IP as Conflict Resolution: A Micro View of IP

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If one pokes at free speech rights with a sharp analytical and historical stick, he or she may be surprised by how much free speech rights depend on and are defined by property rights.[1] My right to deliver a political speech does not mean that I have a right to break into your house and deliver it in your living room. Free speech rights have boundaries, and property rights often decide where these boundaries are. (Some of the harder free speech cases involve cases where property boundaries are blurred, for example, in public forums or on the public airwaves.) In any case, one does not hear much about the potential conflict between trespass law and free speech, but one does hear concerns about a conflict between intellectual property (IP) and free speech. This is the problem that Richard Epstein's paper entitled *Liberty versus Property: Understanding the Foundations of Copyright Law* addresses.[2]

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1. *See generally* John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49 (1996) (describing the historic origin of free speech rights in property rights). *See also* Solveig Singleton, *Reviving a First Amendment Absolutism for the Internet*, 3 TEX. REV. L. & POL. 279, 313–15 (1999) (discussing property issues implicated in Hugo Black's First Amendment doctrine).

2. Richard Epstein, *Liberty versus Property: Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. REV. 3 (2005) ("[T]his Article . . . is an examination of the tension between liberty and property within the natural law tradition of Locke . . . . [It also examines] how the same tension between liberty and property plays out in

The question is whether the difference between IP and physical property is such that we must be concerned about a conflict between free speech and IP in a way we need not be concerned about a conflict between free speech and trespass. Professor Epstein's answer is that IP is different from physical property, but not *that* different.[3] Both IP and physical property rules exist because they are useful in channeling incentives. There will, however, be differences in how particular conflicts between liberty and property ought to be resolved, depending on the nature of the tangible or intangible resource, some of which Professor Epstein explores.[4] This Article defends Professor Epstein's basic argument, that IP and physical property are essentially linked, and further explores how the linkage relates to some obvious differences between the legal regimes for tangible and intangible property.

I. THE ROOTS OF PHYSICAL PROPERTY: PRACTICAL RESOURCE ALLOCATION

When analyzing physical property, Professor Epstein starts from the premise that there is no self-evident or *a priori* justification for the institution.[5] At several points in the argument we need to go back to utilitarian arguments, thinking about the kinds of rules and incentives needed to encourage the creation of new wealth. Another thread in his argument is that we need rules that make sense as a system of resource allocation, in the sense of providing a useful answer to the question of who is entitled to what.[6]

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connection with copyright . . . .") [hereinafter Epstein, *Liberty versus Property*].

3. *Id.* at 4 ("In the end, it is largely proper to yoke together liberty and property . . . ."); *see also id.*:

> [T]he gulf between property rights in tangibles and property rights in intangibles is far narrower than these theorists believe. The set of justifications used in the former carries over to the latter. The only question that remains is how the differences in the nature of the resources in question, whether copyright or patent . . . require a distinctive configuration of property rights in the appropriate area. . . . Intellectual property rights rest on some plausible but not infallible assumptions, but so too do property rights in land and water.

4. *Id.* at 25–26.

5. *See id.* at 5–6; *see also id.* at 28 ("[M]y own private campaign has been to insist that the strength of the natural law theories rested on their implicit utilitarian (broadly conceived) foundations, which require some empirical evaluation of why given institutions promote human flourishing and through it general social welfare.").

6. *See id.* at 7 ("[I]f I do not deserve the fruits of my labor . . . then who does? . . . . [C]ritics leave completely undetermined just who should get the benefit of all the elements that are thought in combination to be insufficient to justify a claim on desert . . . ."); *see also id.* at 9 ("[T]he effort to isolate *proportionate* contributions from luck and from effort falls apart because of the inability to conduct sensible measurements over countless individuals for countless periods.").

This latter thread about the need for rules to serve as a practicable basis for resource allocation turns out to be tremendously important; it ties in directly to the day-to-day function of property rules in conflict resolution. Historically, it was doubtful that there was a Philosopher King (or Economist King) looking down on property rights from above and saying: "We need property rights to create incentives." If we stay tuned into what we know about the history of property law, the rules evolved in case-by-case deliberations.[7] In individual cases, it is the micro-focus emphasis on *conflict resolution* that dominates, i.e., individuals involved in resolving conflicts over actual pieces of property. On a day-to-day basis, authorities (such as they were) would have been largely concerned with what happens when A snatched an apple out of B's hand and B clobbered A over the head with a stick.[8] And this thread of conflict resolution turns out to be important in IP, too, as discussed further below.

In discussing physical property, Professor Epstein is right to set aside idealistic considerations of whether the owners of property deserve their right in it.[9] This will strike a lot of people as counter-intuitive, as divorcing ethics and justice too far. Nevertheless, it is right. The economist F.A. Hayek explains why we cannot worry about establishing perfect fairness or individual merit when it comes to making law.[10] First, we need a system of rules that rewards results, not intentions. This planet can be a harsh environment for human beings. We need to produce food and

7. *See* HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 7–8 (Beacon Press 1963) (1861) (describing how judgments preceded legislators or even principles in ancient law).

8. This view of the evolution of law is recognized today in game theoretic discussions of how legal principles may have evolved in individual encounters. *See, e.g.*, ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984). *See generally* Robert Axelrod, *An Evolutionary Approach to Norms*, 80 AM. POL. SCI. REV. 1095 (1986); Jason Alexander & Brian Skyrms, *Bargaining with Neighbors: Is Justice Contagious?*, 96 J. PHIL. 588 (1999); Ken Binmore and Larry Samuelson, *An Economist's Perspective on the Evolution of Norms*, 150 J. INSTITUTIONAL & THEORETICAL ECON. 45 (1994); Peter Vanderschraaf, *Game Theory, Evolution, and Justice*, 28 PHIL. & PUB. AFF. 325 (2000).

9. Epstein, *Liberty versus Property*, *supra* note 2, at 5–7.

10. F.A. HAYEK, 2 LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE 72 (1976):

> [T]o hold out a sufficient incentive for those movements which are required to maintain a market order, it will often be necessary that the return of people's effort do *not* correspond to recognizable merit . . . . It is not good intentions or needs but doing what in fact most benefits others, irrespective of motive, which will secure the best reward.

shelter and other goods, and so we want to reward those who actually produce those goods, whether they do so by luck or something else. Second, this planet, and human life on it, is inherently unfair by a pure egalitarian standard. Some are born into good families, some into bad, some into rich lands, and some into poor. To eradicate this unfairness would require a level of totalitarian control over human life that would put to shame anything attempted by the former Soviet Union.[11] Law is good at giving us rough and ready rules for when A hits B with a club, but it cannot establish perfection.

II. IP AS CONFLICT RESOLUTION

In moving on to discuss intellectual property, Professor Epstein notes that the process of making IP is statutory and therefore it is top-down,[12] not bottom-up "found law" in the sense that common law or other law built on cases or customs is.[13] But the result is defensible for similar reasons—because it is needed to make us all better off by putting in place incentives to create. I agree with this argument.

However, notice that the earlier concern about practical conflict resolution has fallen out of the debate. Returning to this concern and thinking about IP and the needs of a system of conflict resolution, we again stumble across a difference between IP and physical property. The threat of a breach of the peace that one gets if one grabs an apple out of someone's hand is simply not as immediate if one copies some Macintosh software and leaves him with his own copy, especially if one does so over a wire, remote from him in time and space. Therefore, the argument about incentives is roughly the same for physical property and IP at the macro level, but the problem of conflict resolution is different at the micro level—not a difference of kind, but of degree.

This helps explain why many ordinary people—college students and Grokster fans of all stripes—just feel differently about IP than they do about stealing physical property. And the law recognizes this difference as well in the penalties for copyright. Historically, policing costs have been borne by the copyright owner, not by the publicly funded police and prosecutors brought to bear against more obvious and immediately dangerous breaches of the peace. Penalties for copyright were mostly civil, with criminal violations much less emphasized.[14]

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11. *Id.* at 84–85 ("To achieve [real equality of opportunity] this government would have to control the whole physical and human environment of all persons . . . .").

12. Epstein, *Liberty versus Property*, *supra* note 2, at 20.

13. BRUNO LEONI, FREEDOM AND THE LAW 11, 21–22 (3d ed. 1991).

14. *See generally* Note, *The Criminalization of Copyright Infringement in the Digital Era*, 112 *HARV. L. REV.* 1705 (1999).

It should be noted that this difference in the way IP functions as conflict resolution is a difference of degree, not of kind. It is so because there is a danger that IP will ultimately result in breaches of the peace as wasteful as people hitting each other over the head with clubs. Things could get nasty, with viruses embedded in MP3 files and endless wars between hackers and coders; though this might yield a flood of innovation, this is far from clear, some of the resources thus expended might be better directed elsewhere. Therefore, it is important to return to a consensus on ground rules here.

However, it is easier said than done—it is not likely that many ordinary people will suddenly start worrying in the abstract about incentives. One attempt to get people to think about copyright the way they do about theft has been through deterrence by increasing the penalties for copyright infringement, introducing more criminal penalties, and so on.[15] This is probably a mistake for two reasons. First, empirical research on deterrence shows that it has more to do with the frequency of enforcement than the severity of penalties. A law that is enforced only in a few token cases with severe penalties is a much less effective deterrent than a law with a light penalty that is consistently enforced.[16] Consequently, the direction that should be followed is towards more consistent enforcement, not higher penalties.

Second, increasing penalties for copyright infringement to the point where college students are threatened with being tossed into prison for several years will strike most people as grossly unfair. And it will only further undermine the consensus in favor of copyright.

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15. *Id.*

16. Empirical evidence shows that increasingly severe punishment is a less effective deterrent than increasing the probability the violator will be caught. *See* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES (6th ed. 1995); Ann Dryden Witte, *Economic Theories*, *in* 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 316, 322 (Sanford H. Kadish ed., 1983). Studies of individual level tax compliance have also found that the severity of the penalty is less of a deterrent than the probability of detection. Dick J. Hessing et al., *Does Deterrence Deter? Measuring the Effect of Deterrence on Tax Compliance in Field Studies and Experimental Studies*, *in* WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT 291, 291–92 (Joel Slemrod ed., 1992); *see also* Brian Erard, *The Influence of Tax Audits on Reporting Behavior*, *in* WHY PEOPLE PAY TAXES, *supra*, at 95, 107, 113. These studies suggest that the weight of a sanction only becomes relevant after the likelihood of being caught becomes substantial.

III. SOLVING THE PROBLEM OF POSITIVISM WITH EXPECTATIONS: IP AND PHYSICAL PROPERTY

Professor Epstein shows that ordinary physical property and IP are basically useful man-made creatures.[17] This leads us to a problem that Professor Epstein has discussed at length elsewhere.[18] If these rules are made by man, why can't they be broken and remade by man? That is, if we show that IP is like physical property and vice versa using utilitarian arguments, haven't we just shown that legislatures, as today's spokespersons for society, can remake them at will? Wouldn't this be especially true for IP, which Professor Epstein points out has a more obviously top-down component than physical property?[19]

I think not. To explain why not, I will attempt a sports analogy. Consider a game of basketball. Halfway through the game the referees or some other authority decide to move the basket a few inches higher, or to the left, or to change the application of some other rule to the game. Both the players and the fans would likely be furious and baffled. It does not matter to them where the rules came from, or whether or not the rules could originally have been different in some respect. What matters is that their expectations—their plans and practices—have settled around the rules they were originally given. If the rules are changed, it should only be for a very good reason.

For IP, or basketball, or physical property, what the ground rules are matters because people's expectations matter. We count on rules to make our uncertain future as human beings a little less uncertain. Even with top-down statutory rules, what ultimately matters about the rules is the role they play in people's lives.

Therefore, with IP, as with physical property or with a game of basketball, we can have a meaningful conversation about fairness when the rules are interpreted differently or changed.[20] Italian legal scholar Bruno Leoni, another big advocate of bottom-up rules and legal certainty, thought that at bottom our sense of what is fair and right stem from well-

17. *See generally* Epstein, *Liberty versus Property*, *supra* note 2.

18. Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 123, 157 (2003) [hereinafter Epstein, *Dubious Constitutionality*].

19. Epstein, *Liberty versus Property*, *supra* note 2, at 20.

20. Note that this argument is not intended to supply or supplant the much more specific constitutional inquiries and tests that are brought to bear in considering whether any particular law or practice is unconstitutional; one must have something more specific to base such determinations on than general expectations. The argument about expectations is simply intended to explain how man-made rules, top-down or bottom-up, acquire normative force even if they originally included some arbitrary element.

established expectations, which he referred to as "previsions."[21]

But here again we stumble across another interesting bit of history that has recently split IP and physical property apart on the surface. Technology has made IP increasingly hard to enforce and easy to break, and the practice of routine copying has confused people's expectations of what is fair and right. Once expectations get off on the wrong foot, it can be dreadfully difficult to get them back on the right track again. One almost has to start at the beginning all over again and hope for some kind of "constitutional moment." This is probably what needs to happen for IP. But it will not be a smooth process, and the name calling we have seen so far in the debate will not help.

IV. WHAT IS THE PUBLIC DOMAIN?

Let us explore one final implication of this emphasis on micro conflict resolution for the issue of the conflict between copyright and liberty. Suppose the legislature changes the copyright law, for example, by extending the length of already existing copyrights for a period of years. Professor Epstein has argued that this is a First Amendment violation,[22] just as the change to the boundaries of physical property law by regulation would constitute a taking. The theory is that one cannot give to some without taking from others. In the case of IP, the possession of others is the public domain. In his paper, Professor Epstein invokes public trust law, and notes that the state ought to be reimbursed for intrusions on the public trust.[23] Do we want to treat the public domain as a public trust?

But I think that treating the public domain as a possession of others is also a pretty dubious proposition. Professor Epstein's own point that property must function as a practical system of resource allocation, and that too many competing claims prevent this, is relevant here. In a Lockean tradition, we do not want to be arguing that when someone takes a handful of nuts from the commons, the nuts were, prior to the taking, owned in some sense by everyone. It is much cleaner and causes fewer problems (and I think is more historically realistic) to treat the nuts as being owned by no one. One might ask if it does not make a great deal of sense to treat the public domain in copyright the same

21. LEONI, *supra* note 13, at 198.
22. Epstein, *Dubious Constitutionality*, *supra* note 18, at 157.
23. Epstein, *Liberty versus Property*, *supra* note 2, at 27–28; *see also* Epstein, *Dubious Constitutionality*, *supra* note 18, at 156–58.

way—not as information owned by everyone, but as information owned by no one. Treating it as property owned by everyone just does not seem to make for a sensible system of conflict resolution—there are too many potentially competing claims.

One counter-argument might be that the First Amendment boosts information up into something like property owned by everyone. But I do not think we want it to be treated like a public trust administered by the state. If the last survivor of a key battle is hit by a truck on the way to talk to a historian, should the state sue the truck driver for the resulting loss to the public trust? Probably not.

Therefore, I do not think we need to treat the public domain as anything like common property to throw up a red flag when the legislature messes with it. But this is simply because ordinary people's expectations matter, the way they matter in the basketball example above.

V. CONCLUSION

Professor Epstein is correct in that both physical property and IP are about incentives, though they have different origins (as far as we know). Here are some differences in the way the two systems function as systems of conflict resolution, but those are differences of degree and technology, not differences as to their fundamental nature.

So it does not make much more sense to speak of a conflict between free speech and IP at a fundamental level, than of a conflict between free speech and the law of trespass, if you toss a would-be speaker out of your living room or edit a column in your newspaper. There can be conflicts between IP legislation and the First Amendment, just as there can be conflicts between property law or regulation and the Takings Clause. Once the rules are in place, people should be able to rely on them as a practical matter so fundamental that it becomes normative.

In practice, our expectations about IP enforcement at the micro level have become divorced from the theory that justifies IP as a system of incentives at the macro level. Those notions have to be two sides of the same coin, as they tend to be with physical property, or they will cause conflict rather than resolve it. This problem desperately needs to be resolved with IP, and the name calling that we have seen so far in the debate will not resolve it. What we need is a new appreciation of why incentive systems matter. Perhaps this conclusion is too theoretical for the average downloading college student, but if so, we are going to have bigger problems than just the erosion of IP. We might be looking at the erosion of property rights across the board. If some of the college campus rhetoric about globalism, environmentalism, trade, and other similar issues is any guide, that is just what we are seeing.