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RESPONSE

INDIVIDUAL CREATORS IN THE CULTURAL COMMONS

Robert P. Merges†

INTRODUCTION

In many ways, we now live in a world made possible by widespread individual ownership. Kant and Locke, and perhaps especially Hegel, would be proud: property rights are widely assigned to people who work to express themselves.[1] In today's legal/economic structure—characterized both by large integrated entities and widespread dis-integrated, or small-scale, production—there are many owners. This widespread ownership brings with it great advantages of individual autonomy and decentralized power.

But it also brings a problem. When many components must be integrated to form a salable product, or when there is great value in the aggregation of many dispersed pieces, individual ownership can be costly. Whatever label is placed on it—anticommons, excessive transaction costs, a runaway "permission culture"—the reality is the same: too many rights, too many clearances required, too many resources wasted assembling all the little pieces. Put simply, too much property.[2]

One school of thought says not to worry about these concerns: property rights help form markets, markets bring buyers and sellers together, entitlements change hands—problem solved.[3] Nevertheless, the too-much-property school says to worry a lot because we are

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1 *See* Jeanne L. Schroeder, *Unnatural Rights: Hegel and Intellectual Property*, 60 U. MIAMI L. REV. 453, 454, 459, 462–63 (2006) (explaining Kant's, Locke's, and Hegel's various theories of property). For a defense of widespread property holding in accordance with Hegelian theory, see JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 343–89 (1988).

2 *See* Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1295 (1996) ("[B]usiness people more often than not encounter a tangled, twisted mass of [property rights], which criss-cross the established walkways of commerce."). *See generally* Lawrence C. Becker, *Too Much Property*, 21 PHIL. & PUB. AFF. 196, 199–200 (1992) (questioning whether there are too many competing theories and subtheories of private property, such that no coherence exists).

3 *See, e.g.*, F. Scott Kieff, *Coordination, Property, and Intellectual Property: An Unconventional Approach to Anticompetitive Effects and Downstream Access*, 56 EMORY L.J. 327, 341 (2006).

being swamped by the transaction costs that accompany all those property rights.[4] Influenced by important early work on market failure in the intellectual property (IP) context, those who worry about too much property are convinced that markets will not in fact spring up to solve all these transactional headaches.[5]

When it comes to transaction costs, I am from a third school altogether. Call it the "worry a bit, but not too much" school, or perhaps the "worry, but remember that the worry will often be worth it" school. Here is what I mean: there are two reasons why, despite the very real presence of transaction costs, we ought not to let transactional worries overwhelm our thinking. First, transaction costs often can be overcome. When there are gains from aggregation, in the presence of widely dispersed ownership, IP rights can (and often are) brought together through various licensing schemes and sharing norms.[6] These solutions break through the transactional bottlenecks that all those property rights cause; in the end, there may not be "too much" property, although there will be "lots" of property.

I also bear in mind that "the worry will often be worth it." Many property rights have been allocated for a good reason. Most owners (at least when the system is working properly) have done something to merit an IP right.[7] In some cases, the availability of rights over one's work product might facilitate positive outcomes. It might allow someone who specializes in a particular area to "go it alone," to establish himself as an independent producer. That is, IP rights may make it feasible to leave a large employer and set up shop on one's own. In economic terms, there is a relationship between IP rights and independence.[8] Put slightly differently, IP rights give individual creators greater autonomy, at least in some cases. With IP covering one's work

4 *See, e.g.*, MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES 2 (2008).

5 *See, e.g.*, *id.* at 69–70.

6 *See, e.g.*, Merges, *supra* note 2, at 1295–1300 (describing the formation of "Collective Rights Organizations," institutions for pooling and administering collections of IP rights); Robert P. Merges, *Property Rights Theory and the Commons: The Case of Scientific Research*, *in* SCIENTIFIC INNOVATION, PHILOSOPHY, AND PUBLIC POLICY 145, 162–66 (Ellen Frankel Paul, Fred D. Miller, Jr. & Jeffrey Paul eds., 1996); Robert P. Merges, *From Medieval Guilds to Open Source Software: Informal Norms, Appropriability Institutions, and Innovation* 18–21 (Univ. of Wis. Law Sch., Conference on the Legal History of Intellectual Property, Working Paper, 2004), *available at* http://ssrn.com/abstract=661543 (explaining the open-source movement).

7 For an extended defense of this hypothesis, see ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY (forthcoming 2011).

8 *Cf.* Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 45–46 (1989) (noting that private property can allow for individual autonomy, but arguing that IP rights cannot be justified on this basis because very few individuals have enough bargaining power to acquire the rights to their inventions from their employers).

product, one has greater freedom to direct the course of a creative project or even an entire career.

I
INTELLECTUAL PROPERTY AND THE CONSTRUCTED COMMONS

The "constructed commons" idea fits nicely with the "worry a bit, but not too much" school of thought. The fact-intensive approach outlined by Madison, Frischmann, and Strandburg[9] has a normative dimension that reveals problems (things to worry about) while suggesting a robust methodology for tackling them (the now Nobel Prize–worthy "high granularity" field studies of Elinor Ostrom and others).

The cultural commons idea, drawing from a strong tradition of scholarship on law, norms, and interpersonal cooperation, highlights solutions to transactional dilemmas. And attention to solutions is bound to reduce our worry level. As a sometimes lonely denizen of the "worry a bit" school, I say sincerely to Madison, Frischmann, and Strandburg, "Welcome to the middle ground. Make yourselves at home, and I hope others are on the way."

What are the tools and elements out of which this cultural commons is to be constructed? Madison, Frischmann, and Strandburg identify several, including (1) property rights ("exclusion rights"), (2) governance mechanisms, and (3) openness claims.[10] The third element is actually the flip side of property rights, being comprised in part of limits built into property rights, i.e., user rights.[11] They then go on to describe the distinct methodology that Elinor Ostrom pioneered as a guide to further study about how the cultural commons is actually put together.[12]

Over the years, a fair number of IP observers have shown an interest in the elements identified by Madison, Frischmann, and Strandburg. The unique contribution that Madison, Frischmann, and Strandburg make in their article, however, is to unify these elements under the rubric of Ostrom's field-level approach—to show these disparate aspects of the IP universe as contributing components that work together to form a system for sharing a common resource.

Much could be said about each of these elements and about how they work together in practice. Nevertheless, I limit myself to just a

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9 Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657, 659–60 (2010).

10 *See id.* at 666–68, 687–88 (discussing property rights/exclusion claims); 698–704 (discussing governance mechanisms); 694–98 (discussing openness claims).

11 *Id.* at 695 ("A resource may be open naturally because its characteristics prevent it from being possessed, owned or controlled by anyone.").

12 *See id.* at 675–83. For an early application of Ostrom's common-resource field studies to IP, see Merges, *supra* note 2, at 1327–61.

few topics. My first topic combines two of the elements that help the formation of the cultural commons: property rights and governance mechanisms. In particular, I am interested in the problem of unified ownership or control of many disparate IP rights. I first consider one traditional unifying mechanism, automatic preassignment rules that apply to employee-created works. I examine how the logic of this mechanism has been adapted to multiple contributors who are not in a common employment relationship, i.e., where numerous discrete and independent creators hold rights. The adaptation of the old automatic preassignment mechanism to the contemporary situation of, for example, individual contributors to Wikipedia, seems to me an excellent example of the way players today forge a cultural commons.

I must also comment on what Madison, Frischmann, and Strandburg call "degrees of openness."[13] Their attention in this area is mostly concentrated on limitations built into IP rights, which is of course an important issue. I want to expand their treatment just a bit, by concentrating on legal rules that limit IP rights after they are issued, during what might be called the deployment stage. In particular, I emphasize the power of rules such as estoppel to constrain potential strategic uses of IP rights and thus contribute to keeping a commons open. In addition, I take the opportunity to tout once again an idea I have written about several times: the need for a simple and effective way for holders of IP rights to waive those rights, in whole or in part.[14] No single legal reform would better facilitate openness in a noncontroversial way than to create a safe harbor that allowed IP holders to make a binding commitment not to enforce their rights, either partially or completely. Simple reforms in the IP system could bring this about easily.

A. Unified Control of IP Rights

One technique for constructing the cultural commons is to resolve fragmented ownership through unification of rights in a single pair of hands. There is precedent for this technique. The work-for-hire rule and other centralizing rules unify potentially numerous and widely held rights in the hands of a single entity—a common employer.[15] Creative professionals working as employees have long been subject to these preassignment rules—statutes and common law doc-

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13 *See* Madison, Frischmann & Strandburg, *supra* note 9, at 694–98.

14 Robert P. Merges, *A New Dynamism in the Public Domain,* 71 U. CHI. L. REV. 183, 201–02 (2004).

15 *See* Stanley M. Besen & Leo J. Raskind, *An Introduction to the Law and Economics of Intellectual Property,* 5 J. ECON. PERSP. 3, 15 (1991) (explaining the default rules in work-for-hire situations); *see also* Robert P. Merges, *The Law and Economics of Employee Inventions,* 13 HARV. J.L. & TECH. 1, 5 (1999) (noting that employers own the output of employees "whose primary job responsibility is to solve a specific technical problem").

trines that automatically assign their work product to their employer.[16] The transaction-cost benefits of these sorts of rules have long been understood: although they have always had their critics, the basic logic behind them is hard to argue with.[17] The thought of every animator at Walt Disney Studios owning his or her individual contribution should be enough to prove the point. The transactional nightmare brought on by the need to assemble all these rights makes current licensing bottlenecks look absurdly tame by comparison.

Yet there are two objections to this type of mandatory centralization. One, the loss of creator autonomy, is as old as the rules themselves.[18] Another is less obvious but potentially just as problematic in today's creative milieu. With many dispersed creators working independently, some version of coerced centralization might make sense. But if it does, it would rarely be ideal for such rules to actually coerce full assignment of rights. A similar rule, but one that called only for a prelicense (and a nonexclusive license at that) would seem to better suit the current creative landscape. I will address both of these issues in turn.

1. *Creator Autonomy*

The loss of creator autonomy that comes with coerced preassignment rules is very real. Striking stories—some nonapocryphal—abound of the corporate inventor whose brainchild yields the inventor a token payment of $100 or even $1 while earning billions for the parent corporation.[19] Just as troubling is the fact that an employed inventor is at the mercy of research and development (R&D) managers and other executives who might completely misunderstand the potential of a significant invention. Sometimes things work out, as they did for former DuPont inventor W.L. Gore, who convinced DuPont to let him form a new company dedicated solely to the development of products made of polytetrafluoroethylene (PTFE) or Teflon.[20] This company has invented such products as ePTFE or Gore-Tex.[21] But for every happy ending like Gore-Tex, there are probably W.L. Gores whose employers have not seen fit to spin off promising but puzzling inventions. Lost in these cases is the chance for an inventor to special-

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16 *See* Merges, *supra* note 15, at 5-9.

17 *See id.* at 12-13 (labeling this problem the "holdup right").

18 *See, e.g.*, Catherine L. Fisk, *Removing the 'Fuel of Interest' from the 'Fire of Genius': Law and the Employee-Inventor, 1830–1930*, 65 U. CHI. L. REV. 1127, 1158, 1162 (1998).

19 *See* Merges, *supra* note 15, at 8.

20 *See* Linda Loyd, *Chemical Giant Offshoots Establish Local Start-Ups; DuPont Ideas and People Branch out into New Products, Firms*, PHILA. INQUIRER, July 2, 2007, at D1.

21 *See* W. L. Gore & Associates, Our History, http://www.gore.com/en_xx/aboutus/timeline/index.html (last visited Feb. 10, 2010).

ize and develop a product that he or she really believes in. This loss of autonomy is a real cost of employer ownership.

With so much downside, it might seem positive that large, vertically integrated R&D organizations are becoming scarce in the current business climate.[22] After all, these are the very organizations that most often benefit from automatic preassignment rules. If they are fading out, then fewer creative professionals will end up losing the rights to their creative works. All to the good, right?

Not completely. For all their downside, these rules did bring some significant benefits. As I mentioned, they had the salutary effect of reducing transaction costs. Especially when creators freely give up autonomy in exchange for things like added security, access to expensive facilities, and a large support staff, automatic preassignment rules can be reasonable. Might there be a way to preserve more autonomy, without giving up the benefits of preassignment? I think so.

2. *Prelicense Rules: A Better Fit?*

The better solution, especially in the online context, is prelicensing rules. Under such rules, an individual who contributes content to a group effort agrees in advance to license the contribution to others in the context of the group work. The individual retains other rights, which makes it a license rather than an assignment. If the individual contribution has some value apart from the group effort, the contributor can realize that value. Yet the collective work is safe from the high transaction costs that attend individual ownership of discrete contributions.

Molly Van Houweling has written about the promise of some of these prelicensing arrangements.[23] Van Houweling points to the success of the General Public License (GPL) in the world of software and the Creative Commons licenses in the world of culture:

> These public licenses solve some of the problems I associate with copyright atomism. By allowing licensees to bypass individual negotiations with copyright holders, they alleviate search and negotiation costs. The Creative Commons licenses, which can be embedded in digital files so as to be recognizable by search engines, also demonstrate technology's potential . . . to facilitate improved management of copyright information. Of course, transaction costs may still arise if the potential licensee wants to do something with the work that is covered by copyright but outside the terms of the public license.

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22 *See, e.g.*, Richard N. Langlois, *Chandler in a Larger Frame: Markets, Transaction Costs, and Organizational Form in History*, 5 ENTERPRISE & SOC'Y 355, 355 (2004).

23 Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. (forthcoming 2010), *available at* http://ssrn.com/abstract=1422016.

But at least some subset of reuse can proceed without individual contact or negotiation.[24]

Van Houweling addresses several problems with these licensing schemes, including the fact that both GPL and Creative Commons licenses come in different varieties.[25] This can cause compatibility issues. For example, some licenses provide that the licensed work may be combined with other licensed works only if those other works were licensed under the same licensing agreement. Conflict among licensing terms therefore obviates some of the benefits of coordinated licensing schemes.

The answer, as with coerced assignment, is uniformity. Van Houweling illustrates the wrong way and the right way to pursue this strategy. Facebook, the social-network service, and Lucasfilm's Star Wars MashUp service are examples of the wrong approach to consolidation; they require outright assignment of copyright to the "platform owner" (Facebook and Lucasfilm), which obviously deprives authors of autonomy over their creations.[26] Wikipedia serves as a counterexample; its terms of use require uniformity, but in the form of a license and not an outright assignment:

> One way to avoid the incompatibility problem is for an entire community to agree to use one license (or a compatible set of licenses). Institutional intermediaries can play a useful coordinating role here. Consider the Wikipedia example. Like Facebook and the Starwars Mashup Service, Wikipedia has a copyright policy that specifies the copyright status of contributions to the Wikipedia project. But instead of consolidating rights in the hands of the platform owner in the way that has triggered autonomy-based objections elsewhere, the Wikipedia terms instead merely coordinate the license choices of all contributors by specifying that everything contributed to Wikipedia is available under the same public license. Within the community of Wikipedia contributors, this coordination solves incompatibility problems that might otherwise be posed by atomistic copyright claimed in inconsistent ways by the myriad contributors to Wikipedia. In a recent development in the same vein, the White House has announced that all public input posted on its whitehouse.gov website is subject to a Creative Commons license.[27]

3. *Dispersed Creators and Optimal Granularity*

Thus, coerced prelicensing leaves creators with more leeway over their works. Before I leave this discussion of contemporary coerced centralization, however, I want to address one related issue. In theory

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[24] *Id.* at 57 (footnote omitted).
[25] *See id.* at 57–58.
[26] *See id.* at 58.
[27] *Id.* (footnotes omitted).

at least, there are important additional benefits to permitting creative professionals greater autonomy while still preserving some of the transaction-cost advantages of prelicensing. It is these additional benefits that I take up here.

It is easier to see these advantages with the help of an example. Under a traditional employment arrangement, a creative person—for example, an animator—carries out the tasks that the employer orders him or her to perform. Such tasks might include something like thinking up a secondary character for an animated film. The movie's director and top creative team will then decide whether the character makes it into the film and, if so, in what form. Whatever the individual animator does from that point forward will be at the direction of the bosses. And, by virtue of the work-for-hire preassignment rule, the animation studio already owns the character. Thus, integrating the character into the overall film will not involve transaction costs, at least with respect to the legal rights over the animator's output. That, of course, is the whole point of work for hire.

Now the animator, in the course of thinking up a character that he finds appealing, may have developed an interesting "backstory," possible accompanying characters, or the like. Unless he can effectively "sell" these ideas to the bosses, they will die on the vine. This loss of control over one's work product is, once again, the downside of coerced centralization. But in a more dispersed creative environment—one where large, vertically integrated content producers do not dominate all creative work—things may be different. In this setting, an animator might have a chance to develop characters and make animated films outside the ambit of a large employer. This is all to the good as long as the animator only uses those characters in his own work. But what if, in addition to his individual work, the animator wants to take part in something bigger? What if he wants to use the characters in a Wikipedia entry, perhaps to illustrate the art of animation, or as characters in a public service message about literacy, AIDS prevention, energy conservation, or an infinite number of other causes? For these uses, the greater autonomy that comes with the independent animator's plans for the characters may cause problems. It would seem to be an instance of the runaway transactional bottlenecks caused by many creators not owning full rights to their works—what Molly Van Houweling calls the problem of "atomism"[28] or a manifestation of Lawrence Lessig's complaints about "a permission culture."[29]

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28 *See id.* at 4–6 (noting that in an atomistic system "participants in the creative marketplace may have to track down and negotiate with many far-flung rights holders regarding many separate rights").

29 *See* LAWRENCE LESSIG, FREE CULTURE 8 (2004) (noting that the "rough divide between the free and the controlled has now been erased" such that less free culture exists and, in its place, more of our culture can only be used "upon permission").

Given the benefits of preassignment rules, you can probably guess where I am going. Rules that automatically assign property rights to a centralized authority have a wonderful ability to drastically reduce transaction costs. Of course, in the new creative landscape that I am describing, we understand that centralized employment is not a viable solution to high transaction costs. The question is whether we as a society can get some of the benefits of the coerced centralization without the complete loss of autonomy that comes with its out-and-out employment. The answer, theoretically, is yes. What is encouraging for those who do not always trust theory to play out smoothly is that the answer in the real world is also coming to be yes.

Organizations such as Wikipedia increasingly require some sort of up-front license of those who would contribute content to the group effort. Some observers have criticized a number of these policies; they note that there is a real possibility of inconsistency and a lack of coordination in the policies of organizations setting prelicensing terms.[30] This is understandable. The digital world was conceived in freedom and has been largely dedicated to the proposition that all people can do mostly what they want online. In this instance, however, I think we are seeing some real common sense emerge. The transaction-cost savings of unified licensing terms are very real; as we have seen, they are the reason why employee preassignment rules have been put in place in many contexts. What is really promising, however, is that this new generation of coerced centralization leaves individual creators with much more flexibility in the development of their own contributions. To see what I mean, and why it might matter, we return to my independent animator.

It can be very difficult to know what the optimal use is for something like a single animated character. It could be that the character works best as part of an ensemble—that its maximum value comes when it is integrated into a feature-length film. But it could also be that the character has real value in and of itself. Maybe it would be terrific on posters and postcards or as the hero of a comic book series. Maybe it could be used effectively in advertising or as the basis of a plush toy. When the creator of something like a character works for a large, integrated film studio, these choices will be made by the studio's executives and that will be that. To put it perhaps grandly, the animator's bosses will determine the optimal granularity of the animator's input.

In today's world, where more dispersed production and independent creative work may be more viable, a creator need not so readily cede control over his or her work product. The decision whether and

[30] *See, e.g.*, Rochelle Cooper Dreyfuss, *Collaborative Research: Conflicts on Authorship, Ownership, and Accountability*, 53 VAND. L. REV. 1161, 1189 (2000).

when to use one's creation as an input, and when to commercialize it in standalone form, can more often remain in the hands of the original creator. Put another way, the use of a work as an input need not eliminate other uses that the creator envisions for his work.

The great advantage of prelicensing rules is that they permit this sort of flexibility while simultaneously facilitating the creation of centralized, cooperative content. Returning again to the Wikipedia example, our independent animator can contribute his character to a Wikipedia entry without giving up all control. The standardized Wikipedia participation agreement lowers the costs of using the animator's character as an input, but without eliminating the creator's rights to turn it into a standalone product as well. With the right kind of standards, agreements like this can re-create some of the transaction costs and benefits of the traditional preassignment rules without also cutting down significantly on the authors' autonomy interest in their creations.

This is precisely the kind of outcome we ought to look for, and it is just the sort of thing that Madison, Frischmann, and Strandburg call "constructing" the cultural commons.[31] Preserving autonomy while lowering transaction costs and facilitating assembly of inputs while not precluding other uses are the great advantages of limited prelicensing arrangements. To the extent that informal norms mirror these arrangements, I support those who argue for better recognition of those norms in the operational details of formal law.

4. *A Short Digression on the Anticommons*

These points lead me to an interesting observation about the now-prominent branch of property theory called anticommons. This is the theory that points out the significant costs of widespread and dispersed ownership of inputs needed to assemble a valuable unitary product.[32] At a recent conference, Michael Heller, the great expositor of the anticommons theory, stated its basic premise in these simple terms: "When too many people own pieces of one thing, nobody can use it."[33] There is much to this insight, as the extensive use of Heller's theory by other property scholars makes abundantly clear.

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31 *See* Madison, Frischmann & Strandburg, *supra* note 9, at 669–70 (suggesting that the key question is "how best to use legal and other tools to encourage the growth and persistence of creative, sustainable, and equitable cultural environments").

32 *See* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 623–24 (1998).

33 Michael Heller, Statement at the George Mason University School of Law Information Economy Project Conference: Tragedies of the Gridlock Economy: How Mis-Configuring Property Rights Stymies Social Efficiency (Oct. 2, 2009), *available at* http://www.iep.gmu.edu/GridlockEconomy.php.

Nevertheless, the points I made above about the manifest advantages of prelicensing (as opposed to preassignment) rules push to the foreground an important limitation of the anticommons idea. Heller speaks in terms of "pieces" of "one thing." As discussed above, it is not always apparent whether a given creative work is a piece of something bigger, a viable standalone work, or perhaps both. Although the anticommons theory is primarily a positive, or diagnostic, theory, indicating only the existence of a problem and generally shedding light on how to solve it, one obvious normative implication is straightforward: cut down on the number of IP rights. Or perhaps require arrangements such as preassignment, which cut down on the number of owners if not the number of separate IP rights.

The example of the independent animator carries with it an implicit critique of this normative implication of anticommons theory. My little story highlights the difficulty of knowing whether a given input is better preassigned to a single central entity or instead left in the hands of a small independent creator. To use Heller's formulation, no one knows whether the animated character is one of many "pieces" of a larger thing, or whether it is capable of being a single thing by itself. A diagnosis of the situation that presumes the best use of the character is to integrate it into a feature-length movie leaps right past this important issue.

This does not point to any defect in the theory of anticommons so much as it highlights another issue. If one reads anticommons theory as implying that cutting down on the supply of independent IP rights is always or usually the right result, mistakes will be made. Works that might have led to real, viable independent products—and the career boost they might provide for an independent creator—will be harder to commercialize if we eliminate rights over them, or if we first grant rights but then subject these rights to overly broad presassignment rules.

B. The Importance of Being Open

As I said earlier, there are two aspects of the "openness" component of the cultural commons that I am interested in: first, post-grant or deployment-stage doctrines that encourage openness, and second, a robust voluntary-waiver mechanism in IP law.

One way to promote openness is either to grant fewer rights or encourage those rights to be weeded out in a cheap and simple way. This aspect of openness attacks at the source the potential clogging effect of too many property rights: it cuts off, or at least reduces, the supply of rights.

Another aspect of openness in IP law regulates the way those rights are deployed. Some of these regulatory means have been much

discussed in the context of various controversies, such as patent and copyright misuse and fair use in copyright. These doctrines reduce the transactional drag of the IP system by preventing IP rights from being deployed in a way that reduces access to an important shared resource covered by an IP right. For example, a number of cases have held that it is fair use for a competitor to copy short-access codes on video game cartridges, effectively opening what had been a closed or proprietary game platform to all comers.[34] The platform in this example becomes a common-access resource, and independent game producers can enter the community of game suppliers and players who collect around the platform.

A coauthor and I have written about a somewhat similar situation.[35] Often, patent holders join together to form a technological standard. There has been some controversy, however, arising from situations where a company that helps define and shape a standard is later found to have withheld from the standard-setting organization information about relevant patents.[36] Companies playing this game can reap significant patent-licensing rewards if they are successful. Obviously the strategic use of patents here has the potential to do real economic harm.[37] The solution is a doctrine of "standards estoppel" preventing companies from playing this game.[38] Such a doctrine would prevent a patent owner from engaging in standard setting so as to later extract excess revenues through patents that the owner withheld. Another version of the doctrine would apply where a patent owner who actively invites users to adopt a technological standard covered by one or more patents and promises not to enforce the patents. After widespread adoption, however, the patent owner changes course and tries to extract royalties from the users.[39] The simple point of standards estoppel is to prevent these games. Put in terms of a cultural commons, standards estoppel guarantees that users who rely on pledges of openness will not be frustrated or disappointed. It is a trust-building doctrine and in this way would contribute to a well-functioning common space.

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34 *See, e.g.*, Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1527 (9th Cir. 1992) (finding such an access code to be a functional element of the video game and therefore protected under the fair use doctrine).

35 Robert P. Merges & Jeffrey M. Kuhn, *An Estoppel Doctrine for Patented Standards*, 97 CAL. L. REV. 1 (2009).

36 *See id.* at 10 (noting that troubles arise when "a firm seeks to increase the price by asserting patent rights against adopters of the standard in a manner not contemplated in the original bargain").

37 *See id.* at 10–17 (discussing strategic uses of patents such as "bait-and-switch" and "snake-in-the-grass").

38 *See id.* at 4.

39 *See id.* at 22.

CONCLUSION

The idea of a cultural commons as a shared resource has all manner of interesting implications. Perhaps the most important aspect of Madison, Frischmann, and Strandburg's article, however, is their focus on the dynamic process by which the commons is established, maintained, and renewed. The magic recipe is not all of one flavor or another. We have gone as far as we can on this sophomoric fare. There is little left to learn from either "property über alles!" or "information wants to be free." Instead, it is time to pay attention to the ways people actually put together a usable commons. And so we look to the mixture of property rights, licensing and governance techniques, and user rights or property constraints, to see how things are done on the ground.

There will surely be a normative dimension to all this. These elements do not come to us perfectly formed, ideally adapted to work as we need them to. Nevertheless, the overall emphasis is on how existing, off-the-shelf elements are used in practice to create a workable resource—an aggregate cultural/informational resource with intricate access rules and complex forms of compensation. This approach holds great promise. It can help us move beyond a static, ideologically laden focus to a more dynamic and realistic understanding of the overall IP landscape. It is an approach that can only be helpful—or, to borrow from the authors' own title, eminently constructive.