

Articles

The New, New Property

Anupam Chander*

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* Acting Professor of Law, University of California, Davis; J.D. 1992, Yale Law School; A.B. 1989, Harvard University. Thanks to the participants in the “Property and Contract Go High-Tech” seminar at Stanford Law School, including especially Margaret Jane Radin, for incisive questions and comments. I thank Duncan Kennedy and David Kennedy for inviting me to speak at a Harvard Law School conference on “Land Regimes and Domination,” which led me to think about how property regimes in cyberspace create inequality, just as property regimes have done for ages with respect to land. I have also had the opportunity to present this paper to the faculty at the University of California, Davis, School of Law, and at the Chicago-Kent School of Law, as well as at a conference of the Association of Internet Researchers at the University of Minnesota and a Colloquium at the Computer Science Department at the University of California, Davis. I learned much from each of these presentations. I also thank Jack Ayer, Matt Bishop, Jamie Boyle, Joel Dobris, Richard Epstein, Joe Feller, Rich Ford, Matthew Frederick, Bob Hillman, Jerry Kang, Chris Snyder, and Bruce Wolk for instructive comments. Thanks also to John Clendenin, Kenny Entlinger, Tina Ham, Jehan Jayakumar, Guru Inder Khalsa, Belle Na, Ali Oromchian, Ted Schneider, Kelly Spencer, and especially Henry Martin for helpful research assistance. As always, my deepest thanks to Madhavi Sunder. This Article is dedicated to the memory of John Rawls.

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Introduction

Surveying the history of property from his vantage point a century ago, Pierre-Joseph Proudhon observed famously, “Property is theft!”¹ The premise of this Article is to wonder whether a future Proudhon will review the distribution of resources in the new, new world of cyberspace and declare their origins to be similarly illegitimate. The disappointing answer offered here is that, indeed, a future Proudhon appraising our current system of cyberspace resource entitlements would make a similar declaration. The hopeful suggestion offered here is that it is not too late to avoid that fate.

Control over domain names vests in a person dominion over important cultural and economic resources. For example, the largest reported gathering of humanity, the Kumbh Mela festival, occurs every dozen years at the confluence of the Yamuna, Ganges, and the mystical Saraswati rivers in India. KumbhMela.com, however, is registered to a company in Berkeley,

1. PIERRE-JOSEPH PROUDHON, WHAT IS PROPERTY? 13 (Cambridge Univ. Press 1994) (1840).

California. The entity controlling a domain name that represents the natural place on the Internet for people to gather information or build community about any particular subject immediately gains a powerful voice in that community, perhaps even the power to help define that subject. The power that a domain name entails is not lost, for example, on the Chinese government, whose state-owned news agency, Xinhua, is a joint venturer in China.com.² A growing secondary market in domain names demonstrates their economic value, with prices ranging in the millions for especially attractive names such as Business.com or Loans.com.³ Even the service industry that has grown up around these names is big business, with the largest provider of domain names acquired in 2000 for \$21 billion.⁴ Given their cultural and economic value, disputes over domain name entitlements are inevitable, and recent cases have asked us to decide, for example, who are the rightful owners of SouthAfrica.com,⁵ Barcelona.com,⁶ JewsForJesus.org,⁷ Sex.com,⁸ and Madonna.com.⁹

The rules we write for deciding such disputes have clear international impact, yet little attention has been paid to constructing a just global regime in domain names. Domain names should figure into international law debates for a number of reasons. First, they determine who has global rights to geographic and cultural identifiers.¹⁰ South Africa has even denounced an

2. See http://corp.china.com/about_china/overview.html (last visited Oct. 9, 2002) (listing AOL Time Warner and the Chinese state news agency, Xinhua, as major shareholders of China.com).

3. Andrew Pollack, *What's in a Cybername? \$7.5 Million for the Right Address*, N.Y. TIMES, Dec. 1, 1999, at C8 (reporting that business.com sold for \$7.5 million); *Loans.com Web Address Auctioned for \$3 Million*, WALL ST. J., Jan. 31, 2000, at B6.

4. David E. Kalish, *VeriSign Buys Network Solutions for \$21 Billion*, CHI. SUN-TIMES, Mar. 7, 2000, at 4.

5. John Markoff, *South Africa Is Seeking the Return of a Cyberspace Address*, N.Y. TIMES, Mar. 3, 2001, at C2 (reporting that South Africa seeks transfer of SouthAfrica.com from VirtualCountries, Inc., which has registered more than 30 country names).

6. See *Excelentísimo Ayuntamiento de Barcelona v. Barcelona.com, Inc. (Spain v. U.S.)*, WIPO Arbitration and Mediation Center, Case No. D2000-0505 (2000), available at <http://arbitr.wipo.int/domains/decisions/html/2000/d2000-0505.html> (ordering transfer of Barcelona.com from a Barcelona city resident to the City Government of Barcelona).

7. *Jews for Jesus v. Brodsky*, 993 F. Supp. 282 (D.N.J.), *aff'd*, 159 F.3d 1351 (3rd Cir. 1998) (holding that a critic of the religious organization infringed on the organization's trademark when he employed its name as the domain name for his website).

8. *Kremen v. Cohen*, No. 01-15899 (9th Cir. Jan. 3, 2003); Keith Regan, *The Real Price of Sex.com*, E-COMMERCE TIMES, Apr. 11, 2001, at <http://www.ecommercetimes.com/perl/story/8830.html>.

9. See *Madonna Ciccone v. Dan Parisi (U.S. v. U.S.)*, WIPO Arbitration and Mediation Center, Case No. D2000-0847 (2000), available at <http://arbitr.wipo.int/domains/decisions/html/2000/d2000-0847.html> (ordering the transfer of Madonna.com from a pornographer to the celebrity named "Madonna"). See also *Julia Fiona Roberts v. Russell Boyd (U.S. v. U.S.)*, WIPO Case No. D2000-0210 (2000), available at <http://arbitr.wipo.int/domains/decisions/html/2000/d2000-0210.html> (ordering the transfer of JuliaRoberts.com from a New Jersey resident to the actress).

10. See, e.g., Katherine Baldwin, *Cybersquatters Invade Amazon: Florida Woman Claims Web Domain Name of Primitive Indian Tribe*, S. FLA. SUN-SENTINEL, Oct. 26, 2000, at 20A, available

American corporation's registration of SouthAfrica.com as re-inscribing "the colonial experience."¹¹ Second, domain names present a case study in the possibility of global governance, with the Internet authority ICANN as a world executive and the World Intellectual Property Organization as its judicial arm. Third, domain names represent a valuable resource of the Information Age. Their international distribution thus has important wealth consequences. Indeed, as commerce becomes increasingly electronic, corporations that own prominent, mnemonic domain names may be best positioned to become global leaders in their industries. As useful domain names are grabbed up by Western entrepreneurs, the domain name regime may help further entrench the existing worldwide maldistribution of wealth. Selling their goods and services through cyberspace, the global corporations of tomorrow, like the global corporations of today, will be largely Western.

The grand narrative of this new century may well be the continual expansion of advantage of the few in one domain into another domain, as ever new frontiers are conquered. The meek and poor may never inherit the earth. This Article seeks to disrupt this narrative by calling attention to the hidden bias of formally equal rules in domains as seemingly arcane as those of cyberspace. The Article thus offers a sustained critique of first-come, first-served property regimes, especially from the perspective of global wealth distribution. Because today's most important first possession regimes lie in intellectual property, this critique calls into question the foundations of the increasingly internationalized intellectual property system.¹²

The Article also finds cyberlaw scholarship generally wanting for its inadequate regard for important human values of equality and distributive justice. Current cyberlaw scholarship seems motivated by a vision of society concerned principally with free speech, intellectual creativity, privacy, and autonomy. Concerns for equality and distributive justice are greatly neglected.¹³ I hope in this Article to introduce these concerns as central values in constructing rules for the Information Age.

at 2000 WL 22204828 (noting that a Brazilian native tribe wishes to claim Yanomami.com from its Florida registrant).

11. Markoff, *supra* note 5.

12. A recent United Kingdom government report observes the difficulties a first possession regime in intellectual property poses for developing nations which are often "second comers" to certain types of technological innovation. Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* (Sept. 2002), available at http://www.iprcommission.org/papers/pdfs/final_report/CIPR_Exec_Sum.pdf ("Developing countries negotiate [intellectual property rights] from a position of relative weakness. The difficulty is that they are 'second comers' in a world that has been shaped by the 'first comers.'").

13. There are some notable exceptions. Consider Keith Aoki's concern for international equity in cyberspace:

The distributive patterns produced by the intersection of a particular form of the sovereign nation-state (and their related intellectual property and other laws) and the Internet may tend to favor the "public" sovereignties of developed nations such as the United States. These patterns may also favor the "private" sovereignty of firms that

In the process of constructing these rules, we should not view any rule as *natural*. Such an approach would be especially anomalous, of course, in the wholly *artificial* realm of cyberspace. But I will go further, arguing that certain rules should not be viewed as natural even for the natural world. My principal target is the hoary rule of first possession, which I hope to show as unattractive because of its distributional consequences.

The methodology of the Article is to study philosophy, history, economics, and international law to craft a just international property rights regime in cyberspace. But as cyberlaw can learn from other disciplines, these disciplines can also gain from the engagement. Cyberlaw scholarship must be seen not as an effort to simply apply old rules to a new domain, *mutatis mutandis*, but as an invitation to revisit the traditional principles themselves.

The Article proceeds as follows. Part I reveals how the existing property rights system for domain names perpetuates inequality in the distribution of wealth. Like the fox in *Pierson v. Post*,¹⁴ domain names are now generally subject to the rule of first possession, with domain names handed out for a nominal sum on a first-come, first-served basis. By rewarding domain names to those technologically adept and wealthy enough

function in a transnational mode but that are economically linked to the nations of the developed world. This favoritism occurs at the expense of poorer nations, groups, and individuals in the developing regions of the world and in pockets of immiseration within the developed world.

Keith Aoki, *Considering Multiple and Overlapping Sovereignties: Liberalism, Libertarianism, National Sovereignty, "Global" Intellectual Property, and the Internet*, 5 IND. J. GLOBAL LEGAL STUD. 443, 445–46 (1998). Lawrence Lessig has also noted the importance of considering equality with respect to cyberspace. See, e.g., LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 220 (1999) [hereinafter LESSIG, CODE] (“The values of free speech, privacy, due process, and equality define who we are. If there is no government to insist on these values [in cyberspace], who will do it?”); Lawrence Lessig, *Commons and Code*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 405, 416 (1999) (arguing against excessively strong intellectual property rights in cyberspace because “the values of universality and equality demand the preservation of a commons”); see also Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View From Liberal Democratic Theory*, 88 CAL. L. REV. 395, 452 (2000) (arguing that an unregulated cyberspace would be detrimental to minority interests); Dan L. Burk, *Patents in Cyberspace: Territoriality and Infringement on Global Computer Networks*, 68 TUL. L. REV. 1, 50–51 (1993) (noting a disparity between “information rich” and “information poor” nations, leading to the possibility that developed nations are employing information superiority in a form of “neo-colonization”). In his study of racial identity in cyberspace, Jerry Kang espouses equality norms in virtual communities. See Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1204 (2000). Shubha Ghosh points out the need to consider “the distributive justice issues raised by intellectual property.” Shubha Ghosh, *The Merits of Ownership; or, How I Learned to Stop Worrying and Love Intellectual Property*, 15 HARV. J.L. & TECH. 453, 456 (2002). Scholars seeking to employ technology in the aid of a “semiotic democracy” place equality in the process of cultural creation and meaning production at the heart of their endeavor. See, e.g., William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1217–18 (1998). On “semiotic democracy,” see generally JOHN FISKE, TELEVISION CULTURE 236–39 (1983).

14. 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).