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

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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.[1] The contrasting theory is that the right to own an idea is quite different from the property rights afforded to ownership of physical property.[2] 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.[3] 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

1 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.").

2 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).

3 *Id.* at para. 9.

framework of copyrights. Although the idea has never been implemented due to strong opposition, this Part explains that intellectual 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."[4] 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.[5] 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.[6] 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

4 U.S. CONST. art. I, § 8, cl. 8.
5 Volokh, *supra* note 1, at 1167.
6 *Id.*

meaning in 'intellectual property.'"[7] Advocates for the private property argument ("Private Property") tend to be "rent-seekers with a vested interest in the existing law."[8] It is no surprise that the most recent legislation pushing copyright protection closer to perpetual property rights[9] was backed by notorious copyright owners such as Disney and Bob Dylan.[10] 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."[11] Regardless of the motive for the campaign for Private Property, legislators have taken heed.[12]

Proponents of Private Property continue to rest their case on Locke's Labor Theory,[13] 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."[14] It is a fundamental assumption that property rights, if recognized through a legal system, provide incentive to expend resources to improve that property.[15] 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

7 Boldrin & Levine, *supra* note 2, at para. 2.

8 *Id.*

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

10 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).

11 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.").

12 *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.").

13 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.").

14 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.

15 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.

Clause in the Constitution, advocates latch onto legal positivism, claiming that the Framers promised to "promote the . . . Arts"[16] by affording exclusive control over that which is original. Without such a guarantee, there would be no incentive to expend mental labor.[17] Therefore, this incentive is so necessary that intellectual property should be governed similarly to tangible private property.[18] 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.[19]

B. Theory Two: Intellectual Monopoly

Opponents of Private Property distinguish intellectual property from private property.[20] 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.[21] 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.[22]

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16 U.S. CONST. art. I, § 8, cl. 8.

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

18 Volokh, *supra* note 1, at 1167.

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

20 Boldrin & Levine, *supra* note 2, at para. 2.

21 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.

22 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.").

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.[23] "[P]roperty rights in tangible goods," from an economics perspective, help facilitate efficient transactional interaction "in the context of scarcity."[24] Without such 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.[25] However, the transferee's copy "leads an existence entirely independent of [the transferor's] copy."[26] 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.[27]

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.[28]

The argument against Private Property, then, insists that intellectual property is not 'property' at all. Instead, it is simply a government-granted monopoly;[29] it is a license to possess, use,

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23 *Id.*
24 *Id.*
25 Boldrin & Levine, *supra* note 2, at para. 3.
26 *Id.*
27 *Id.*
28 Harper, *supra* note 14, at 15.
29 Walker, *supra* note 10, at 46.

and transfer your idea. From an economic standpoint, monopolies are unfavorable in a capitalist system, because they thwart efficiency while raising prices to consumers.[30] Therefore, intellectual monopolies "restrict[] distribution—by producing fewer copies and by making copies more expensive,"[31] 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.[32] Numerous nonfiction books are written by reading and researching other books. Many songs contain samples of other songs.[33] 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.[34] 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.[35]

The notion that copyrights are slowing, instead of protecting, the creative process is all too evident in the realm of software and technology.[36] Our current economy, including the entertainment industry, is driven by technology.[37] 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.[38] Because of new technology, major studios are not

30 Levine, *supra* note 15, at 16.

31 *Id.*

32 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 ("By conferring monopolies in discoveries . . . complex obstacles . . . arise when a user needs access to multiple patented inputs to create a single useful product.").

33 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.").

34 Levine, *supra* note 15, at 16.

35 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.").

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

37 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.").

38 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

the only producers of professional-sounding music. Software programs such as Sony Acid Pro[39] 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.[40] Still, the Digital Millennium Copyright Act (DMCA) "creates new restrictions on technology, and those restrictions lead to lawsuits and a sharp decline in available venture capital."[41] The DMCA, the latest major copyright legislation, provides copyright owners with added protection against new technology.[42] 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.[43] 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."[44]

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easy to copy music.").

39 *Sony Announces Major Acid Pro Software Upgrade*, INTERNET VIDEO MAGAZINE, Jan. 19, 2006, http://www.internetvideomag.com/News/News2006/011906_Sony_Acid_Pro.htm.

40 Go Open Source, The Basics of OSS, 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.").

41 Shapiro, *supra* note 11, at 17.

42 17 U.S.C. § 1201(a) (2000).

43 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.").

44 *Id.* at para. 8.

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.[45] 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."[46] 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 domain, or a pool of ideas for public use without limitation.[47] 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."[48]

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.[49] 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."[50] Nevertheless, Private Property advocates should be wary of the extent to which the need for protection is overstated, for unforeseen implications

45 *Id.* ("Ordinarily . . . we do not consider monopoly power necessary to provide adequate incentives for economic activity.").

46 U.S. CONST. art I, § 8, cl. 8.

47 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.").

48 *Id.*

49 *See infra* Part III.

50 Eisenstadt, *supra* note 47, at 61.

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."[51] Such promotion is to be accomplished, specifically, "by securing *for limited Times* to Authors . . . the exclusive Right to their respective Writings."[52] 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 extensive 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.[53] 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.[54]

In *Eldred v. Ashcroft*, the Supreme Court encountered the constitutionality of the latest copyright term extension.[55] The copyright legislation at issue was the Copyright Term Extension Act, passed in 1998.[56] The Act enlarged the duration of copyrights by twenty years.[57] Before upholding the extension, Justice Ginsberg gave a detailed and chronological account of the history of copyright legislation.[58] 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

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51 U.S. CONST. art. I, § 8, cl. 8.

52 *Id.* (emphasis added).

53 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.").

54 *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").

55 Eldred v. Ashcroft, 537 U.S. 186, 194 (2003).

56 *Id.* at 195.

57 *Id.* at 193, 195.

58 *Id.* at 194–96.

first term."[59] 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.[60] 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.[61] In 1976, "Congress altered the method for computing federal copyright terms."[62] 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.[63] For works already published before 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.[64] The last major extension, the CTEA, increased the copyright term to the life of the author plus seventy years.[65] 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.[66] In just a twelve-year span between 1962 and 1974, it was lengthened nine times.[67] 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.[68] 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,"[69] 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

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

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

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

62 *Eldred,* 537 U.S. at 194.

63 1976 Act, Pub. L. No. 94-553 § 302(a), 90 Stat. 2541, 2572 (1976) (current version at 17 U.S.C. § 302(a) (2000)).

64 *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)).

65 17 U.S.C. § 302 (2000).

66 Walker, *supra* note 10, at 46.

67 *Eldred,* 537 U.S. at 195 n.2.

68 *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.").

69 U.S. CONST. art I, § 8, cl. 8.

to invest in the restoration and public distribution of their works."[70] This rationale works for copyrights already owned by companies such as Disney and artists such as Bob Dylan.[71] 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.[72] 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."[73] This means that society's advantage has not been realized in the past thirty years.[74]

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."[75] 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."[76] 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.[77] Justice Breyer has commented that the "primary legal effect is to grant the extended term not to authors but to their . . . corporate successors."[78] In the past decade, RIAA has increasingly complained of music pirating on the internet, which is facilitated by file-sharing

70 *Eldred*, 537 U.S. at 207.

71 Walker, *supra* note 10, at 46.

72 Tim Lee, *supra* note 53.

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

74 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 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.").

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

76 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).

77 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.").

78 *Eldred*, 537 U.S. at 243 (Breyer, J., dissenting).

websites.[79] 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*.[80]

Grokster involved copyright infringement claims against a company that provided an arena for, and facilitated the practice of, sharing music files online.[81] 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."[82] 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 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."[83] 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.[84] 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."[85] The Court's retreat to alternatives, while recognizing that "technological innovation may be discouraged,"[86] elicits one clear interpretation: protecting ideas as if they were property, though

79 John Borland, *RIAA Sues 261 File Swappers*, CNET NEWS.COM, Sept. 8, 2003, http://news.com.com/2100-1023_3-5072564.html.

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

81 *Grokster*, 125 S. Ct. at 2770.

82 *Id.*

83 *Id.* at 2776.

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

85 *Id.* at 2776.

86 *Id.*