Individualized v Particularized Entitlement Inquiries

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My analysis now looks something like this:

Some entitlements should be "prima facie" protectible from invasion. That means that there are some entitlements which the owner should be able to protect even if he or she is unable to prove (a) that protection is in the net social interest or (b) that the invader's action is deserving of punishment.[1] I would call these entitlements "property."

In order to decide if an entitlement should be granted "property" status, it may be that a social-welfare calculus should be made. But the question to which that calculus should be applied is NOT, "should this particular invasion of the interest be restrained," but rather, "is this interest of the type for which the owner's own subjective assessment of harm should conclusively (or near-conclusively) guide the state in dealing with the interest." Only if the answer to this

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1.
Of course, many have argued that our legal system only punishes wrongdoers when doing so futhers the net social interest, so that the two categories I posit here are in reality one. By dividing the two categories as I have, I mean to indicate that it is not necessary to resolve that question at this stage of my inquiry. I am interested in investigating instances which can be explained neither by an individualized "social interest" theory or by an individualized "punishment" theory. ~~We are~~ I am instead investigating the nature of the distinction between individualized inquiries and typology inquiries. This is somewhat the nature of the distinction at issue when arguments are made regarding "act" versus "rule" utilitarianism.

question is in the negative, should the question be asked of whether this particular enforcement is in the public interest. One might call the interests which require time-by-time justifications of the latter sort, "tort" interests.[4] One purpose of my article will be to argue for this two-tier inquiry: First, the court should determine if the alleged entitlement is "property" or not.[2] If it is, the entitlement should be honored and the plaintiff should prevail.[3] Second, if it is not, the court should determine if enforcing the alleged entitlement in the particular context presented would further social goals. This second is the "tort" inquiry.

Note the distinctions between my definitions and those of the Calabresi & Melamed "Cathedral" article. Calabresi and Melamed wrote as if entitlements were stable entities, protected by "property" or "liability" (tort) rules.[4] When the

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2.
It may be that institutional considerations, such as the legislature's purported superiority in making such "property" decisions, should enter in here. This and other questions about the nature of the first-tier inquiry will be addressed below at ____.

3.
The issue of what relief plaintiff should be entitled to is not foreclosed by calling the entitlement "property" -- that is, an injunction should not be automatic. Once the entitlement is violated, additional interests-- e.g., free speech interests-- may be triggered. The question of relief is discussed below at ____.

4.
They essentially argue that physical entitlements are protected by the fullest mode (i.e., by "property rules") when such

object of the entitlement has physical substance, such an approach makes sense. When the object is an intangible capable of infinite multiplication,[5] however, such distinctions are less helpful than they might be, for some "intellectual property" entitlements vanish altogether when the context changes.

Now it might be contended that the same thing is true in the C & M system. For example, a person who has a "property

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protection is feasible, and by a less owner-regarding mode (i.e., by "liabilty rules") when such protection is not feasible.

5. Of course, each multiplication will require physical resources. Even the simple singing of a song requires a larynx and breath. Nevertheless, what gives the physical resource its exchangeable value will be an intellectual product which itself cannot be exhausted. Thus, there can be one tape recording of a new song, or millions. The difficult issues in intellectual property law lie with distinguishing those replications which should be placed in the creator's control from those which should not.

Re physical property, it is only at death that the law reaches a consensus that "complete control" by owner is undesirable. (Consider the rule against perpetuities.) Re nonphysical property, the dangers of complete control are always obvious--there will always be some out of the infinitude of possible replications which will benefit the users without harming the owner. Also, the paralysis problem is acute. That is, it has been argued in justification for the negligence rule (see Coleman's apt attack) that if we allowed lawsuits to be successful whenever one placed another's property at risk and the risk caused injury, the transaction costs would discourage even desirable risk-taking. That problem is even more acute in the intellectual property context, where "building on the shoulders" of the past is the way everything in an interdependent society operates. One small project may build on thousands' of predecessors' insights; to give each predecessor an automatic and not-limited-by-time right to sue and collect for repayment of his contribution would stall all growth.

rule" entitlement to refuse to sell his auto may nevertheless find, when his auto is totalled in an accident, that he has no right to demand payment from the car's destroyer. (In a negligence system, one is entitled to impose risks on other's property without paying either for the entitlement or for the property so burdened, so long as the risk-imposing behavior in the particular context serves to further net social welfare.) As a guide for where negligence or nuisance type liability rules should place a result, C & M ask whether something "would have been" bought or sold in a perfect market. That analysis begins from the assumption that the entitlement already existed in a hypothetical perfect market from which analogies may be drawn. In intellectual property, by contrast, an entitlement may not exist outside of the litigation context.[6] One cannot assess entitlements by reasoning from the market, for often the decision to be made in an intellectual property case is whether such a market entitlement should exist. In addition, since there is no "perfect" market for public goods,[7] any such

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6.
Note the interesting implications for Betamax.

7.
Products capable of being infinitely multiplied are public goods. To see the market failure clearly, remember that in long-run equilibrium in a perfect market, price will equal the marginal cost of producing an extra unit of the good. For public goods, the marginal cost (excluding the cost of the physical mode of embodying the public good) is zero. Were price equal to zero, there would be no market in the ordinary sense.

reasoning by analogy is arguably suspect, even for those intellectual productions which (like copyrights) do have "property" status by law and for which at least some markets exist in fact.

In I.P., a common issue is whether a creator[8] should be given a right of control outside of the contexts where "social interests" are most clearly served. (E.g., the "consumer confusion" versus "misappropriation of investment" theories of justification for trademark infringement suits.) In the C & M system, any deliberate taking triggers "property rule" vetoes--that is, where a market is possible, the courts do not inquire whether the transfer is in the social interest, but allow the owner to restrain the contested taking or use of his property, regardless. This again demonstrates the limitations of the C & M system for intellectual property. In I.P., most of the

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8.
Of course, an additional layer of complexity is added in applying the analysis presented in this paper to the real world, since often it is an assignee, or an entity even further removed from the creator, who is the active party in enforcing intellectual property rights. These complexities are outside the scope of this paper; except where expressly noted otherwise, the analysis will pertain to the creator's assertion of his or her own rights. This does not mean that the results of this paper are not generalizable to the case of the assignee; after all, in the dealings between creator and potential assignee, the creator's bargaining strength will often crucially depend on what the creator's options would be if he or she kept possession and exercised control in the marketplace on her own. The point is merely this: it is necessary to use special care when engaging in such generalization.

takings are deliberate. Copyright infringement, for example, is considered an "intentional" tort.[9] Yet some of these deliberate takings should be prohibited, and some allowed. A ground for distinguishing between them, other than the availability of markets, must be found.

Thus, we now have two potential criticism of using the C & M model for the purposes of analyzing the intellectual property area:

- First, one cannot use the market analogy with the same confidence as in the instances where physical takings and uses are at issue, (a) because the litigation process is sometimes used in this area to set up a market not previously in existence, (b) because the litigation process is sometimes used to protect some aspect of behavior ~~as~~ for which no market is desired,[10] operating here, where one would allow litigation but not purchase? This category gets us close to C & M "inalienability" -- things protectable but not in a market.

9.
Square with Bright Tunes v. Harrissongs. Also square with patent prohibitions on unaware copying.

10.
Or is it? Consider INS v AP. WHile the courts wouldn't have enforced a buying and selling right in "news" that'd keep ordinary citizens from passing information along, the opinion did indeed give the one news service something to "sell" vs the other. So this category needs rethinking. Is there anything like the blood example (Titmuss,"THE GIFT RELATIONSHIP"

and (c) because the market analogy is particularly dangerous where no perfect market solution is available.[11]

- Second, one cannot use the C & M "honor the owner's subjective veto whenever a deliberate taking is in question" rule.[12]

There must be some other way (other than deliberate v nondeliberate) to distinguish the takings which should be freely allowed from those which the owner should be allowed to control. Perhaps the criterion should be: one should choose an entitlement to receive the C& M type "property rule" treatment (i.e., veto all over deliberate uses) by looking at which i.p.

11.
Demsetz's perfect price discrimination might be a "perfect" solution of sorts, although of course quite different from the usual notion thereof. Among other things, in his system the creator captures all value except where transafction costs operate to insulate some potential buyers who will "look" like zero price buyers but who in fact would experience some positive value from using the good. The latter group would still have some consumer surplus.

12.
Of course, the law doesn't honor the C & M rule all the time anyway: consider "privileges," which in intentional torts operate somewhat as does the negligence calculus. Only for rare privileges, such as in VINCENT V LAKE ERIE, does the presence of the social welfare justification NOT erase the obligation to pay. Perhaps one should say that the obligation to pay should always be present-- but that turns out to be intuitively undesirable. When an individual shoots in self-defense one does not feel the shooter need pick up his assailant's medical costs. So even for deliberate takings of physical goods, the issue of ENTITLEMENT is always present, and may sometimes depend on context. This means the assertions in the text may need rethinking here.

interests NEED that treatment. Potential candidates for the latter list:

1. i.p. interests which are intended to protect personality & privacy. As to these, objective measures of harm may be particularly likely to be inadequate, AND the reason for protecting the interests are peculiarly likely to be tied in with the subjective/objective distinction in the first place, e.g., the desire to create a zone of privacy. Examples:

   - privacy interests.
   - publicity interests
   - interests in reputation. I have trouble seeing these as "personality" interests, but given the way the courts tend to respond -- I think here of Dow Jones -- that may explain some of the strange things going on in misappropriation and rights of publicity.

2. i.p. interests created to protect incentives for which engaging in particularized second-guessing will erode incentives.

There is an alternate way to characterize the above discussion. One might say my approach is quite consistent with the Calabresi and Melamed approach, and that my inquriy is

simply: how to distinguish those entitlements which should recieve "property rule" (veto) protections merely because they have been taken in a context where a market was possible (e.g., those which have been taken intentionally), from those entitlements which should be protected only if such protection is warranted in a particular context. Since in the i.p. area, the mere possibility of a market bargain shouldn't mean the i.p. should be protected,[13] this may be a mere alteration of the C & M model to fit a new context. However, I don't think that a fruitful ~~way to proceed~~ line of argument. For C & M, the key question is the availability of markets, and my key questions are quite different. While the availability of markets arises in my analysis, it only does so for certain types of entitlements. It thus seems preferable to make explicit the departures from their ~~market~~ model.

Note main points:

* In the intellectual property area, the mere intentionality of a taking, or the presence of a possible market, does not itself justify a plaintiff's winning his or her action against the

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13.
Think: does this also suggest that the mere possiblity of NO market bargain shouldn't necessarily indicate fair use is appropriate? Maybe, for those types of I>P> for which the primary justifications are personality rather than eco incentives. So my analysis has implications for both sides of the inquiry.

taker.

* In the intellectual property area, the mere unintentionality of a taking, or the presence of other market barriers, does not itself justify defendants' winning, except if market incentives were at the core of the grant of the entitlement in question.[14]

* It may be that my "property" inquiry itself needs to be subdivided. For example, it may be that "personality" type entitlements should be protected from second-guessing only where plaintiff seems to be asserting some personality-type interest, but not where he is asserting some pecuniary or market type interest. (Overlooking this last distinction may be the cause of some of the overly-plaintiff-protective rights of publicity cases.) For a similar example, it may be that "incentive" type entitlements should be protected from second-guessing exclusively in those instances where we think it is only the owner who can accurately gauge his harm and thus his incentives.[15]

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14. I have argued that copyright's fair use doctrine is one of these exceptions.

15. I'm assuming here, of course, that we'd attach a "property" veto right to an incentive-type entitlement only where this

* Except for "incentive" type entitlements for which property rights are clear (such as, arguably, copyright), the "process" modes of analysis of C & M will not work. That is, one cannot start with the inquiry, "what would have happened in a market" and then mimic that result. The appropriateness of the entitlements must be faced directly.

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doubt re measurability of harm is present, and that otherwise we'd use a case-by-case approach for incentive-based entitlements. The assumption may be wrong. In particular, it may be that, a la my old fair use argument, that whenever incentive-type analysis is in issue, second-guessing is always appropriate, at least where defendant can show that the usual incentive analyses wouldn't fit a particular case because the presumedly available market is absent. Or perhaps, as Michelman implicitly suggests, there may be other reasons for being reluctant to second-guess.

Michelman's article also impliedly suggests that an all- or-nothing approach is simplistic, and that one should merely "weigh in" the impact of second guessing. Given the difficulty of the inquiry Michelman wants the courts to enter into--cf., Henderson's arguments-- and (more importantly) my intuitions about the value of veto rights, I find the "weigh everything in" argument unattractive.

16. See Coleman on the Sherman Act and Kaldor-Hicks.