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"Is Nozick Kicking Rawls's Ass? Intellectual Property and Social Justice"

UC Davis Legal Studies Research Paper No. 108

UC Davis Law Review, Vol. 40, 2007

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ABSTRACT: Is the libertarian vision of Nozick in ascendance in intellectual property, overshadowing Rawls's egalitarianism? Yes, and rightly so, some intellectual property scholars suggest. They argue that intellectual property law seeks to solve a fundamental problem of information economics: without intellectual property protections, the ready duplicability of information undermines incentives to create information. Armed with this economic insight and fortified a neo-liberal faith that markets with well-defined property rights in information will best promote liberty, these scholars would keep intellectual property's focus single-minded: to incentivize the production of information.

In this introduction to a symposium on "Intellectual Property and Social Justice," we argue that this view is too narrow. A variety of societal goals must inform intellectual property law because (1) understanding intellectual property's impact on a variety of social values helps us restrain maximalist intellectual property demands; (2) relying on the tax and welfare systems to remedy any resulting distributional deficiencies is unrealistic; (3) the *raison d'etre* of Western intellectual property laws is not necessarily globally scalable because of varying capacities to innovate; (4) we must attend to the kind of innovation that law spurs (for example, does the existing regime adequately incentivize the discovery of treatments for poor people's diseases?); and (5) we can best understand fair use doctrine not just as market failure but as an important component of free speech.

The fact that a legal regime might be created for one purpose should not mean that the implications of that regime for all other purposes should be ignored. The state raises an army because of the need to assure its security against foreign invasions. Yet, the state might deploy the army domestically in case of natural disasters. And it might establish limits on how the army might operate (such as prohibitions on torture and sexual harassment) - limits stemming not necessarily from self-defense but from other human values. Similarly, the fact that intellectual property law might be established for instrumental reasons does not mean that other purposes should not be considered when we set its metes and bounds.

"Everyone's a Superhero: A Cultural Theory of 'Mary Sue' Fan Fiction as Fair Use"
UC Davis Legal Studies Research Paper No. 110
California Law Review, Vol. 95, p. 597, 2007

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ABSTRACT: Lieutenant Mary Sue took the helm of the Starship Enterprise, saving the ship while parrying Kirk's advances. At least she did so in the unofficial short story by Trekkie Paula Smith. Mary Sue has since come to stand for the insertion of an idealized authorial representative in a popular work. Derided as an exercise in narcissism, Mary Sue is in fact a figure of subaltern critique, challenging the stereotypes of the original.

The stereotypes of popular culture insinuate themselves deeply into our lives, coloring our views on occupations and roles. From Hermione Granger-led stories, to Harry Potter in Kolkata, to Star Trek same-sex romances, Mary Sues re-imagine our cultural landscape, granting agency to those denied it in the popular mythology. Lacking the global distribution channels of traditional media, Mary Sue authors now find an alternative in the World Wide Web, which brings their work to the world.

Despite copyright law's grant of rights in derivative works to the original's owners, we argue that Mary Sues that challenge the orthodoxy of the original likely constitute fair use. The Mary Sue serves as a metonym for all derivative uses that challenge the hegemony of the original. Scholars raise three principal critiques to such unlicensed use: (1) why not write your own story rather than borrowing another's? (2) even if you must borrow, why not license it? and (3) won't recoding popular icons destabilize culture? Relying on a cultural theory that prizes voice, not just exit, as a response to hegemony, we reply to these objections here.

"Closely-Held Firms and the Common Law of Fiduciary Duty: What Explains the Enduring Qualities of a Punctilio?"

UC Davis Legal Studies Research Paper No. 111
Tulsa Law Review, Vol. 41, 2006

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ABSTRACT: This article explores fiduciary norms in the closely-held firm. It focuses generally on judicially-developed standards of business ethics and specifically on the perceived gap between articulated and applied norms. The article includes data on the frequency with which Cardozo's famed "punctilio of an honor the most sensitive" statement is cited and offers explanations for the continuing appeal of the standard.

"The Populist Safeguards of Federalism"

UC Davis Legal Studies Research Paper No. 109

Ohio State Law Journal, 2007

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ABSTRACT: Extant legal scholarship portrays citizens as the catalysts of federalization. Scholars say citizens pressure Congress to impose their morals on people living in other states, to trump home-state laws with which they disagree, or to shift the costs of regulatory programs onto out-of-state taxpayers, all to the demise of states' rights. Since Congress (usually) gives citizens what they want, scholars insist the courts must step in to protect states from federal encroachments. By contrast, this Article proposes a new theory that suggests citizens actually defend state prerogatives, potentially making judicial review of federalism unnecessary. The theory identifies several reasons, overlooked in the scholarly literature, why citizens may oppose congressional efforts to expand federal authority vis a vis the states. First, citizens often deem state policy superior on the merits to any one-size-fits-all federal policy. Second, citizens fear that congressional action on one issue (however desirable) may pave the way for unwelcome federal action on related issues in the future. Third, most citizens prefer to have state, rather than federal, officials administer policies, not only because they trust state officials more, but also because they can keep state officials on a shorter leash. Fourth, citizens value political processes, and not just the outputs of those processes; they may be willing to sacrifice desired policy outcomes out of respect for direct democracy and federalism. For all of these reasons, citizens will cabin federal power. The Article closes by discussing some implications of the theory for ongoing debates over judicial review of federalism.

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