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## Be Careful What You Wish For: Copyright's Campaign for Property Rights and an Eminent Consequence of Intellectual Monopoly

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**Be Careful What You Wish For:  
Copyright's Campaign for Property Rights  
and an Eminent Consequence of  
Intellectual Monopoly**

*Ian McClure\**

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\* J.D. Candidate 2008, Chapman University School of Law; B.S. Economics 2005, Vanderbilt University. I would like to dedicate this Comment to my parents, Annie and John McClure, whose open-minded words of wisdom have been the best free education that I could have ever received.

## INTRODUCTION

Two competing theories attempt to define the essence of intellectual property. One theory holds that intellectual property rights are no different than the ownership of tangible private property, such as houses and cars.<sup>1</sup> The contrasting theory is that the right to own an idea is quite different from the property rights afforded to ownership of physical property.<sup>2</sup> Proponents of this latter argument generally disagree with intellectual property laws, claiming that they effectuate “intellectual monopolies” in an economy that should instead encourage competition.<sup>3</sup> Part I of this Comment explains the problems with characterizing intellectual property as tangible private property. An understanding of each rationale is necessary to comprehend each side’s justification for protecting, or not protecting, intellectual property rights.

Part II of this Comment highlights the historical campaign for property rights conducted by copyright proponents. It outlines the path toward absolute and perpetual copyright protection that is currently being taken both by Congress and the Courts. Furthermore, it stresses the blatant disregard for both the intended meaning of the Constitution and the importance of free and unobstructed dissemination of information.

To show exactly what this campaign means for creative and economic efficiencies, Part III parallels the current copyright legal model with implications that violate the honorable intentions of antitrust law. Here, an analysis of the media industries is undertaken, specifically calling attention to empirical data of market monopolization. Furthermore, government-granted monopolies generate undue market power, causing market fragmentation and consumer frustration when copyrighted products are tied with incompatible patented technology. Finally, Part III emphasizes the internal burdens that intellectual property laws, and more specifically copyright laws, place on the creative process.

Part IV discusses recent changes in the law of eminent domain, in evaluating the Fifth Amendment’s application to the framework of copyrights. Although the idea has never been implemented due to strong opposition, this Part explains that intel-

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<sup>1</sup> Eugene Volokh, *Sovereign Immunity and Intellectual Property*, 73 S. CAL. L. REV. 1161, 1167 (2000) (“Intellectual property advocates often stress that intellectual property is property, with dignity and worth equal to that of tangible property.”).

<sup>2</sup> Michele Boldrin & David K. Levine, *Property Rights and Intellectual Monopoly*, at para. 2, <http://www.dklevine.com/general/intellectual/coffee.htm> (last visited Apr. 8, 2007).

<sup>3</sup> *Id.* at para. 9.

lectual property, and more specifically copyrights, are at risk of becoming subject to the government's power of eminent domain. State governments have the constitutional authority to undertake this action, and the U.S. Supreme Court has ensured state immunity from suit for infringing certain intellectual property rights. Through a proposed system of compulsory licensing and periodical payments of just compensation, the market inefficiencies caused by perpetual copyright protection will be alleviated, and the incentive to create will remain intact.

Part IV discusses the real possibility of eminent domain's application to copyright, and should be considered as a warning to copyright proponents. Thus, it does not zealously advocate for broad government power over property, whether that property is tangible or intangible. Instead, Part IV should be understood to proffer one possible resolution, albeit unfavorable to copyright owners, to the problems that arise from copyright's campaign for perpetual protection. Copyright proponents should take heed to this suggested path and realize that their staunch position for property rights may lead them to unwanted consequences. Indeed, the very position that they take opens the door for the government to apply its eminent domain power over copyrights.

#### I. INTELLECTUAL PROPERTY OR GOVERNMENT-GRANTED MONOPOLY: WHY THE INTANGIBLE SHOULD NOT BECOME TANGIBLE

##### A. Theory One: Intellectual Property

The Copyright Clause of the U.S. Constitution secures for authors "the exclusive Right to their respective Writings," but only "for limited Times."<sup>4</sup> Literalists, while disregarding the language "for limited Times," equate such exclusivity to that which is afforded by property laws to owners of real and personal private property.<sup>5</sup> Proponents make a case that an idea is "property," as that word is read and understood in property class as a first year law student.<sup>6</sup> Thus, "[t]he argument exploits an ambiguity in the common usage of the word 'idea' to incorrectly equate the usual meaning of the word 'property' and its specific meaning in 'intellectual property.'"<sup>7</sup> Advocates for the private property argument ("Private Property") tend to be "rent-seekers with a vested interest in the existing law."<sup>8</sup> It is no surprise that the most recent legislation pushing copyright protection closer to

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<sup>4</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>5</sup> Volokh, *supra* note 1, at 1167.

<sup>6</sup> *Id.*

<sup>7</sup> Boldrin & Levine, *supra* note 2, at para. 2.

<sup>8</sup> *Id.*

perpetual property rights<sup>9</sup> was backed by notorious copyright owners such as Disney and Bob Dylan.<sup>10</sup> Understandably, owners of moneymaking assets will want those assets protected. Thus, it is the result of lobbying and rent-seeking motives that the term “intellectual property” has replaced that which only a generation ago was coined “copyright.”<sup>11</sup> Regardless of the motive for the campaign for Private Property, legislators have taken heed.<sup>12</sup>

Proponents of Private Property continue to rest their case on Locke’s Labor Theory,<sup>13</sup> which creates the assumption that by mixing our labor with something, we make that thing our own. Thus, the application of intellectual property to this theory creates the following equation: mental labor plus other ideas equals private property. Accordingly, “[i]deas and expressions and inventions are all the product of mixing our labor, in this case our mental labor, with the common property of preexisting ideas and information.”<sup>14</sup> It is a fundamental assumption that property rights, if recognized through a legal system, provide incentive to expend resources to improve that property.<sup>15</sup> The argument follows that authors and inventors need incentive to create their works, and that without this incentive, innovation and invention would be no more. Pointing to the Copyright Clause in the Constitution, advocates latch onto legal positivism, claiming that the Framers promised to “promote the . . . Arts”<sup>16</sup> by affording exclusive control over that which is original. Without such a guarantee, there would be no incentive to expend mental labor.<sup>17</sup> There-

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<sup>9</sup> Copyright Term Extension Act, 17 U.S.C. § 302(a) (2000).

<sup>10</sup> Jesse Walker, *How Intellectual Property Laws Stifle Popular Culture*, REASON, Mar. 2000, at 46, available at <http://www.reason.com/news/show/27635.html> (last visited Apr. 8, 2007).

<sup>11</sup> Gary Shapiro, President, Consumer Electronics Assoc., Remarks at the Cato Institute Conference: Copyright Controversies: Freedom, Property, Content Creation, and the DMCA, in *Copyrights and Property Rights*, CATO POLICY REPORT, July–Aug. 2006, at 17 (“[I]ntellectual property’ didn’t even exist a generation ago; it was just called copyright.”).

<sup>12</sup> *Id.* (“Copyright protection has also expanded immeasurably over the last three decades. Terms of protection are much longer. The original term was set in 1790 at 14 years. Congress has acted 13 times to expand the length of the copyright terms; 11 of those expansions were passed during the last 40 years.”).

<sup>13</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287–88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (“The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his.”).

<sup>14</sup> Jim Harper, Director of Information Policy Studies, Cato Institute, Remarks at the Cato Institute Conference: Copyright Controversies: Freedom, Property, Content Creation, and the DMCA, in *Copyrights and Property Rights*, *supra* note 11, at 15.

<sup>15</sup> David K. Levine, Co-author of *Against Intellectual Monopoly*, Remarks at the Cato Institute Conference: Copyright Controversies: Freedom, Property, Content Creation, and the DMCA, in *Copyrights and Property Rights*, *supra* note 11, at 16.

<sup>16</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>17</sup> Thomas G. Field Jr., *What is Intellectual Property?*, FOCUS ON INTELLECTUAL PROPERTY RIGHTS 2 (2006), available at <http://usinfo.state.gov/products/pubs/intelprp/>

fore, this incentive is so necessary that intellectual property should be governed similarly to tangible private property.<sup>18</sup> The creator of an original idea should be able to completely exclude all others from it, and should be able to possess, use, and transfer it as the owner sees fit. As one professor has stated,

Intellectually or artistically gifted people have the right to prevent the unauthorized use or sale of their creations, just the same as owners of physical property, such as cars, buildings, and stores. Yet, compared to makers of chairs, refrigerators, and other tangible goods, people whose work is essentially intangible face *more* difficulties in earning a living if their claim to their creations is not respected. Artists, authors, inventors, and others unable to rely on locks and fences to protect their work turn to IP rights to keep others from harvesting the fruits of their labor.<sup>19</sup>

## B. Theory Two: Intellectual Monopoly

Opponents of Private Property distinguish intellectual property from private property.<sup>20</sup> The Constitution, the importance of the public domain, and the effect that intellectual property laws ostensibly have on economic efficiency all lend support to this argument.<sup>21</sup> At the outset, this theory is more easily understood by defining the fundamental characteristics of tangible property and contrasting these inherent traits with those of intangible property.

Physical property is a scarce resource, and its use and possession is limited. Inherent in tangible things is the fact that two people cannot possess the same thing at the same time.<sup>22</sup> Thus, the sale or transfer of physical property necessarily means that the prior possessor cannot use it anymore. Similarly, the execution of the right to exclude necessarily means that the owner will be the only one who can use it. Copying tangible goods is a limited process, because again, other tangible goods must be used as production materials.<sup>23</sup> “[P]roperty rights in tangible goods,” from an economics perspective, help facilitate efficient transactional interaction “in the context of scarcity.”<sup>24</sup> Without such

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<sup>18</sup> Volokh, *supra* note 1, at 1167.

<sup>19</sup> Field Jr., *supra* note 17, at 2–3 (emphasis added).

<sup>20</sup> Boldrin & Levine, *supra* note 2, at para. 2.

<sup>21</sup> The constitutional support and the importance of the public domain are analyzed in Part I. The effect of IP laws on economic efficiency is evaluated in Part III.

<sup>22</sup> Harper, *supra* note 14, at 15 (“If I have an apple and you want to eat it too, we can’t both eat it without bumping our faces together and making quite a mess. In economic parlance, an apple is a rivalrous physical good. No two people can possess it at the same time.”).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

property rights, transaction costs would be extremely high because resources such as time and energy would be spent ensuring exclusive possession and protection. Realistically, the market for transferring tangible goods becomes an arena for animalistic behavior.

In contrast, intellectual property is not similarly scarce. The creator of an idea may still enjoy that idea exclusively, but only if he or she does not reveal it. He or she may, however, communicate that idea to another person, and still retain an identical copy; the original copy.<sup>25</sup> However, the transferee's copy "leads an existence entirely independent of [the transferor's] copy."<sup>26</sup> The new copy may be limitlessly transferred or duplicated without affecting the original copy. Consider the following scenario:

You teaching me the law is a production process through which at least three private, rivalrous, and excludable inputs (your idea, your time, and my time) generate a private, rivalrous, and excludable output: my knowledge of the law . . . . If you were to die, my copy of the idea of the law . . . would continue to exist, and would be at least just as useful as it would have been had you remained alive. My copy of the law . . . possesses, therefore, economic value. Similarly, your copy of the law . . . also possesses economic value.<sup>27</sup>

An idea is not a public good, and may be excludable. Yet, an idea may multiply without depleting resources, and once it is disclosed, it becomes public.<sup>28</sup>

The argument against Private Property, then, insists that intellectual property is not 'property' at all. Instead, it is simply a government-granted monopoly;<sup>29</sup> it is a license to possess, use, and transfer your idea. From an economic standpoint, monopolies are unfavorable in a capitalist system, because they thwart efficiency while raising prices to consumers.<sup>30</sup> Therefore, intellectual monopolies "restrict distribution—by producing fewer copies and by making copies more expensive,"<sup>31</sup> availing fewer people of the intellectual product.

Furthermore, many ideas are born from other ideas. Many patents are innovations, or rather, new ways of using other resources or patents.<sup>32</sup> Numerous nonfiction books are written by

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<sup>25</sup> Boldrin & Levine, *supra* note 2, at para. 3.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Harper, *supra* note 14, at 15.

<sup>29</sup> Walker, *supra* note 10, at 46.

<sup>30</sup> Levine, *supra* note 15, at 16.

<sup>31</sup> *Id.*

<sup>32</sup> Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698, 699 (1998), available at [www.sciencemag.org/cgi/reprint/280/5364/698.pdf](http://www.sciencemag.org/cgi/reprint/280/5364/698.pdf) ("By conferring monopolies in discover-

reading and researching other books. Many songs contain samples of other songs.<sup>33</sup> Therefore, an author may be able to earn more money from the use of his or her copyright, but may have to pay more for the ingredients for creating the work.<sup>34</sup> There is friction in the creative process imputable to the recognition of copyrights. The argument that copyrights instill incentive to create is met with the fact that they deter innovative action.<sup>35</sup>

The notion that copyrights are slowing, instead of protecting, the creative process is all too evident in the realm of software and technology.<sup>36</sup> Our current economy, including the entertainment industry, is driven by technology.<sup>37</sup> While the Record Industry Association of America ("RIAA") complains of lost sales on the front end because of technology's facilitation of pirating music, it neglects to mention that the cost of recording and the difficulty with which it is now done has been extremely diminished by new technology.<sup>38</sup> Because of new technology, major studios are not the only producers of professional-sounding music. Software programs such as Sony Acid Pro<sup>39</sup> can be purchased and used in a living room with a personal computer. Accordingly, more production means more music at a cheaper price. In the software industry, the concept has been pushed by many eager advocates, exemplified by the Open Source Software initiative.<sup>40</sup> Still, the

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ies . . . complex obstacles . . . arise when a user needs access to multiple patented inputs to create a single useful product.").

<sup>33</sup> Boldrin & Levine, *supra* note 2, at para. 20 ("We can't create great new music by modifying wonderful old music because all the wonderful old music is under copyright at least until the 22nd century.").

<sup>34</sup> Levine, *supra* note 15, at 16.

<sup>35</sup> Boldrin & Levine, *supra* note 2, at para. 20 ("The greatest bar to this outpouring of wonderful new innovative music . . . is the copyright system. If we were to abolish copyright today we are confident that the most important effect would be a vast increase in the quantity and quality of music available.").

<sup>36</sup> *Id.* at para. 20 ("[M]odern technology, rather than strengthening the case for intellectual monopoly in music, weakens it.").

<sup>37</sup> Walker, *supra* note 10, at 49 ("Where samizdat artists once had to make do with photocopiers and audio cassettes, they now can use videotapes, camcorders, Photoshop, digital film editing, recordable CDs, MP3 files, and the Internet. The result has been an explosion of amateur films, fiction, and music, all of which can be 'published' for a minimal investment by putting them on the Web.").

<sup>38</sup> Boldrin & Levine, *supra* note 2, at para. 20 ("[T]he cost of producing the first copy . . . has decreased enormously due to the same computer technology that makes it so easy to copy music.").

<sup>39</sup> *Sony Announces Major Acid Pro Software Upgrade*, INTERNET VIDEO MAGAZINE, Jan. 19, 2006, [http://www.internetvideomag.com/News/News2006/011906\\_Sony\\_Acid\\_Pro.htm](http://www.internetvideomag.com/News/News2006/011906_Sony_Acid_Pro.htm).

<sup>40</sup> Go Open Source, The Basics of OSS, [http://www.go-opensource.org/software\\_basics/](http://www.go-opensource.org/software_basics/) (last visited Apr. 8, 2007) ("The basic idea behind open source is very simple: when programmers can read, redistribute, and modify the source code for a piece of software, the software evolves. People improve it, people adapt it, people fix bugs. And this can happen at a speed that, if one is used to the slow pace of conventional software development, seems astonishing.").



Digital Millennium Copyright Act (DMCA) “creates new restrictions on technology, and those restrictions lead to lawsuits and a sharp decline in available venture capital.”<sup>41</sup> The DMCA, the latest major copyright legislation, provides copyright owners with added protection against new technology.<sup>42</sup> In its wake, technology, itself subject to copyright law, suffers from constraints. Summarily, increased copyright protection results in decreased facilitation of copyright production.

### C. Contrast: Property Rights and Intellectual Property Rights

In comparison, intellectual property laws take a step further in affording protection than do most tangible property rights. Tangible property rights give a person the right to use the property exclusively or to transfer it. Once tangible property has been transferred, the rights of the prior possessor are discontinued. However, intellectual property rights continue after the property has been transferred.<sup>43</sup> Effectively, intellectual property laws grant the owner the right to control the transferee’s use of the property after it has been transferred. Economists Michael Boldrin and David Levine view the sale of intellectual property, under current intellectual property law, as a contract not to compete. They assert that “[t]he most significant feature is the agreement not to sell copies of the idea in competition with the person who sold you the idea. Outside of the area of ‘intellectual property’ such an agreement would be called anti-competitive, and a violation of the antitrust law.”<sup>44</sup>

The argument against treating intellectual property as private property, in essence, claims that intellectual property laws implicitly violate antitrust law, and consequently create monopolies that are not allowed otherwise.<sup>45</sup> This argument is supported by Article I, Section 8, Clause 8 of the Constitution, which explicitly prevents intellectual property laws from effectuating perpetual monopolies. This Clause affords exclusive rights to “Writings and Discoveries” for “limited Times.”<sup>46</sup> Thus, while proponents of Private Property point to exclusive rights, opponents point to the limited nature of the guarantee. Inferred from this limited right or limited license is Congress’s intention to create a public do-

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<sup>41</sup> Shapiro, *supra* note 11, at 17.

<sup>42</sup> 17 U.S.C. § 1201(a) (2000).

<sup>43</sup> Boldrin & Levine, *supra* note 2, at para. 7 (“Intellectual property law is not about your right to control your copy of your idea . . . . What intellectual property law is really about is about your right to control my copy of your idea.”).

<sup>44</sup> *Id.* at para. 8.

<sup>45</sup> *Id.* (“Ordinarily . . . we do not consider monopoly power necessary to provide adequate incentives for economic activity.”).

<sup>46</sup> U.S. CONST. art I, § 8, cl. 8.

main, or a pool of ideas for public use without limitation.<sup>47</sup> The rationale for creating a public domain goes hand-in-hand with the argument against intellectual monopoly. The Founding Fathers must have anticipated that the free flow of information would be pertinent to the creative process and the furtherance of original but resourceful ingeniousness. A public domain, it is argued, “contributes to a democratic society, a strong economy, and the advancement of science.”<sup>48</sup>

On one hand, the argument that intellectual property laws provide incentive to create has some merit, for monetary motivations are reasonably understandable. On the other, perpetual protection resembling property rights might effectuate monopolies which, in turn, implicitly violate antitrust laws.<sup>49</sup> The argument against Private Property makes it evident that intellectual property is not tangible property, and the laws that govern tangible property elicit economic efficiency problems when applied to ideas. While most advocates of Private Property relish protection of their own rights, they would be narrow-minded to discount the importance of access to other ideas. When balancing the importance of the broad dissemination of knowledge and information with the significance of ensuring appropriate protection to authors and inventors, one commentator has offered a settlement-inducing observation: “Free and forward-moving societies need both.”<sup>50</sup> Nevertheless, Private Property advocates should be wary of the extent to which the need for protection is overstated, for unforeseen implications may surface as a result of overcompensation.

## II. COPYRIGHT'S CAMPAIGN FOR PROPERTY RIGHTS

The Copyright Clause of the Constitution provides Congress the power “[t]o promote the Progress of . . . useful Arts.”<sup>51</sup> Such promotion is to be accomplished, specifically, “by securing *for limited Times* to Authors . . . the exclusive Right to their respective Writings.”<sup>52</sup> The foresight of the Founding Fathers was impressive, for they recognized the importance of creative roles in a progressive society. Yet, “useful Arts” in the late eighteenth century could not have put the Founding Fathers on notice of the ex-

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<sup>47</sup> Anita Eisenstadt, *The Importance of the Public Domain*, in FOCUS ON INTELLECTUAL PROPERTY RIGHTS, *supra* note 17, at 60 (“[T]he Founding Fathers of the United States realized that it is critical to balance the intellectual property interests of authors and inventors with society’s need for the exchange of ideas.”).

<sup>48</sup> *Id.*

<sup>49</sup> See *infra* Part III.

<sup>50</sup> Eisenstadt, *supra* note 47, at 61.

<sup>51</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>52</sup> *Id.* (emphasis added).

tensive material which would become subject to legislation because of the power granted by this Clause. In the two-plus centuries that Congress has possessed this power to promote the arts, it has only *increased* the duration of the copyright term, and therefore the strength of the right, for authors and creators.<sup>53</sup> Implicit in this line of legislation is the continued assumption that incentive is the most important, and most vulnerable, factor for furthering creative progressiveness, and that term extensions stimulate incentive.<sup>54</sup>

In *Eldred v. Ashcroft*, the Supreme Court encountered the constitutionality of the latest copyright term extension.<sup>55</sup> The copyright legislation at issue was the Copyright Term Extension Act, passed in 1998.<sup>56</sup> The Act enlarged the duration of copyrights by twenty years.<sup>57</sup> Before upholding the extension, Justice Ginsberg gave a detailed and chronological account of the history of copyright legislation.<sup>58</sup> What she uncovered was a steadfast course toward perpetual exclusive ownership of copyrights.

Copyright's campaign for property rights began in 1790, when "[t]he Nation's first copyright statute . . . provided a federal copyright term of 14 years from the date of publication, renewable for an additional 14 years if the author survived the first term."<sup>59</sup> In 1831, copyright protection enjoyed its first extension, expanding the federal copyright term to forty-two years, including twenty-eight years of protection from the date of publication and a fourteen-year renewal.<sup>60</sup> The copyright front was silent until 1909, when the term was again expanded to fifty-six years, keeping the twenty-eight-year protection but extending the renewal period to twenty-eight years.<sup>61</sup> In 1976, "Congress altered the method for computing federal copyright terms."<sup>62</sup> The 1976 Act extended protection for all works created after the effective date of January 1, 1978, by an identified natural person, to fifty years after the author's death.<sup>63</sup> For works already published be-

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<sup>53</sup> Tim Lee, *What's So Eminent About Public Domain: The Copyright Lobby Makes a Dubious Case for IP Protection*, REASONONLINE, Oct. 31, 2005, <http://www.reason.com/news/show/32988.html> ("Despite the [c]onstitutional requirement that copyrights be 'for limited [T]imes,' Congress has effectively made them perpetual, one extension at a time.").

<sup>54</sup> See H.R. REP. NO. 105-452, at 4 (1998) (stating that term extension "provide[s] copyright owners generally with the incentive to restore older works and further disseminate them to the public").

<sup>55</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 194 (2003).

<sup>56</sup> *Id.* at 195.

<sup>57</sup> *Id.* at 193, 195.

<sup>58</sup> *Id.* at 194–96.

<sup>59</sup> *Id.* at 194; Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (1790).

<sup>60</sup> Act of Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 436, 439 (1831).

<sup>61</sup> Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080 (1909).

<sup>62</sup> *Eldred*, 537 U.S. at 194.

<sup>63</sup> 1976 Act, Pub. L. No. 94-553 § 302(a), 90 Stat. 2541, 2572 (1976) (current version)

fore the effective date, “the 1976 Act granted a copyright term of 75 years from the date of publication,” which was a nineteen-year increase from the fifty-six-year term granted under the 1909 Act.<sup>64</sup> The last major extension, the CTEA, increased the copyright term to the life of the author plus seventy years.<sup>65</sup> However, these major Acts do not complete the list of legislative activity expanding copyright terms. The copyright term has been lengthened eleven times in the past forty years.<sup>66</sup> In just a twelve-year span between 1962 and 1974, it was lengthened nine times.<sup>67</sup> Not a single legislative act has curtailed this expansion towards perpetual protection for copyrights.

In *Eldred*, Justice Ginsburg used this history as evidence of Congress’s intentions, and, presuming the correctness behind the rationale for it, she reasoned that such a course should be shown deference.<sup>68</sup> Such deference, though, and such a course, must discontinue at some point if it is going to parallel the Constitution’s mandate that such a monopoly be “for limited Times,”<sup>69</sup> and in order to create an all-important public domain. Still, the *Eldred* court elected to follow “rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works.”<sup>70</sup> This rationale works for copyrights already owned by companies such as Disney and artists such as Bob Dylan.<sup>71</sup> However, for works that have yet to be created, no resourceful knowledge or creation has become accessible through the public domain since the 1970s, unless copyright owners chose not to renew them.<sup>72</sup> Importantly, “[t]he limitation is not for the advantage of the inventor, but of society at large, which is to take the benefit of the invention after the period of limitation has expired.”<sup>73</sup> This means that society’s advantage has not been realized in the past thirty years.<sup>74</sup>

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at 17 U.S.C. § 302(a) (2000)).

<sup>64</sup> *Eldred*, 537 U.S. at 195 (citations omitted); 1976 Act, Pub. L. No. 94-553, § 304(a)–(b), 90 Stat. 2541, 2573–74 (1976) (current version at 17 U.S.C. §§ 304(a)–(b) (2000)).

<sup>65</sup> 17 U.S.C. § 302 (2000).

<sup>66</sup> Walker, *supra* note 10, at 46.

<sup>67</sup> *Eldred*, 537 U.S. at 195 n.2.

<sup>68</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors . . . .”); *Eldred*, 537 U.S. at 198 (“[T]his Court has been similarly deferential to the judgment of Congress in the realm of copyright.”).

<sup>69</sup> U.S. CONST. art I, § 8, cl. 8.

<sup>70</sup> *Eldred*, 537 U.S. at 207.

<sup>71</sup> Walker, *supra* note 10, at 46.

<sup>72</sup> Tim Lee, *supra* note 53.

<sup>73</sup> *Eldred*, 537 U.S. at 224 n.2 (Stevens, J., dissenting) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 175 (1824)).

<sup>74</sup> Boldrin & Levine, *supra* note 2, at para. 20 (“Indeed, with modern computers there are a great many creative innovators . . . lacking perhaps the physical skills and training to play an instrument . . . or even to read sheet music . . . who could modify, edit

Over two hundred years ago, the rationale was much different than it is today. In 1829, the “main object was ‘to promote the progress of . . . useful arts;’ and this could be done best, by giving the public at large [access to the works] . . . at as early a period as possible.”<sup>75</sup> This rationale remains consistent in patent law, as the Supreme Court noted in 1964 that a state could not “extend the life of a patent beyond its expiration date,” and in 1989 that “free exploitation of ideas will be the rule, to which the protection of a federal patent is the exception.”<sup>76</sup> Still, the campaign for property rights continues in the copyright arena. This campaign can, without mistake, be somewhat attributed to the lobbying efforts of copyright owners, and in particular by corporate copyright owners.<sup>77</sup> Justice Breyer has commented that the “primary legal effect is to grant the extended term not to authors but to their . . . corporate successors.”<sup>78</sup> In the past decade, RIAA has increasingly complained of music pirating on the internet, which is facilitated by file-sharing websites.<sup>79</sup> It brought its plight to the eyes of the watching world, and it received enormous sympathy and compassion in the courts. Consequently, copyright owners are undefeated in the past decade in the Supreme Court, including a recent 9-0 victory in *MGM v. Grokster*.<sup>80</sup>

*Grokster* involved copyright infringement claims against a company that provided an arena for, and facilitated the practice of, sharing music files online.<sup>81</sup> In that case, the Court held that “one who distributes a device with the object of promoting its use to infringe copyright . . . is liable for the resulting acts of infringement by third parties.”<sup>82</sup> Drawing a parallel to real property, one who sets up a gun or knife store undoubtedly “distributes a device with the object of promoting its use” to kill or injure. Nevertheless, he is not “liable for the resulting acts” of murder “by third parties.” This parallel may not include all of

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and create great new music on their home computers at trivial cost. The greatest bar to this outpouring of wonderful new innovative music . . . if you haven't guessed already . . . is the copyright system.”)

<sup>75</sup> *Pennock v. Dialogue*, 27 U.S. (2 Pet.) 1, 19 (1829) (quoting U.S. CONST. art I, § 8, cl. 8).

<sup>76</sup> *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151 (1989).

<sup>77</sup> Lee, *supra* note 53 (“[T]hanks to industry lobbying, Congress extended the terms in 1976, and again in 1998.”); *see also* Walker, *supra* note 10, at 46 (“Congress acts as a rubber stamp for copyright holders, especially the big campaign donors in the entertainment industry.”).

<sup>78</sup> *Eldred*, 537 U.S. at 243 (Breyer, J., dissenting).

<sup>79</sup> John Borland, *RIAA Sues 261 File Swappers*, CNET NEWS.COM, Sept. 8, 2003, [http://news.com.com/2100-1023\\_3-5072564.html](http://news.com.com/2100-1023_3-5072564.html).

<sup>80</sup> Lee, *supra* note 53; *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2769 (2005).

<sup>81</sup> *Grokster*, 125 S. Ct. at 2770.

<sup>82</sup> *Id.*

the nuances which led to the Court's reasoning in *Grokster*, but it displays the echelon that copyright protection has reached in the Court.

The Court went on to admit that "it may be impossible to enforce rights in the protected work effectively against all direct infringers."<sup>83</sup> However, such impossibility results from Congress's inability to grasp the profundity and complexity that protecting ideas entails. Without question, rewarding creation is important. That the means for this end must be absolute and unqualified, similar to property rights, is unreasonable and "impossible." Nevertheless, like Congress, the Court decided that artistic protection was more important than encouraging technological innovation, and the only way to absolutely protect it was to penalize somebody.<sup>84</sup> In light of the recognized impossibility for absolute protection, the Court resorted to the position that "the only practical alternative [would be] to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement."<sup>85</sup> The Court's retreat to alternatives, while recognizing that "technological innovation may be discouraged,"<sup>86</sup> elicits one clear interpretation: protecting ideas as if they were property, though noble, may not be efficient.

The entertainment industry has argued for, and received, longer protection. Adversaries have noted, however, that it is not about increasing the protection of *copyrights* that is at issue. Instead, it is about increasing the protection of a business model.<sup>87</sup> One commentator has warily observed that "[i]t is not about the right to the fruits of one's own labor. It is not about the incentive to create, innovate or improve. It is about the 'right' to preserve an existing way of doing business."<sup>88</sup> Ironically, the business model of the recording industry, which thrives on creation, has clearly been threatened by creation. To this end, famous author Robert Heinlein ascribes the following:

There has grown up in the minds of certain groups in this country the notion that because a man or corporation has made a profit out of the public for a number of years, the government and the courts are charged with the duty of guaranteeing such profit in the future, even in the face of changing circumstances and contrary public interest. This strange doctrine is not supported by statute nor common law. Neither individuals nor corporations have any right to come into court

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<sup>83</sup> *Id.* at 2776.

<sup>84</sup> *Id.* at 2775 ("The more artistic protection is favored, the more technological innovation may be discouraged . . .").

<sup>85</sup> *Id.* at 2776.

<sup>86</sup> *Id.*

<sup>87</sup> Boldrin & Levine, *supra* note 2, at para. 21.

<sup>88</sup> *Id.*

and ask that the clock of history be stopped, or turned back, for their private benefit.<sup>89</sup>

The recording industry, more than any other copyright-driven industry, is undergoing changes and challenges to its business model.<sup>90</sup> Despite the woes that new technology supposedly has caused, “[t]he music industry will be the greatest beneficiary of the digital revolution.”<sup>91</sup> Despite the revenue streams that have been created, and that will be created, through new and more refined licensing models enabled by innovative technologies, the industry continues to look to “technical protection measures to ensure that producers reali[z]e the value of recorded music.”<sup>92</sup> Such measures include encryption technology which would prevent certain uses of a copyright after it is purchased, propounding the idea that copyright protection controls not only how a good is distributed but also how that good is used after a consumer purchases it.<sup>93</sup> Additionally, industry leaders believe that internationally compatible systems for identification of information technology are necessary for increased copyright protection, and that “tattooing” of protected materials and electronic copyright management is essential.<sup>94</sup>

It is ironic that proponents of increased copyright protection should call technology the culprit and the savior at the same time. Even more astonishing is the recent Digital Millennium Copyright Act (“DMCA”), which made it illegal to circumvent certain protection technologies with new technology.<sup>95</sup> Allen Dixon, General Counsel and Executive Director for IFPI, has proclaimed that “[u]nauthori[z]ed circumvention activities and circumvention devices weaken the robustness and integrity of any technical measure developed . . . .”<sup>96</sup> In other words, the DMCA, and proponents of stronger copyright protection like Dixon, would undermine the rationale for copyright protection, i.e., the incentive to create and innovate, by preventing the advancement of technological innovation in order to preserve a way of doing business. Dixon adds that “[w]hile telecommunications and information

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<sup>89</sup> ROBERT A. HEINLEIN, *Life-Line*, in *THE PAST THROUGH TOMORROW* 25 (1967).

<sup>90</sup> Allen N. Dixon, General Counsel and Executive Director, IFPI, Future Issues for the Protection of Phonogram Producers, Speech at the JSO 4th Asia-Pacific Copyright and Neighbouring Rights Seminar, Tokyo, Mar. 8, 2000, available at [http://www.ifpi.org/content/section\\_views/allen\\_dixon\\_speech.html](http://www.ifpi.org/content/section_views/allen_dixon_speech.html) (last visited Apr. 5, 2007).

<sup>91</sup> *Id.* (quoting Gerald Levin, Chairman and Chief Executive Officer, Time Warner).

<sup>92</sup> *Id.*

<sup>93</sup> Boldrin & Levine, *supra* note 2, at para. 6.

<sup>94</sup> Dixon, *supra* note 90, at II(a).

<sup>95</sup> 17 U.S.C. § 1201 (2000). For more details on the legislative history of the DMCA, see David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, at 702–38 (2000).

<sup>96</sup> Dixon, *supra* note 90, at II(b).

technologies are intriguing in their own right, public acceptance and demand for advanced communications and information processing technology is driven by *content*.<sup>97</sup> This is where the industry is wrong. The demand for content, or music, already existed before advanced information technologies were born. It is the demand for the new technologies—the handheld MP3 player, the cell phone, or the next big thing—that makes music more accessible, that drives the demand for more content. Take the new information technologies away, and people will find ways to create them again. That is innovation, not circumvention.

Whatever the intent of the campaign may be, the effect is real and the same. Copyright protection, evidenced by both congressional activity and judicial decision, has continuously and increasingly resembled that which is afforded property rights. In some capacities, copyright protection exceeds that afforded to tangible property. This course has both current and future implications. These legal monopolies have begun to sustain recognizable impacts on relevant markets.<sup>98</sup> In the aggregate, these effects can influence commerce and economic efficiency in ways that antitrust laws seek to prevent.

### III. WHY ABSOLUTE COPYRIGHT PROTECTION AMOUNTS TO A VIOLATION OF ANTITRUST LAW

#### A. Antitrust and Intellectual Property: The Intersection

During the U.S. Industrial Revolution, railroad tycoons, oil robber barons, and steel giants swallowed competition “while reaping monster profits through unconscionable business activity.”<sup>99</sup> Technological innovation, manufacturing, and transportation were all stabilized by set standards created in “Trusts.”<sup>100</sup> Effectively, these Trusts created predictable standards in prices and quality, but as a result, they restrained price competition by controlling production.<sup>101</sup> Market entry barriers stifled the incentive for improving products. Such monopolistic business practices led to the birth of antitrust law.<sup>102</sup> Today, courts do not usually see such blatantly unlawful business activity. However, with the assistance of intellectual property laws, subtle market

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<sup>97</sup> *Id.* at para. 4 (emphasis added).

<sup>98</sup> *See infra* Part III.

<sup>99</sup> Eddy Hsu, *Anti-Trust Regulation Applied to Problems in Cyberspace: iTunes and iPod*, 9 INTELL. PROP. L. BULL. 117, 122 (2005); *see also* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 6–7 (2003) (describing the history of antitrust in more detail).

<sup>100</sup> Hsu, *supra* note 99, at 122.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*



mechanisms are exploited to create economies of scale.<sup>103</sup> The question to be determined in the copyright forum is whether these economies of scale negatively impact economic efficiency and consumer behavior, and whether they deter the incentive to create. If so, advocacy for absolutely exclusive and perpetual copyright protection may rise to the level of encouraging the violation of antitrust law.

The right to own an idea exclusively is often conceded to be a government-granted monopoly.<sup>104</sup> Monopolistic behavior is more easily attributable to the work of patents, for such a right enables an individual or corporation to exclude others from using or selling a useful, and in some cases necessary, product or good. For example, in the pharmaceutical industry, the cure for cancer could, in theory, be patented and held exclusively. As a result, the owner of such a patent could charge unconscionable prices for the remedy to this deadly disease.

#### B. The Early Doctrine: Patents

In patent law, the courts have frequently confronted the question of whether a government-granted monopoly is an exception to antitrust law. "In any given case, courts . . . had to find that one or the other concept took precedence," and at first, "courts considered patents to be a government-endorsed exception to the antitrust laws."<sup>105</sup> In 1902, one Supreme Court decision explicitly held that the practice of price-fixing by patent holders deserved immunity.<sup>106</sup> In the early days of antitrust law, patent law and antitrust law were at odds, and many believed that they worked in different directions.<sup>107</sup> After all, patent law granted monopolies, and antitrust law prevented them.<sup>108</sup> Nevertheless, the recent prevailing idea is that they work together.<sup>109</sup> In *Atari Games Corp. v. Nintendo of America, Inc.*, the court proclaimed that "the aims and objectives of patent and antitrust laws may seem, at first glance, wholly at odds. However, the two bodies of law are actually complementary, as both are aimed at

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<sup>103</sup> *Id.*

<sup>104</sup> Sheila F. Anthony, *Antitrust and Intellectual Property Law: From Adversaries to Partners*, 28 AIPLA Q.J. 1, 4 (Winter 2000) ("For much of this century, courts and federal agencies regarded patents as conferring monopoly power in a relevant market."); Walker, *supra* note 10, at 46 ("Copyrights, unlike trademarks, have always posed problems, even if you think they're necessary. They are, after all, government-granted monopolies . . .").

<sup>105</sup> Anthony, *supra* note 104, at 4–5.

<sup>106</sup> *Bement v. Nat'l Harrow Co.*, 186 U.S. 70, 92, 95 (1902) (holding that the practice of patent pooling was exempted from the reach of antitrust, despite blatant price fixing).

<sup>107</sup> Anthony, *supra* note 104, at 4.

<sup>108</sup> *Id.* at 4–6.

<sup>109</sup> *Id.* at 7.

encouraging innovation, industry and competition.”<sup>110</sup> The court in *Atari Games*, exemplifying the current movement of thinking in this arena, may have confused two very important factors. That is, there is a large difference between protecting the competitive process and protecting the competitor.<sup>111</sup> Both bodies of law may fundamentally encourage innovation in some respect, and both may encourage, or preserve, industry to some capacity.<sup>112</sup> Yet antitrust law protects competition, while intellectual property law protects one competitor. This concept is what keeps antitrust and intellectual property law at odds, and in the court, together.

### C. The New Problem: Copyrights

Copyrights involve antitrust inclinations in a much more contained faculty than do patents. The right to exclusively use and sell the cure for cancer, conceivably the result of a single patent, could obviously confer monopoly power that would harm consumers and production of the product. On the other hand, the right to exclusively use and sell a book or a song, by itself, would not normally impact an entire market for literature or music. However, in the aggregate, such exclusive rights could bring copyright ownership to the same level of projected impact as that of an important and useful process or product.

Recently, at a House of Representatives hearing, the Chair of the Subcommittee on Courts, the Internet, and Intellectual Property stated the obvious: “Digital music not only has a future in the music business; it is the future.”<sup>113</sup> As discussed above, this inevitably means that, as technology goes, so goes the music industry. Again, however, the legal system which supposedly protects and encourages the creation of music also hinders the advancement of certain technology.<sup>114</sup> This notion is what

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<sup>110</sup> 897 F.2d 1572, 1576, (Fed. Cir. 1990) (citing *Loctite Corp. v. Ultraseal Ltd.*, 781 F.2d 861, 876–77 (Fed. Cir. 1985)).

<sup>111</sup> Connie C. Davis, *Copyright and Antitrust: The Effects of the Digital Performance Rights in Sound Recordings Act of 1995 in Foreign Markets*, 52 FED. COMM. L.J. 411, 419 (2000) (“Antitrust laws are intended to protect the competitive process through economic efficiency and competition. Antitrust laws are also geared towards enhancing competition, rather than protecting competitors.”).

<sup>112</sup> Though this comment lays out problems resulting from this line of thinking, there is still some merit to the argument that affording the right to some limited form of compensation to a creator will encourage further innovation. Similarly, such rights can preserve an industry, although such preservation may hinder the progressive nature of a capitalist society.

<sup>113</sup> *Digital Music Licensing and Section 115 of the Copyright Act: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 1 (2005) (opening statement of Hon. Lamar Smith).

<sup>114</sup> Boldrin & Levine, *supra* note 2, para. 20.

revolutionized the aforementioned Open Source Initiative.<sup>115</sup> Nevertheless, recognition of the need to sync music and new technology has led companies which hold patented technology to bid into the entertainment industry, and more specifically, into the market for copyrights.<sup>116</sup> The cross-market merging of giant conglomerates has shrunk the diversity among those doing business in the entertainment and media industries.<sup>117</sup> Reflect on the following passage:

[I]n 1983, fifty corporations dominated most of every mass medium and the biggest media merger in history was a \$340 million deal. . . . [I]n 1987, the fifty companies had shrunk to twenty-nine. . . . [I]n 1990, the twenty-nine had shrunk to twenty-three . . . . [I]n 1997, the biggest firms numbered ten and involved the \$19 billion Disney-ABC deal, at the time the biggest media merger ever. . . . [In 2000,] AOL Time Warner's \$350 billion merged corporation [was] more than 1,000 times larger [than the biggest deal of 1983].<sup>118</sup>

Currently, 71.7% of the recording industry's global market share is allocated to just four companies.<sup>119</sup> However, horizontal integration, the significant control of a specific media sector, is not the largest problem for the free dissemination of information. Instead, vertical integration of the media market, with the same companies gaining ownership of content and the means to distribute it, causes this problem.<sup>120</sup> In other words, the media moguls are gaining ownership of copyrights and patents, and they are using them both to monopolize the content provided and the means for distributing the content.

The best example of antitrust implications arising from combining a patented instrument for distribution with copyrighted content comes from Apple's iPod and iTunes venture.<sup>121</sup> While multiple MP3 players exist, the iPod is the only player licensed by Apple to play music securely encoded with Apple's AAC codec technology.<sup>122</sup> Thus, if consumers want to buy the iPod to listen

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<sup>115</sup> Open Source Initiative, <http://www.opensource.org> (last visited Apr. 8, 2007).

<sup>116</sup> Kevin J. Delaney, *Yahoo Bets on Media in Search for Online Advertising vs. Rival Google*, PITTSBURGH POST-GAZETTE.COM, Mar. 2, 2005, <http://www.post-gazette.com/pg/05061/465147.stm> (last visited Apr. 5, 2007).

<sup>117</sup> BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* xx-xxi (6th ed. 2000).

<sup>118</sup> *Id.* (emphasis added).

<sup>119</sup> Press Release, IFPI, *The Recording Industry in Numbers 2005* (Aug. 2, 2005), available at [http://www.ifpi.org/content/section\\_news/20050802.html](http://www.ifpi.org/content/section_news/20050802.html).

<sup>120</sup> Robert W. McChesney, *The New Global Media*, THE NATION, Nov. 29, 1999, at 11, available at <http://www.thenation.com/doc/19991129/mcchesney>.

<sup>121</sup> See Apple's homepage for the iPod, <http://www.apple.com/ipod/> (last visited Apr. 5, 2007).

<sup>122</sup> Apple, *iTunes: About Third-party Music Players and AAC File Support*, <http://docs.info.apple.com/article.html?artnum=93032> (last visited Apr. 5, 2007). Similarly, songs downloaded using other codec technology will not be able to play through

to music on a portable music player, they must buy content from iTunes. Therefore, the embedded link of AAC-encoded music between iTunes and the iPod raises a possible antitrust violation by creating an illegal tie.<sup>123</sup> Under Sections One and Two of the Sherman Act, parties to a contract or an agreement in restraint of trade, or made in an attempt to monopolize, shall be guilty of a felony.<sup>124</sup> “The Supreme Court has defined a tying arrangement as an agreement by one party to sell [the tying] product to another on the condition that the buyer also purchase [the tied product].”<sup>125</sup> In this case, the collusion occurs between the consumer, who exclusively deals with Apple in the second market for the tied product, and Apple, who excludes competition from the second market.<sup>126</sup>

Apple’s product is technologically incompatible with the rest of the market, and because the process becomes patented, other companies are forced to invent different solutions to avoid paying licensing fees. Proponents of intellectual property laws might argue that this exemplifies incentive to invent, resulting in added competition and availability. In actuality, the market becomes fractured because of non-compliant standards, causing consumer frustration.<sup>127</sup> Consumers resort to buying the most accessible product for a higher price. Economies of scale are achieved through intellectual property protection at economic efficiency’s expense. Consequently, an intellectual monopoly is born.

#### D. The Department of Justice’s Solution, the “Rule of Reason,” and Copyrights

The legal community, specifically the Federal Trade Commission (FTC) and the Department of Justice (DOJ), has attempted to address the clash between antitrust and intellectual property by adopting the “rule of reason.”<sup>128</sup> As a preliminary as-

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iTunes. *Id.*

<sup>123</sup> Hsu, *supra* note 99, at 123.

<sup>124</sup> *Id.*; 15 U.S.C. § 1. The Sherman Act declares that “[e]very contract . . . in restraint of trade or commerce . . . is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . .” *Id.* “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty of a felony . . .” *Id.* § 2.

<sup>125</sup> *Carl Sandburg Vill. Condo. Assoc. No. 1 v. First Condo. Dev. Co.*, 758 F.2d 203, 207 (7th Cir. 1985) (citing *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5–6 (1958)).

<sup>126</sup> Hsu, *supra* note 99, at 123.

<sup>127</sup> *Id.*

<sup>128</sup> U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 3.4 (1995), available at <http://www.usdoj.gov/atr/public/guidelines/0558.pdf> [hereinafter ANTITRUST GUIDELINES] (stating that the rule of reason applies in the “vast majority of cases”); see also *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 7–8 (1979).

assessment method, this doctrine inquires into the anticompetitive impact of a certain practice involving the licensing or use of intellectual property by raising particular questions about it.<sup>129</sup> The first question posed is “whether the restraint is likely to adversely affect competition. Second, if there is a likely anticompetitive effect, the inquiry determines whether the restraint on competition is reasonably necessary to achieve pro-competitive . . . efficiencies . . . that outweigh those anticompetitive effects.”<sup>130</sup> The analysis involves several steps, the first of which is to define the “relevant market.”<sup>131</sup> The definition of a relevant market includes the product market and the geographic market. The product market is defined by identifying substitutes for the product, while the geographic market is defined by asking whether consumers would import substitutes or similar products if the price of a domestically produced product goes up.<sup>132</sup>

Once the relevant market is defined, the FTC or the DOJ will assess market power. Market power is defined by these agencies as “the ability profitably to maintain prices above, or output below, competitive levels [in a relevant market] for a significant period of time.”<sup>133</sup> An important factor in the ability to exercise market power is the ease with which competitors can enter the relevant market.<sup>134</sup> If market power exists, the agencies will determine how that power was acquired, or how it will be maintained. Transactions involving an agreement that might hinder competition will be closely scrutinized.<sup>135</sup> Moreover, market power may be acquired legally, but sustained illegally.<sup>136</sup> Finally, even if market power is legally acquired and maintained, certain anticompetitive business activity may violate antitrust law if it unreasonably restrains competition.<sup>137</sup>

Evaluating copyrights arbitrarily under the “rule of reason” illustrates why this area of intellectual property poses antitrust problems that may be circumvented when analyzing patents under this doctrine. First, the relevant market for a book or song proves that there are few substitutes for a consumer’s favorite music or novel. A Bruce Springsteen fan is not likely to find solace listening to soft jazz instead, and neither is that consumer

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<sup>129</sup> ANTITRUST GUIDELINES, *supra* note 128, § 3.4.

<sup>130</sup> Anthony, *supra* note 104, at 9.

<sup>131</sup> *Id.* A relevant market is one in which products would actually and directly compete with one another. *Id.* at 10.

<sup>132</sup> *Id.* at 9–10.

<sup>133</sup> ANTITRUST GUIDELINES, *supra* note 128, § 2.2

<sup>134</sup> *Id.* § 4.1.1.

<sup>135</sup> *See id.* § 3.4.

<sup>136</sup> *Id.* § 2.2.

<sup>137</sup> *Id.*

likely to import a CD from France to quench his desire to rock out to "Born in the USA" if the price increases domestically. Music, like a good novel, is a particular good which consumers choose because they identify the artist or author. By contrast, many patented products, such as a car, can and will be substituted easily if domestic prices rise above certain utility levels. Furthermore, the vast number of foreign cars on the streets is a testament to the importability of such patented products. Still, certain patented products, when used with and complimented by copyrighted products, have become impossible to substitute, such as iTunes and the iPod.

Market power can be quite accurately measured by the ability of a competitor to enter the market. Viewing copyrights through a fundamental lens, not anyone can create a marketable copyright to compete with those that are profitable. Authors publish once and never publish again. Musicians come and go without notice. Surprisingly, and quite unnoticed by most of the music-consuming public, over 180 legitimate music download services were launched globally in 2004.<sup>138</sup> Why so unnoticed? One commentator easily answers, emphasizing that "[y]our first step in choosing a store should be determining which stores are compatible with your portable music player, since online music stores will not give refunds if you find you've made a mistake later on."<sup>139</sup> Undoubtedly, such constraints keep Apple in control of the market, selling over 600 million downloads between 2003 and the end of 2005, which accounted for 80% of legal music downloads in the United States.<sup>140</sup> Here, Apple's tying arrangement, coupled with its first mover advantage, comes to fruition.

A first mover is a firm that is first to enter a market, creating opportunities to raise barriers to entry.<sup>141</sup> The advantage can translate into the ability to keep competitors out of the marketplace. Before competitors attempt to enter the market, the first mover has the opportunity to collect substantial economic rents through monopoly pricing.<sup>142</sup> The first mover advantage can create economies of scale, which also deter competition because new entries would have to incur losses once they enter the market be-

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<sup>138</sup> Press Release, IFPI, *supra* note 119.

<sup>139</sup> Troy Dreier, *Understanding Online Music Stores*, CNET'S QUICK GUIDE, May 9, 2006, [http://reviews.cnet.com/4520-11297\\_7-6518467-1.html](http://reviews.cnet.com/4520-11297_7-6518467-1.html).

<sup>140</sup> Adam L. Penenberg, *The Right Price for Digital Music*, SLATE, Dec. 5, 2005, <http://www.slate.com/id/2131573/>.

<sup>141</sup> Posting of Narasimha Chari to VenChar, *First Mover Advantage and Barriers to Entry*, [http://www.venchar.com/2004/01/first\\_mover\\_adv.html](http://www.venchar.com/2004/01/first_mover_adv.html) (Jan. 8, 2004).

<sup>142</sup> iTunes sells downloads for a flat rate of 99 cents. However, due to industry and consumer criticism, the pricing structure may be changing to reflect the popularity of different types of music. See Jeff Leeds, *Apple, Digital Music's Angel, Earns Record Industry's Scorn*, N.Y. TIMES, Aug. 27, 2005, at A1.

fore they can attain the same efficiencies of scale.<sup>143</sup> If the first mover exploits a patent, especially if it is non-compatible with other complimentary goods sold in the market, the ability to capture the consumer group and deter competition is great.<sup>144</sup> In this way, market power can be easily attained, as it has been by Apple, by combining the licensing of copyrights with a patented non-compatible technology.

As copyright's campaign for property rights continues, the economic inefficiencies that perpetual and overreaching protection creates will become manifest. The legal monopoly that is conferred by the government should not exempt rights holders from antitrust violations. Nevertheless, monopoly market power can be alleviated by other instruments of law. One proposition that has never been completely adopted is the government's use of its eminent domain power.

As Private Property advocates push for rights similar to those recognized in tangible property, certain consequences to copyright ownership may gain potential, including the concern of copyrights becoming subject to the government's eminent domain power. This prospect, exposed in the next section, is made possible by copyright's steadfast campaign and the antitrust problems caused by this position. Adherence to the words of Article I, Section 8, Clause 8, as explained in Parts I and II, might diminish the viability of this phenomenon. Nevertheless, because of the current state of copyright law and the position that its proponents take, eminent domain has become a practicable possibility for the government to alleviate the inefficiencies in copyright law, which, ironically, were created by the government in the first place. This occurrence would be unfortunate for copyright owners. Therefore, the reality of this possibility, and the following proposal, should be recognized as both a warning to copyright owners and an appeal for change in the way that copyright law is made and interpreted.<sup>145</sup>

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<sup>143</sup> Posting of Narasimha Chari, *supra* note 141.

<sup>144</sup> *Id.* (“[M]any elements of the first mover advantage can be leveraged into creating strong barriers to entry[, including patents].”).

<sup>145</sup> Complete abolishment of all copyright protection is not necessary. There is, after all, *some* merit in rewarding creation by reserving a right to capitalize on that creation, whether that capitalization be economic or otherwise. However, the correct interpretation of the protection under Article I, Section 8, Clause 8 of the Constitution calls for legislative reformation to account for a growing need for a public domain and the further accessibility of new information and ideas. A starting point for changing the currently prevailing interpretation is at the length of the term for copyright protection. Next, particularly stifling legislation such as the DMCA should be reconsidered to minimize the see-saw relationship between technology and copyrighted content and to create a more balanced equilibrium for the two so that technological advancement and new creative content can progress as one.

#### IV. AN EMINENT CONSEQUENCE: WHY COPYRIGHTS COULD BECOME SUBJECT TO EMINENT DOMAIN

The Fifth Amendment states, in the negative, “nor shall private property be taken for public use, without just compensation.”<sup>146</sup> This Clause elicits the inference that the government has the power to take certain private property, but the power is limited by the requirements that the taking be only for a public use, and that the government pay the owner just compensation for harm done.<sup>147</sup> Ambiguity in the Constitution is not an anomaly, and the clause conferring eminent domain power to the government is no exception. The assessments to be made when analyzing a taking under the Fifth Amendment include (1) whether the thing to be taken actually constitutes private property, (2) whether that private property is being taken for a public use, and (3) what comprises just compensation.<sup>148</sup> If all three are satisfied according to the meaning conferred under the Constitution, then such private property may be legally taken without successful objection by the owner of the property.<sup>149</sup>

##### A. Intellectual Property as Private Property

The U.S. Supreme Court recognizes that the eminent domain power conferred under the Fifth Amendment applies to the states via the Fourteenth Amendment.<sup>150</sup> When read literally, private property must be taken to invoke the Takings Clause. Land, because of its limited nature, is coveted by the government for particular uses which are easily attributable to the public interest. Hence, the Clause chiefly applies in cases involving the disposition of real property.<sup>151</sup> In such cases, the Court has deferred to legislative judgment when analyzing public need for the use of the takings power.<sup>152</sup> If another form of private property exhibits such a public need, it is reasonable to believe that the Court would show similar deference when analyzing such a case under

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<sup>146</sup> U.S. CONST. amend. V.

<sup>147</sup> Donald J. Kochan, “*Public Use*” and the Independent Judiciary: *Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 60 (1998) (“The government is given the power to take property for public uses when it is necessary to control the governed, but it is obliged to control itself by compensating property owners harmed by its actions and by taking property only for public use.”).

<sup>148</sup> See *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231–32 (2003).

<sup>149</sup> *Id.* at 232.

<sup>150</sup> See *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

<sup>151</sup> See, e.g., *Kelo v. City of New London*, 125 S. Ct. 2655 (2005); *Berman v. Parker*, 348 U.S. 26 (1954); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

<sup>152</sup> *Berman*, 348 U.S. at 33 (“If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.”).



the Eminent Domain Clause.<sup>153</sup>

The Court has expressed that the takings power may be applied to private property other than real property. In *Phillips v. Washington Legal Foundation*,<sup>154</sup> the Court was confronted with a case involving the state's use of interest on lawyers' trust accounts ("IOLTA") to pay for legal services provided to the needy. The Court held "that the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal."<sup>155</sup> In *Brown v. Legal Foundation of Washington*,<sup>156</sup> the Court reaffirmed that the interest earned was private property. The Court likened the transfer of the interest to a per se taking, stating that the transfer of interest "seems more akin to the occupation of a small amount of rooftop space in *Loretto*."<sup>157</sup> In *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>158</sup> the occupation of rooftop space constituted a per se taking of private property under the Fifth Amendment. Accordingly, in *Brown*, the Court found the transfer of interest applicable under the Takings Clause.<sup>159</sup>

Two sources could potentially provide states with the authority to take a privately owned patent from one company and have another company manufacture the same patented product.<sup>160</sup> First, a government's eminent domain power, already executed for the redevelopment of land and buildings, may be extended to intellectual property such as prescription drug patents.<sup>161</sup> In a presentation to the National Legislative Association on Prescription Drug Prices, Law Professor Kevin Outterson proposed that "[s]tates may exercise this power against pharmaceutical patents, just as they have always exercised eminent domain over real property."<sup>162</sup> Second, in 1999, the U.S. Supreme Court held in *Florida Prepaid Postsecondary Education Expense Board v.*

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<sup>153</sup> *But see* LEONARD C. GILROY, REASON FOUNDATION, STATEWIDE REGULATORY TAKINGS REFORM: EXPORTING OREGON'S MEASURE 37 TO OTHER STATES (2006), available at <http://www.reason.org/ps343.pdf> (examining eminent domain and the need for a movement toward stronger property rights and a limit on eminent domain's application).

<sup>154</sup> 524 U.S. 156 (1998).

<sup>155</sup> *Id.* at 172.

<sup>156</sup> 538 U.S. 216 (2003).

<sup>157</sup> *Id.* at 235.

<sup>158</sup> 458 U.S. 419, 421 (1982) (holding that the occupation of rooftop space constituted a per se taking of private property under the Fifth Amendment).

<sup>159</sup> *Brown*, 538 U.S. at 235.

<sup>160</sup> Barbara T. Dreyfuss, *Patents Pending: A D.C. Official Takes a Renegade Approach to Get Lower-Priced Drugs for Residents*, THE AMERICAN PROSPECT ONLINE EDITION, Feb. 23, 2005, [www.prospect.org/web/page.wv?section=root&name=ViewWeb&articleId=9237](http://www.prospect.org/web/page.wv?section=root&name=ViewWeb&articleId=9237).

<sup>161</sup> *Id.*; Volokh, *supra* note 1, at 1167.

<sup>162</sup> Kevin Outterson, *States May Reduce Drug Prices with an Eminent Domain Process for Pharmaceutical Patents*, Presentation to the National Legislative Association on Prescription Drug Prices, [www.nlarx.org/present/modelpharmEDpresent.html](http://www.nlarx.org/present/modelpharmEDpresent.html) (last visited April. 1, 2006).

*College Savings Bank*<sup>163</sup> that states are generally immune from patent infringement if due process, by way of just compensation, is afforded to the patent owner. The Court in *Florida Prepaid* stressed that a state's infringement of a patent is not by itself unconstitutional, as long as some remedy is provided. In fact, "only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent could a deprivation of property without due process result."<sup>164</sup> Thus, per this decision, a state may take a privately held patent, as long as it pays just compensation to the patent owner. This holding seems odd considering the lengths to which the Supreme Court has gone to uphold absolute protection of intellectual property. Nevertheless, interpreted broadly, this holding highlights the fact that protection for intellectual property is not an absolute right, and government intervention may supersede the exclusivity of this right.

The decision in *Florida Prepaid*, together with the decisions in the IOLTA cases, fuel the prospect that intellectual property could viably become subject to a state's eminent domain power. This idea was considered seriously by legislators in the District of Columbia, when David A. Catania, Councilmember of the Committee on Health, introduced the Prescription Drug Compulsory Manufacture License Act of 2005.<sup>165</sup> The bill proposed that, under eminent domain authority, a state should be able to require a compulsory license to produce a patented pharmaceutical product. Further, the state should be able to pass that license on to a generic firm to produce the product in an effort to alleviate pharmaceutical prices.<sup>166</sup> At a public hearing concerning the bill, Professor Kevin Outterson stated the following:

[I]ntellectual property proponents are making a push to call patents, copyrights and trademarks "intellectual property" so they are covered by eminent domain protections. The Supreme Court has gone along with this argument. States have the right, for a public purpose, to take private property as long as they pay just compensation. If we can do it with a house, why should the state not be able to, not take the patent right, but force pharmaceutical manufacturers to give us a non-exclusive license? Given that this policy would positively impact

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<sup>163</sup> 527 U.S. 627, 643 (1999).

<sup>164</sup> *Id.*

<sup>165</sup> Bill 16-114, Comm. on Health, Council of the District of Columbia, 16th Council Period (D.C. 2005) (codified as amended as the Prescription Drug Excessive Pricing Act of 2005, D.C. CODE § 28-4551 (2006)), available at <http://www.dccouncil.washington.dc.us/images/00001/20050211092234.pdf>.

<sup>166</sup> Committee on Health, Council of the District of Columbia, Draft Committee Report on Bill 16-114, the "Prescription Drug Compulsory Manufacture License Act of 2005", at 3-4 (Mar. 23, 2005), available at <http://www.nlarx.com/modelleg/docs/DCRprtCompulsoryLicensing16-114.doc>.

Medicaid recipients and employees of the state, eminent domain should be available to serve this public purpose.<sup>167</sup>

Though the bill's sponsor, Catania, backed off from the eminent domain idea, the precedent was set for the novel theory. Eminent domain's application to intellectual property may be close in time.

Substituting copyrights for patents in such a bill, and under the "private property" assessment in an eminent domain analysis, is, unfortunately, easily envisioned. As mentioned previously, copyright owners have campaigned for years that copyrights are in fact "private property," as that word is meant under the Fifth Amendment. The writers of Catania's bill agreed, stating that "intellectual property proponents are making a push to call patents, *copyrights* and trademarks 'intellectual property' so they are covered by eminent domain . . ."<sup>168</sup> Although there are shortfalls in the parallel between intellectual property and "private property," the current prevailing campaign by Congress and in the Court is to equate the two.<sup>169</sup> Thus, it is not the inherent nature of copyrights that calls for application of the eminent domain process. Instead, it is the incorrect insistence that copyright proponents themselves have made for over two hundred years that invites the application of copyrights to this process. In sum, copyrights satisfy the first step in the eminent domain analysis not by their own attributes, but because they have been mistakenly forced into this assessment by their own sponsors.

#### B. A Public Use for Copyrights

The Supreme Court, within the last century, has claimed that the public use provision within the Takings Clause does not particularly mean what it literally says.<sup>170</sup> In practice, there is now no requisite public use of the property taken.<sup>171</sup> Rather, the Court has explicitly rejected any "use by the public" test for public use.<sup>172</sup> Specifically, the Court has stated that "[i]t is not essential that the entire community, nor even any considerable portion . . . directly enjoy or participate in any improvement in

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<sup>167</sup> *Id.* at 4.

<sup>168</sup> *Id.* (emphasis added).

<sup>169</sup> The continued extension of the copyright term toward perpetual protection, and the decisions by the Court to uphold these extensions, shows that Congress and the Court have slowly but surely agreed that intellectual property owners should be afforded the same rights as private tangible property owners. See *Eldred v. Ashcroft*, 537 U.S. 186, 204 (2003).

<sup>170</sup> *Kochan*, *supra* note 147, at 51–52.

<sup>171</sup> *Id.*

<sup>172</sup> *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 707 (1923).

order [for it] to constitute a public use.”<sup>173</sup> Moreover, the Court has expressly provided that the legislature’s determination will receive deference as “well-nigh conclusive” of the public interest in the taking.<sup>174</sup> Provided with the Court’s deference, the legislature needs only a good reason, or purpose, to take private property in the public interest.

Most recently, in *Kelo v. City of New London*, the Court held that “a State may transfer property from one private party to another if future ‘use by the public’ is the purpose of the taking . . . .”<sup>175</sup> The Supreme Court has conveniently reduced “use by the public” to a “carefully considered” economic plan<sup>176</sup> that serves a broadly defined public purpose.<sup>177</sup> In fact, the Court has approved of takings for “public use” in a purely economic context. In *Hawaii Housing Authority v. Midkiff*, the Court approved a statute allowing the state to take land from lessors and transfer it to lessees in order to reduce the concentration of land ownership.<sup>178</sup> The Court concluded that eliminating the “social and economic evils of a land oligopoly” qualified as a valid public use.<sup>179</sup> In *Ruckelshaus v. Monsanto Co.*, the Court concluded that eliminating a significant barrier to entry in the pesticide market and thereby enhancing competition constituted a public use.<sup>180</sup> This line of decisions under the Takings Clause increases the likelihood that intellectual property, under copyright proponents’ stretched definition, may be taken for public use.

Legislatures may soon claim that the economic inefficiencies resulting from its own government-granted monopolies in copyrights and patents may just prove reason enough for federal and state governing bodies to follow the lead of David Catania and the District of Columbia. The public purpose in that specific instance, to alleviate pharmaceutical prices to the consuming public,<sup>181</sup> would surely pass the Supreme Court’s current public use doctrine. As discussed, in the copyright arena, a similar situation may have already surfaced with iTunes and the iPod.<sup>182</sup> That problem may worsen as the music industry collapses into one media conglomerate,<sup>183</sup> and the right to sell music is decided

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<sup>173</sup> *Id.*

<sup>174</sup> *Berman v. Parker*, 348 U.S. 26, 32 (1954).

<sup>175</sup> 125 S. Ct. 2655, 2661 (2005).

<sup>176</sup> *Id.* at 2661.

<sup>177</sup> *Id.* at 2663.

<sup>178</sup> 467 U.S. 229, 231–32 (1984).

<sup>179</sup> *Id.* at 241–42.

<sup>180</sup> 467 U.S. 986, 1015–16 (1984).

<sup>181</sup> Outterson, *supra* note 162.

<sup>182</sup> Hsu, *supra* note 99, at 122.

<sup>183</sup> See Press Release, IFPI, *supra* note 119 (noting that currently, 71.7% of the recording industry’s global market share is allocated to just four companies).

by one company, or even one person. Surely, if breaking up a land oligopoly serves a public purpose, constituting a valid taking of land,<sup>184</sup> so could breaking up a media oligopoly, constituting a “valid” taking of copyrights.

Under this hypothesized exercise, a state might implement legislation calling for compulsory licensing of copyrights for just compensation. In this way, the government will force the transfer of certain rights to the use and sale of a copyrighted product from one private party to another, or many others. The price, just compensation, will be paid by the government. In effect, the result of the process is similar to a right of first sale.<sup>185</sup> The transferees will be similarly situated entities with the capabilities of marketing and selling such products to the public. The result will be increased competition, increased output, and decreased prices to the public, which legislatures will call a beneficial public purpose. This directly mimics the purely economic benefit in *Midkiff*—the Supreme Court has already given its blessing to this supposed public use, taking from A and giving to the rest of the alphabet. Again, in *Kelo*, the Court approved such a maneuver.<sup>186</sup>

In the context of eminent domain as applied to copyright, the benefit could be deemed public because of the facilitation of public access to information. Moreover, if the same practice is duplicated for patented technology such as Apple’s AAC codec technology,<sup>187</sup> market frustration and fragmentation will be alleviated by technological homogeneity. As a result, the consuming public will not have to ask whether the music they are buying will work with their respective player, and the 180 legal music downloading services launched in 2004<sup>188</sup> will sell more downloads. Presumably, the holding in *Florida Prepaid* will extend to copyrights, leaving the state immune from an infringement suit as long as due process is granted by paying just compensation for the taking.

The ease with which the proposed system fits within the legal framework for “public use,” and the compelling justifications that seemingly create valid benefits for imposing the process,

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<sup>184</sup> *Haw. Hous. Auth.*, 467 U.S. at 231.

<sup>185</sup> Douglas Clement, *Creation Myths: Does Innovation Require Intellectual Property Rights?*, REASON, Mar. 2003, at 35, available at <http://www.reason.com/news/show/28703.html> (“Boldrin and Levine emphasize that . . . innovators should be given ‘a well defined right of first sale.’ . . . [a]nd creators should be paid the full market value of their invention, the first unit of the new product. That value is . . . the current value of everything it’s going to earn in the future.”).

<sup>186</sup> *Kelo*, 125 S. Ct. at 2661.

<sup>187</sup> Apple, *supra* note 122.

<sup>188</sup> Press Release, IFPI, *supra* note 119.

should be heeded by copyright proponents. Open eyes do not have to strain to foresee the possibility and its apparent suitability under current Supreme Court interpretation. This should be enough to curtail current practice and interpretation.

### C. Just Compensation for Copyrights

The U.S. Supreme Court has stated that “[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.”<sup>189</sup> Just compensation is measured by the property owner’s loss, not the government’s gain.<sup>190</sup> The owner must be returned to a position as if the property had not been taken; he is entitled to no more.<sup>191</sup> If the net loss is zero, however, then just compensation due will be zero.<sup>192</sup> On its surface, this raises a concern for those who might invest in property; but even in the open market, those investors would receive nothing in return for this investment because there is no expectation of a return.

In the case of a copyright owner, just compensation will be the loss of the right to sell the copyrighted product. A copyright is not limited, and therefore the sale, or lease, of a copyright is not a one-time transaction. Profits from the sale of a copyrighted product are earned over time by collecting royalties. Therefore, the current net loss to the copyright owner will be the future right to collect royalties. In such a case, just compensation would be difficult to measure, if not impossible. Nonetheless, by using a system which calculates actual sales and downloads of the copyright, just compensation could be measured and paid over time, just as royalties are collected. However, it is possible that the legislation would not include future profits in “just” compensation.<sup>193</sup> In this case, a reasonable royalty, including interest and costs, would be calculated and paid.<sup>194</sup> This raises an important concern for copyright owners because most revenue generated by copyrights is earned over a long period of time. Legislation, by neglecting to include future profits in just compensation, would be getting off easy without accounting for an adequate return on investment. Again, this possibility should encourage copyright

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<sup>189</sup> *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985).

<sup>190</sup> *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 237 (2003).

<sup>191</sup> *Olson v. United States*, 292 U.S. 246, 255 (1934).

<sup>192</sup> *Brown*, 538 U.S. at 237–38.

<sup>193</sup> Committee on Health, *supra* note 166, at 11 (stating that Councilmember Catania responded that “the current body of law supports the idea that such a payment would not include compensation for lost profits”).

<sup>194</sup> *Id.* (“[U]nder equitable principles of fairness, a reasonable, not excessive royalty would be appropriate.”).

owners to change the course of their current campaign to ensure that this does not become a reality.

#### D. Research and Development

In the patent arena, the adverse effect on research and development is the most recognized and wholly legitimate argument against the use of eminent domain.<sup>195</sup> Opponents argue that compulsory licensure of patents will undermine the incentives for research and development.<sup>196</sup> In light of the huge costs associated with research and development,<sup>197</sup> companies investing in patents will be hesitant to spend such time and money on their creations if their creations can be taken away.

This argument is not as successful in the copyright arena, making copyrights more apt to be subject to eminent domain. Although research and development plays an integral part in the development process of a patent, demanding substantial investments of time and money,<sup>198</sup> these investments of time and money are not usually as substantial in the development of a copyright. A songwriter does not employ a research and development team as does a pharmaceutical company.<sup>199</sup> During the mid-1990s, one patent was granted in the software industry for every \$10 million spent on research and development.<sup>200</sup> It is difficult to imagine that the same level of investment is usually expended to create a song, book, or painting.<sup>201</sup> Thus, the fear of expending resources for little return must be far less with copyrights than with patents. Following this intuition, Nobel Prize winner and renowned economist Robert Lucas offers the following comparison of copyrights with patents:

If we do not enforce copyrights to music, will people stop writing and recording songs? . . . Not likely . . . If so, then protection against musical 'piracy' just comes down to protecting monopoly positions: something economists usually oppose, and with reason.

. . . [But w]hat about pharmaceuticals? . . . Here millions are spent

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<sup>195</sup> Outterson, *supra* note 162.

<sup>196</sup> *Id.*

<sup>197</sup> Committee on Health, *supra* note 166, at 11 (summarizing Sharon Treat's testimony that "drug companies often cite research and development as huge costs").

<sup>198</sup> *Id.*

<sup>199</sup> Clement, *supra* note 185, at 38 ("Much of the high cost of pharmaceutical R&D . . . is due to the inflated values placed on drug researchers' time because they are employed by monopolists.")

<sup>200</sup> James Bessen & Robert M. Hunt, *The Software Patent Experiment*, 2004 FED. RES. BANK OF PHILA. BUS. REV. 27 (2004), available at <http://www.phil.frb.org/files/br/brq304rh.pdf>.

<sup>201</sup> The music industry will argue that recording costs are relatively high, but these costs are steadily in decline because new technology makes music recording inexpensive. See *supra* note 37.

on developing new drugs. Why do this if the good ideas can be quickly copied?<sup>202</sup>

In this light, unfortunately, it is easy to envision the government's prospective argument that compulsory licensing of copyrights would not destroy the copyright creation process in the same way that compulsory licensing of patents might destroy the incentive to invest in patent creation. Because the incentive does not disappear, and because lower costs are more easily covered by payment of just compensation, the primary argument that prevents subjecting patents to the eminent domain process does not translate to the copyright arena. Copyright campaigners should take note of this and amend their practices accordingly.

#### CONCLUSION

This Comment demonstrates to copyright proponents that their very insistence on lobbying for absolute and perpetual protection actually opens the door to unwanted consequences. First, there are fundamental problems associated with characterizing intellectual property as tangible private property. Although fine arguments have been made by proponents of the private property theory, most of these proponents are self-interested owners of intellectual property rights. These owners understandably have a vested interest in securing profits for themselves in a system that promotes rent-seeking activities. Nevertheless, affording to intellectual property the same perpetual and absolute property rights that are granted to tangible private property causes economic inefficiencies as well as internal friction in the creative process.

Second, the historical, and currently prevailing, campaign for property rights conducted by copyright advocates has never been denied, despite the inefficiencies created by recognizing perpetual intellectual monopolies. Courts and legislators have heeded to lobbying pressures, continually strengthening and extending copyright protection, approaching the perpetual protection afforded to tangible property. Although protecting the interests of authors is not without merit, absolute copyright protection is not the most efficient method to spur creativity. In fact, this method actually thwarts the creative process by failing to recognize the importance of free and unobstructed dissemination of information to the creative process. Furthermore, the true intent of the Constitution, which states that such protection shall only

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<sup>202</sup> Clement, *supra* note 185, at 37 (quoting Robert E. Lucas, Jr., Nobel Laureate and Economist, Univ. of Chi.).



be “for limited Times,”<sup>203</sup> is not being correctly followed.

Third, copyright’s historical outline, proof that Congress and the Courts tend to treat copyrights like absolute property rights, has antitrust implications. The practical application shows that market inefficiencies are created through the monopoly power conferred by intellectual property laws to copyright and patent owners. Such inefficiencies cause less output, and higher prices to consumers, of patented and copyrighted products. Furthermore, the sale of copyrighted products tied with the sale of an incompatible patented technology, such as iTunes and the iPod, produces a fragmented and frustrated market for the copyrighted products. When a monopoly over this business model is legally obtained, antitrust law intentions are debased, and antitrust law is violated.

This phenomenon is consistent with, and provides further support for, the proposition that legislators may create for themselves an escape from the quagmire they have established, and find it both worthy and constitutional to subject intellectual property, and more specifically copyrights, to the power of eminent domain. It is not the author’s intention to argue for the immediate application of eminent domain with blind ambition. Instead, the intention has been to suggest a viable, although unattractive, alternative to the inefficiencies created by intellectual monopolies in an effort to instill motivation to change current legislation and copyright law interpretations. The proposed system would involve a compulsory licensing scheme that mirrors a right of first sale for copyright owners. The transaction would include the required transfer of a copyrighted product, in return for just compensation to be paid over time as royalties are paid. Utilizing the Takings Clause<sup>204</sup> in the Constitution as a sword, and exploiting the U.S. Supreme Court’s decision in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*<sup>205</sup> as a shield, legislators have created for themselves both the authority and purpose to take copyrighted materials and transfer them to other entities, private or not, for a public use. The rationale to do so depends on the extremity of antitrust implications that will arise from perpetual ownership of intellectual monopolies. In the media industry, which includes music, film, and publishing, this possibility becomes more evident as market diversity moves toward singular control by one media conglomerate.

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<sup>203</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>204</sup> U.S. CONST. amend. V.

<sup>205</sup> 527 U.S. 627, 630 (1999).

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Although this use of the Takings Clause will undoubtedly solicit great opposition, it seems hypocritical for copyright proponents to argue for equating copyrights with private property for the last two hundred years, and then to argue that those very same copyrights should not become subject to the Takings Clause. Copyright proponents can only avoid such a hypocritical position by receiving this warning and modifying their stance on property rights. In sum, for the benefit of copyright owners, copyright's campaign for property rights should blow the whistle on itself. If this Comment's proposed action should indeed present itself in legislation, the words "for limited Times" will be the "I told you so" from the Founding Fathers.

