

Property Altlaws II: the Anti-Delegation Doctrine in 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. 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. Yet, 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 both simplified and 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.

In this paper, we offer a theory of “productive disobedience” that relates specifically to the contributions made by free riding in facilitating the dynamic evolution of intellectual property frameworks. Like civil rights laws, which owe much of their evolution to the dialogic and symbolic power of civil disobedience in drawing attention to the need for a more inclusive system, our systems of property and intellectual property have benefited from challenges that have drawn attention to the ways in which proprietary frameworks both enclose and exclude alternative sources of innovation from those outside of the proprietary system.

Indeed, far from honoring the owner’s right of exclusion, we argue that many of the most innovative shifts in the development of intellectual property law have been inextricably linked to the law’s limited recognition of the perceived ‘outlaw’ in crafting a variety of exceptions to existing entitlements, and in reducing the degree of delegation that the law provides to a property owner. In this paper, drawing upon several formative episodes in the recent statutory and common law history of intellectual property, we argue that some types of transgression have played an integral role in preventing both ossification and consolidation within intellectual property’s system of property rules, and introduce the persona of the intellectual property ‘altlaw,’ who bears some similarity to the outlaw but carries important differences as well.

In contrast to the situation the law must confront in the context of real property outlaws, whose demands can often only be met by dispossessing owners of their property, the nonrivalrous nature of property in information permits the law to respond to intellectual property disobedience in more sophisticated ways by, among other things, creatively switching between property and liability rules in response to 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. These developments owe much of their rich complexity to

the productive functions played by some forms of free riding, which has helped to clarify boundaries and relativize property rights with other, sometimes competing values. As a result, intellectual property law reflects an intrinsic dynamism that is at once attributable to the free rider's ability to pierce the sanctity of property rights and to the law's capacity to respond flexibly to the law-breaking behavior.