ordering. Government entities such as the FTC take seriously the interface between intellectual propertization and antitrust principles.⁵¹ In academia, there is an emerging cross-over literature.⁵² After a period of over-focus

⁵⁰Although spamming is apparently the target of moral opprobrium, it can be argued that the federal CAN-SPAM Act, 2003 Pub. L. No. 108-187, 117 Stat. 2699, principally codified at 13 U.S.C. §§7701 and 18 U.S.C. 1037, which preempts stricter state laws, is not in fact an attempt to get rid of spam, but rather to protect those who consider themselves legitimate retailers sending out bulk advertising messages while punishing scammers and purveyors of pornography. Under the CAN-SPAM Act, labeling that would facilitate filtering out junk messages is not required, nor is a "Do Not E-Mail" list, and tickets.now can send me spam messages forever because I bought one ticket from them once.

⁵¹FTC REPORT, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (Oct. 2003), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>; DEPARTMENT OF JUSTICE AND FTC, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995), available at <http://www.usdoj.gov/atr/public/guidelines/0558.htm>.

⁵²To name only one example, scholars are taking a serious interest in the interface between copyright and freedom of expression. See, e.g., C. Edwin Baker, *First Amendment Limits on*

on propertization, some of the caselaw has begun to take other policies into account. Witness the (perhaps somewhat belated) discussion of copyright misuse in the *Napster* case,⁵³ or the (perhaps incomplete) discussion of the First Amendment in the *DeCSS* cases.⁵⁴ And, as I said above, at least at the appellate level, trademark cases involving new digital practices have been moving away from (or at least slowing down) expansion of propertization.

Nevertheless, legal discourse would serve society better if new information practices did not cause costly periods of over-propertization before we remember our roots; and if such practices did not cause intense attention to issues that are beside the point, such as whether or not collecting (or delivering) information causes tortious physical harm to a hard drive owned by a person or entity that does not want to release (or receive) the information. I offer this Comment only as one voice among many, as a modest proposal: let's consider both competition policy and free speech policy separately and explicitly when we face cases and legislative measures pushing the boundaries of propertization.

Copyright, 55 VAND. L. REV. 891 (2002); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L. J. 147 (1998); Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); Rebecca Tushnet, *Copyright as a Model for Free Speech Law*, 42 B. C. L. REV. 1 (2001).

⁵³After *Napster* was already shut down because of its loss in the copyright action brought against it by the record labels, the trial judge in Northern California agreed with *Napster's* argument that there was a substantial possibility that the record labels' activities were anticompetitive and amounted to copyright misuse; and, too late for the survival of *Napster*, as it turned out, the judge issued an order permitting *Napster* to pursue this point with discovery. *In re Napster Inc. Copyright Litigation*, No. C MDL 00-1369 MHP, Feb. 21, 2002, available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/napster/napster022102ord.pdf>.

⁵⁴*Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), *aff'd sub nom. Universal City Studios, Inc. v. Corley*, 273 F. 3d 429 (2d Cir. 2001).