

## Property Atlaws II: The Anti-Delegation Architecture of Intellectual Property

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We live in an age of profound confusion regarding the future of intellectual property. Never before has a proprietary legal regime been so deeply and substantively empowered—by countless legislative and common law interpretations—and so widely and prominently disobeyed by popular citizens. To some commentators, this divide between the legal potency of intellectual property entitlements and the accompanying incidence of disobedience signals a coming crisis for intellectual property law, illustrating the need for owners to harness more effective modes of surveillance and deterrence against infringement. To others, however, the widespread incidence of disobedience illustrates a timeless lesson: that systems of intangible ownership are noticeably leaky regimes that cannot possibly control and prevent *all* acts of infringement, particularly in the digital age. While the former perspective implicitly (and optimistically) celebrates the power of law in deterring disobedience and illegal behavior, the latter suggests the continuing power of technological innovation to circumvent legal control.

Both views, however, subscribe to a general world view that oversimplifies the role of disobedience within both historical and contemporary approaches to intellectual property. The law and literature surrounding intellectual property often tends to treat the alleged infringer as little more than a petty thief, a willful trespasser who is deserving, at best, of moral opprobrium, and, at worst, of criminal punishment. As a result, contemporary literature on intellectual property within the popular media reflects a continued excoriation of the intellectual property outlaw, who is often variously blamed for the breakdown of the music and software industry, as well as a variety of other harms linked to hacking and identity theft.

Many of these accounts are undeniably compelling, drawing attention to the need for much more aggressive regimes of law and technology in addressing the problem of widespread digital piracy. Yet, as we have argued in a companion article, property

disobedience is a far more complex phenomenon than the literature and scholarship surrounding property suggests. To the extent that such alarmist observations conflate all types of transgressions, they actually overlook a key source of instruction in crafting legal solutions. Indeed, the more that the media focuses on the incidence of disobedience, the more it becomes reduced to a static set of behaviors that unwittingly paint a portrait of intellectual property law as a set of fixed rules in stark black and white, rather than its true character as a set of governing principles that are routinely subjected to constant revision and adjustment.

Part of this discussion, we think, connects more deeply to another area of considerable tension regarding the proper role of property and liability rules in governing intellectual property itself. In legal literature, we are well familiar—almost too familiar—with the omnipresence of Calabresi and Melamed’s platform of remedies. It today retains an almost biblical omniscience in legal literature, capturing the minds of first year law students and seasoned legal scholars alike. This prominence, in part, makes it all the more vexing for why its prescient framework has only, just recently, occupied the minds of intellectual property scholars. But, as in any other field, it has also led to a somewhat unique division. Scholars who look at intellectual property through the lens of property rights arrive at a solution that focuses on the similarities between real property and intellectual property, thus leading to a greater reliance on property rules, whereas scholars who focus on the differences between real property and intellectual property focus more on the utility of liability rule solutions.

Two recent papers—from quite different vantage points--illustrate this trend. In a prominent recent article forthcoming in the Yale Law Journal, Henry Smith posits perhaps the strongest defense of an analytical complementariness between intellectual property and property rules, arguing that information costs play a particularly powerful role in the delineation and enforcement of intellectual property rights, particularly with respect to patented inventions.<sup>1</sup> In another article, Mark Lemley and Philip Weiser argue from almost the opposite point of view, arguing that the special context of intellectual property often suggests that liability rules might be more appropriate because it is often

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<sup>1</sup> See Smith, *Intellectual Property as Property: Delineating Entitlements in Information* at 4, forthcoming, *Yale L J* (2007).

difficult to tailor injunctive relief appropriately.<sup>2</sup> Because of the legal uncertainty that accompanies the changing circumstances of technological innovation, Lemley and Weiser suggest that injunctive relief can often create hidden incentives for intellectual property owners to rely on holdout strategies, thus exacting licensing fees that are often inefficient.<sup>3</sup> If injunctions cannot be well tailored to the scope of the property right itself, Lemley and Weiser argue, then a liability solution may be far more appropriate.<sup>4</sup>

While we find both papers to offer significant contributions to this undertheorized field, we also think that the larger body of scholarship overlooks an important normative insight that stems—not from the remedies that the law chooses—but rather from the construction of intellectual property architecture itself. In this paper, we argue that scholars have paid insufficient attention to the way in which the law, *ex ante*, regulates both the composition and design of intellectual property—and, importantly, how a study of its architecture dramatically affects the definition and remedy for intellectual property disobedience altogether. Drawing upon several formative episodes in the recent statutory and common law history of intellectual property, we argue that the architecture of intellectual property law reflects, at significant points, a character that we describe as an “anti-delegation architecture”—the idea that the “bundle of sticks” in intellectual property depends on a variety of *ex ante* legislative and judicial determinations regarding the evolution of subject matter, allowable uses, rights, and restraints that actually anticipate, rather than prohibit, certain types of disobedience.

A study of anti-delegation carries both descriptive and normative facets. As we argue, the question of how we define piracy and infringement, we argue, is intimately related to the question of how the law constructs protectable intellectual property itself. Further, this system of architectural anti-delegation, we argue, actually plays a determinative role in choosing whether liability or property rules can be appropriate. In contrast to the situation the law must confront in the context of real property outlaws, whose demands can often only be met with injunctive relief, the nonrivalrous nature of property in information permits the law to respond in more sophisticated ways by, among other things, creatively switching between property and liability rules. This response

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<sup>2</sup> Lemley and Weiser at 1.

<sup>3</sup> Lemley and Weiser at 2.

<sup>4</sup> Lemley and Weiser at 2.

often occurs as a result of a specific incidence of market failure, often leading to dynamic and productive intervention by the courts or Congress to cure the problem through a host of solutions, such as compulsory licenses and immunity rules.

We characterize these remedial shifts as anti-delegative in character, both in order to draw attention to the role of law in governing the gatekeeping power of the owner, and in order to draw a metaphorical linkage to the constitutional non-delegation doctrine, which we believe holds some parallel insights to the architecture of intellectual property. Although a comprehensive examination of the similarities and differences between the anti-delegation architecture of intellectual property law and the Constitutional non-delegation doctrine is beyond the full scope of this Article, it is important to note at the outset that a similar type of metaphor informs the existence of intellectual property. As it is currently defined, the constitutional non-delegation doctrine operates to prevent Congress from delegating a formal power to enact legislation to administrators or other branches of government absent the existence of an intelligible principle of guidance. It derives its origins, in part, from Lockean constraints on the legislative power, such that “being derived from the People by a positive voluntary Grant and Institution. . . .the Legislative can have no power to transfer their Authority of making Laws, and place it in other hands.”<sup>5</sup>

The same theme, we argue, operates at different points in intellectual property—both in terms of its design, and also in terms of its range of potential uses by third parties. For this reason, this Article offers a new framework that harmonizes the different construction of copyright and patent with their varying degrees of delegation to the owner. Like the constitutional nondelegation doctrine, intellectual property law limits wholesale delegations to private parties in reaching key *ex ante* determinations regarding the structural, compositional, and relational aspects of intellectual property, even before the property right is created.<sup>6</sup> This system explains, for example, why information—and

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<sup>5</sup> JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 141.

<sup>6</sup> In drawing this comparison, we do not mean to suggest that we are unmindful of the important debates circulating regarding the proper breadth and scope of the doctrine, only that the metaphorical parallels are somewhat prescient when we consider the development of the architecture of intellectual property law. See, e.g., Adrian Vermeule & Eric Posner, *Nondelegation: a Postmortem*, 70 U. CHI. L. REV. 1331 (2003), Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003), *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 384 (1928) (“If Congress shall lay down by legislative act an intelligible principle to which the person or body

infringement—tends to be governed differently than any other form of protectable property.

Both normatively and descriptively, the anti-delegation architecture of intellectual property also enables us to reorient our understanding of disobedience as a result. As we show, this hybrid regime operates both *ex ante* and *ex post* in intellectual property, and plays a key role in both enabling and tolerating certain kinds of free riding. The emergence of this unique architecture plays a key role in the law's embrace of certain types of transgression, which have played an integral role in preventing both ossification and consolidation within intellectual property's system of property rules. The emergence of these developments owe much of their rich complexity to the productive functions played by free riding, which has helped to clarify boundaries and relativize property rights with other, sometimes competing values.

Recent discussions, however, tend to overwhelmingly reject the suggestion that some forms of free riding can ever be a productive force for change in intellectual property. As many writers have noted, the precarious, utilitarian balance between public and private entitlements that characterizes the governance of intellectual property is swiftly becoming overshadowed by a deepening level of reliance on private forms of control through a combination of contract and technological surveillance through code. The advent of digital rights management technologies and other types of 'lock out systems,' for example, promises to foreclose certain challenges to intellectual property from ever reaching the public arena.

However, far from displacing intellectual property outlaws, these private innovations in the technology of property enforcement have only increased the importance of a measured study of disobedience. While many scholars have already identified several harms associated with these forms of private ordering and surveillance, our study theorizes how these modes of control mount a more fundamental challenge to the structure of intellectual property law by eroding the very nature of what makes it

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authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”), *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)( determining that the National Industrial Recovery Act, authorizing the President to "approve codes of fair competition," was an unconstitutional delegation), *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936)(holding unconstitutional provision of Bituminous Coal Conservation Act delegating wage and hour limitations to producers) *Fuentes v. Shevin*, 407 U.S. 67 (1972)(holding *ex parte* replevin seizures to violate due process).

unique: its anti-delegation architecture. As we argue, the fundamental evolution of the anti-delegation architecture implicitly depends on preserving the signaling function played by free riders in drawing attention to market failure and the need for judicial or legislative intervention. In such instances, far from disregarding the interests of the perceived ‘outlaws,’ the law has often played a mediating role, incorporating them into its own analytic framework in contemplating a shift towards liability rule solutions.

Further, because recent forms of private ordering foreclose all forms of public oversight and intervention, they foreclose an important avenue of dynamic legal change and evolution. The task for this paper is therefore to theorize the importance of preserving a level of marginal disobedience that still provokes a shift in entitlements when justified, but that also preserves the crux of the incentive to create. For intellectual property’s anti-delegation architecture to function dynamically, we argue, the law must allow for certain disputes to arise in the first instance; for innovation to flourish, the law must aim for something less than total incapacitation of all types of free riding. We argue, therefore, that tolerating a marginal degree of disobedience may be essential in forcing the law to reconsider (or even just consider) its allocation of entitlements, and that this dynamic function crucially depends on striking a delicate, precarious balance between allowing some types of productive disobedience to seek legal affirmation through courts or Congress. Towards this end, we seek to offer a host of potential solutions that still preserve the signaling and redistributive values of disobedience while ensuring a critical respect for the rule of law.

Our paper proceeds in three parts. In Part I, we explore some of the basic differences between intellectual property and real property, focusing on the fundamental structure of the anti-delegation architecture regulating intellectual property. Whereas real property law affords a strong (though far from absolute) gatekeeping role to the owner in setting boundaries, intellectual property is typically governed by an implicit tendency against delegation to the owner in nearly all matters regarding its inception and governance.

In Part II, we attribute the dynamism of intellectual property’s anti-delegation architecture, at least in part, to the some of the productive forces of disobedience, and refine our theory to include a series of contemporary examples illustrating the link

between property rules, liability rules and disobedience. In *Property Outlaws*, we introduced a distinction between the “acquisitive” outlaw who seeks to procure a benefit from another’s intellectual property without payment, and who would normally be required to license a work for use; and the “expressive” outlaw who seeks to utilize another’s intellectual property for reasons linked to protest or First Amendment considerations. In Part II of this paper, we return to that basic typology by focusing on free riders and other types of unauthorized uses, and show how the law adapted its anti-delegation architecture to comport with competing values stemming from innovation and equity.

Part III develops these archetypes further, and theorizes a series of ways to preserve the specific values served by productive disobedience in intellectual property. In this section, in particular, we examine the costs presented by digital rights management and other forms of private ordering, and analyze how these structures both alter and subvert the anti-delegation structure of intellectual property law. We end by suggesting a series of variables to preserve the vitality of the anti-delegation architecture in the face of private ordering.