

VESTED USE-PRIVILEGES IN PROPERTY AND COPYRIGHT

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I. INTRODUCTION

Despite the best efforts of a few generations of law professors and Supreme Court justices, the claim “If it’s mine I can do whatever I want with it” continues to exert a strong normative pull in our culture.<sup>1</sup> I shall dub this claim the “sovereign use principle.” This principle asserts not only the entitlement to do things with what is owned,<sup>2</sup> but also the entitlement *not* to do with it what others might like. Note

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1. See, e.g., GIRLICIOUS, IT’S MINE (Geffen Records 2008) (“It’s mine, it’s mine, it’s mine/I can do whatever, ever, I can do whatever, ever”). Need I adduce more?

2. The entitlement to “do things” asserted here includes both what the Romans called *jus utendi* (the right of beneficial use) and *jus abutendi* (the right of abuse or destruction). See 1 ROSCOE POUND, JURISPRUDENCE 115 (1959). I leave aside the concept of *ius fruendi*, as it involves a question I am not considering here, namely how to define the scope of the “it” with respect to which a claim of sovereign use is asserted. See generally, Eric Claeys, *Productive Use in Acquisition, Accession, and Labour Theory*, in PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW (James Penner & Henry E. Smith eds., 2014); Christopher M. Newman, *Transformation in Property and Copyright*, 56 VILL. L. REV. 251 (2011).

that this claim is very different from the other key normative claim of property owners, the so-called “right to exclude.”<sup>3</sup> This latter claim can be restated colloquially as “If it’s mine, you have to keep off without my permission.” There is some debate among property theorists as to which claim provides the central principle of property law.<sup>4</sup> We need not weigh in on that debate to observe that people care deeply about the sovereign use principle even apart from the right to exclude. People tend to regard the freedom to use their property as they please as a sort of affirmatively vested entitlement inherent to the very possession of property. Moreover, when they assert “If it’s mine, I can do what I want with it,” they also assert its logical corollary: “If I can’t do what I want with it, it’s not really mine.”

Interestingly, intuitions derived from the sovereign use principle have become the basis for a significant strand of rhetoric and argument directed against copyright law. The thrust of this argument is that copyright violates the sovereign use principle.<sup>5</sup> It does so by imposing restrictions on our use of chattels that in every other respect we own as property. Even though you own a copy of a book, film, or music recording, copyright law may forbid you from doing certain things with it, such as using it to produce additional copies, or to read (or play) it aloud in a public place.<sup>6</sup> The same is true of your computer, television, and smart phone — even though you own them, copyright law restricts you from using them in certain ways, such as downloading certain files from or posting them to the Internet, or showing a television broadcast.<sup>7</sup> As Tom Bell has argued, “[C]opyright relies for its very existence on violating property rights — the traditional common-law rights that each of us presumably enjoys in such tangible things as our printing presses, guitars, and throats.”<sup>8</sup> Of course, copyright is not the only area of law that prevents people from using their property in ways they would like. In fact, virtually *all* laws restricting certain types of conduct have the practical effect of preventing us

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3. See Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

4. On the use side, see, for example, Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U. L. REV. 617, 631 (2009) (defining property as the “right to determine exclusively how a thing may be used”); on the exclusion side, see Merrill, *supra* note 3.

5. See, e.g., TOM W. BELL, *INTELLECTUAL PRIVILEGE: COPYRIGHT, COMMON LAW, AND THE COMMON GOOD* 12 (2014) (arguing that copyright conflicts with traditional property rights); David Hamilton, *It’s My Copy and I’ll Sell It If I Want To: Capitol Records, LLC v. ReDigi, Inc.*, 97 J. PAT. & TRADEMARK OFF. SOC’Y 232, 235–40 (2015); Sherwin Siy, *Copies, Rights, & Copyrights: Really Owning Your Digital Stuff*, PUB. KNOWLEDGE (June 13, 2013), <https://www.publicknowledge.org/CopiesRightsCopyrights> [<https://perma.cc/E52X-2T7C>].

6. See 17 U.S.C. § 106 (giving copyright owners exclusive rights to reproduce or publicly perform the work).

7. *Id.* (also forbidding unauthorized public distribution or display).

8. BELL, *supra* note 5, at 12.

from doing things we might like to do with our property. Traffic laws restrict our use of our automobiles. Environmental laws restrict our uses of land. Laws against murder restrict our uses of knives, guns, and other objects. Are any or all of these laws violations of property rights? Does property ownership grant stronger standing to contest some of these restrictions than others? If so, which ones?

To answer these questions, we must first assess the status of the sovereign use principle posited above. Is it analytically coherent? Does it accurately describe the way property rights are instantiated in positive law? Part II of this Article addresses these questions. Section II.A explains in Hohfeldian analytical terms what it means to have a vested use-privilege. A use-privilege is an interest denoting the absence of any duty to consult the discretionary preferences of others in deciding how a resource is to be used. The interest is said to be vested when the privilege owner enjoys immunity from expropriation absent consent or at least compensation. Section II.B examines the extent to which vested use-privileges exist in practice as cognizable property interests, concluding that they are well-established and protected in private law but that current regulatory takings doctrine leaves use-privileges with insufficient protection to qualify as vested. This discussion includes an attempt to articulate formal criteria to distinguish between rights claims properly characterized as affirmative assertions of discretionary control over the used property, and ones that defensively assert the claimant's own countervailing right of non-interference in his or her own property interests.

Part III applies this framework to analyze the exclusive rights conferred by Section 106 of the Copyright Act<sup>9</sup> and concludes that the exclusive rights to perform and reproduce copyrighted works, while restricting personal liberty, do not constitute claims of discretionary control over identified chattels so as to violate the sovereign use principle. Exclusive distribution and display rights, on the other hand, as well as the rights against mutilation and destruction granted by the Visual Artists Rights Act ("VARA"),<sup>10</sup> are the functional equivalent of appurtenant servitudes on specified chattels. This finding is consistent with the fact that the first-sale doctrine, which serves to reduce the servitude-like effects of exclusive rights, applies only to distribution and display.

The Article thus has two main purposes: It attempts to make a contribution to private law and property theory by providing a formal account of use-privileges as property interests distinct from any right to exclude. It also seeks to advance discussion of the relationship between tangible property law and copyright, both by showing how

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9. 17 U.S.C. § 106 (2012).

10. 17 U.S.C. § 106A (2012).

analogies drawn from the former can illuminate our understanding of the latter, and by considering to what extent the rights protected by copyright undermine tangible property interests.

## II. VESTED USE-PRIVILEGES IN PROPERTY

### *A. Hohfeldian Specification of the Sovereign Use Principle*

#### 1. Defining “Use-Privilege”

What does it mean to assert “If it’s mine, I can do whatever I want with it”? To describe with precision what this claim means when translated into a set of legal entitlements, this Article adopts the analytical terminology proposed by Wesley Hohfeld, which divides the world of jural relations into four possible sets of contrasting correlative pairs.<sup>11</sup> In these terms, a first cut at restating the sovereign use principle might be: “Title to a thing includes the privilege to engage, or to refrain from engaging, in any use of which the thing is susceptible.” In Hohfeld’s system, a “privilege” is the opposite of a “duty,” and the correlative of a “no-right.”<sup>12</sup> A privilege to do X is thus the negation of a duty to refrain from doing X. Accordingly, the sovereign use principle would appear to assert that ownership of a thing entails an absence of any duty either to engage in or to refrain from engaging in any uses of which the owned thing is susceptible. When stated this way, the asserted privilege clearly requires some qualification if it is to correspond to anything actually existing in our legal system. There is no such thing as an absolute privilege — in other words, a legal entitlement to take action X such that doing so cannot possibility violate any duties owed to anyone else.<sup>13</sup> Even the most diehard proponent of the sovereign use principle understands that there are many things you are not allowed to do even with the objects you own. As the saying goes, “Your freedom to swing your fist ends just where my nose begins.”<sup>14</sup> You cannot assert that others should respect your property rights without agreeing that your own freedom of action is properly limited by their property rights. Because of this seeming im-

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11. See Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 33–44 (1919). The pairs are: right/duty, privilege/no-right, power/liability, and disability/immunity.

12. *Id.* at 32.

13. Perhaps “no such thing” is an overstatement. But to exist, an absolute privilege would have to pertain to some activity that, in the legal system being described, is categorically immune from criminal prohibition and unburdened by any conceivable duty to others based in tort or enforceable contracts. Freedom of thought, perhaps?

14. For discussion of the unclear origin of this phrase, see *Your Liberty To Swing Your Fist Ends Just Where My Nose Begins*, QUOTE INVESTIGATOR (Oct. 15, 2011), <http://quoteinvestigator.com/2011/10/15/liberty-fist-nose/> [<https://perma.cc/6Z4L-DTCW>].

possibility of identifying any actions that one has an unqualified privilege to take, it may appear pointless to conceive of use-privileges as vested entitlements, which is likely part of the reason why it is common to gravitate toward the “right to exclude” principle alone as defining the essence of property.

Actually, Hohfeld’s system provides a fairly straightforward answer to this objection. To speak of “absolute privilege” is to forget that Hohfeld’s system is one of bilateral jural relations.<sup>15</sup> Every right possessed by A must correspond to some defined duty possessed by some dutyholder B.<sup>16</sup> By the same token, any privilege possessed by A must correspond to some defined no-right possessed by some person B.<sup>17</sup> The privilege conferred by property ownership does not purport to negate the existence of any conceivable duties owed by the property owner to others that may restrict her use of the owned thing. It purports only to negate one specific duty: the duty to comply with the discretionary preferences of others as to how the owned thing will be used. Even under the sovereign use principle I may well be able to raise a legally valid objection to your use of your property — it’s just that this objection will have to be justified by something other than the phrase “I want that thing to be used differently.” Only the owner has the right to say “I want that thing to be used in this way and not that way,” and have this expressed preference impose a duty on others not to engage in uses that violate those preferences. The non-owner has no right to do this — or rather, as good Hohfeldians we should say affirmatively that he has a no-right to do this. The correlative of this no-right is the owner’s use-privilege, and our precise definition of the former also defines the scope of the latter. Rather than “If it’s mine, I can do what I want with it,” a more accurate formulation would be, “If it’s mine, you can’t tell me what to do (or not do) with it.” I shall call this the “sovereign use-privilege.”

Since both the sovereign use-privilege and its corresponding no-right describe relations between classes of unenumerated persons mediated by the owned thing, they are *in rem*, in exactly the same sense as the owner’s right to exclude and the non-owners’ correlative duties.<sup>18</sup> As a non-owner, my no-right with regard to the thing I do not own governs my relations with everyone else in the world vis-à-vis that thing, such that my inability to enforce use preferences does not depend on the identity of the other person who might wish to use it. The same is true of the owner’s privilege: she need not know anything

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15. Hohfeld, *supra* note 11, at 32.

16. *Id.*

17. *Id.*

18. See generally Thomas Merrill & Henry Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001).

about the identities of other would-be imposers of preferences to know that she is entitled to disregard them.

## 2. Defining “Vested”

To fully specify the sovereign use principle in Hohfeldian terms, we need to do more than define the scope of the use-privilege it asserts. We also need to specify the relationship between that use-privilege and the property owner. The sovereign use principle does not posit the use-privilege as merely a default aspect of ownership, but rather as an integral one. The principle asserts that the privilege is protected by what Hohfeld would call an “immunity,” which correlates to an absence of power on the part of someone else to abrogate it.<sup>19</sup> Just as the absence of a duty is called a privilege, this absence of a power to alter jural relations is called a “disability.”<sup>20</sup>

Property entitlements are understood to be protected by such an immunity, because they would be of little use if they could be abrogated by others at will. However, the immunity is no more absolute than the use-privilege itself, for there remain circumstances in which others may have a power to abrogate or qualify property entitlements, such as through adverse possession, prescriptive easement, or eminent domain. It is nevertheless quite robust. My title is liable to alienation or abandonment of the property, but each of those liabilities corresponds to a power entirely in my control.<sup>21</sup> If the property is land, I am also liable to expropriation via adverse possession, but I have the ability to prevent this by exercising the minimal diligence needed to detect a disseisor during the lengthy period required to effectuate the expropriation.<sup>22</sup> Up until that point, my right to exclude remains intact and may be used to interrupt and invalidate the adverse possessor’s exercise of power. Finally, I am liable to expropriation by means of eminent domain. I cannot prevent this form of expropriation from occurring, but the expropriation triggers a right to just compensation that recognizes my prior rights and privileges with respect to the property as having a special status that may not be ignored by the taker.<sup>23</sup>

This Article shall refer to property entitlements<sup>24</sup> as being “vested” in some party when they have this characteristic — namely, that the entitled party is protected by an immunity that disables others

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19. Hohfeld, *supra* note 11, at 53.

20. *Id.* at 55. The correlative of a “power” (the capacity to alter jural relations), in turn, is a “liability” (the susceptibility to such an alteration). *Id.* at 44.

21. *See generally* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 518–44 (1st ed. 2007).

22. *See id.* at 194–219.

23. *See id.* at 1247–57.

24. I include within this term all rights, privileges, and powers (or sets thereof) that give the holder some measure of control over use of the property.

from expropriating those entitlements without triggering some right that the party can use either to forestall the expropriation or to be compensated for it. The sovereign use principle asserts that all the privileges contained within the sovereign use-privilege are vested in the property owner, and that this vesting is a matter independent of the right to exclude — though that right, too, is a vested entitlement.

### *B. Vested Use-Privileges as Recognized Property Interests*

We have identified conceptually what it means to refer to a vested use-privilege. The next step is to demonstrate that such a privilege actually exists in our law as a recognized property interest. The dominant “right to exclude” paradigm assumes that absent a robust exclusion right, the interest discussed does not qualify as property. In order to show the actual status of vested use-privileges in current property law, this Section will address two questions: (1) To what extent is it possible to own a use-privilege separately from any right to exclude? (2) To what extent are the privileges contained within the sovereign use principle actually vested?

#### 1. Ownership of Use-Privileges Without Rights To Exclude

A use-privilege is valuable insofar as it permits action free of any duty to consult the preferences of others. A use-privilege alone, however, does not protect its holder from actions by others that may interfere with the privileged use. While an *in rem* privilege permitting me to traverse Blackacre would mean that no one else could forbid me from doing so, it would not prevent others from obstructing my passage. If not conjoined with some protective right forbidding such interference, then, a bare use-privilege would be of precarious value. It is therefore unsurprising that a positive easement such as a right-of-way conjoins the use-privilege with a right of non-interference.<sup>25</sup> This right, however, differs from a right to exclude; it does not prevent others from using the same strip of land subject to the easement, but only forbids them from taking actions that would block my passage.<sup>26</sup> Another example would be the profit-à-prendre, a nonpossessory interest giving its holder the privilege (again, protected by a right of non-interference) to enter the land of another and take natural resources such as petroleum, minerals, timber, or wild game.<sup>27</sup> Nonpossessory use-rights<sup>28</sup> of this kind are often referred to as

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25. See MERRILL & SMITH, *supra* note 21, at 975.

26. See *id.*

27. See *id.* at 976–77.

28. By “use-right” I mean a use-privilege that is combined with a right of non-interference in the privileged use.

usufructuary, and once created they are recognized in law as vested property interests.<sup>29</sup> These examples serve to indicate that vested use-privileges exist in property law.

## 2. Is the Sovereign Use-Privilege Vested?

The usufructuary interests discussed above suffice to demonstrate that use-privileges can be vested without any accompanying right to exclude. The sovereign use principle, however, asserts that all use-privileges pertaining to an owned thing are presumptively vested in the thing's owner. Vesting exists to the extent that the owner has protection against abrogation of those privileges. To evaluate the status of the sovereign use principle as a matter of positive law, we must therefore identify the ways in which an owner's use-privileges may be abrogated, whether by private parties or state actors, and ask whether such protections exist. Our first step, however, must be to define abrogation.

As posited above, not all legal norms restricting an owner's use of her property thereby abrogate her sovereign use-privilege — only those that impose the discretionary use preferences of some other party. The problem is that this distinction may be malleable in practice. When you say that my freedom to swing my fist ends at your nose, are you not asserting a right to impose the preference that my fist not be used to hit your nose?

Not so. Your right not to have me hit you in the nose is not an application of a right to tell me specifically what to do with my hand. Nor is it really a right to tell me *not* to do something with my hand. The content of your actual rights claim is not defined in terms of my hand at all. It is defined in terms of your nose, and actions that physically harm your ability to use and enjoy it. It does not purport to tell me to take or refrain from any particular action with my fist at any particular moment — it just tells me generally not to take actions that have certain consequences, whenever and whatever the actions consist of, and whether I perform them using my fist or any other object. If I hit your nose, your claim against me will consist of showing that my doing so constituted a harmful or offensive touching of your person that was unauthorized.<sup>30</sup> The identity of the object used to touch you and its attributes are irrelevant to the claim, except insofar as facts pertaining to them help you to show that the touching was harmful and that I was responsible.

Similarly, if I wish to build a pig farm on my land and you tell me it would be an actionable nuisance, you are not asserting discretionary

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29. See MERRILL & SMITH, *supra* note 21, at 975.

30. See 6A CORPUS JURIS SECUNDUM, ASSAULT § 11 (2016).



authority to decide what I do with my land, you are asserting a right to be free from unreasonable interference with your use and enjoyment of your land.<sup>31</sup> You have no right to tell me not to have a pig farm *per se*, only a right to be free of the harmful spillover effects of my doing so.<sup>32</sup> If I find technology that will keep the smell and noise entirely confined to my land, you will have no ground for complaint. Your claim does not turn on the identification of my land or its specific attributes, or on any entitlement specifically linking you to my land. It turns only on whether my activities actually and unreasonably harm your use and enjoyment of your land.

In either example, I can insulate myself from any risk of violating property rights simply by identifying any objects owned by others (such as your nose) that are near enough to be physically affected by my activities. If I do not touch (directly or indirectly) anything that does not belong to me, and do not create any spillover effects that might tangibly alter anything that does not belong to me, then I can be fairly sure I am committing neither trespass, nor battery, nor nuisance. Within these bounds, I can indulge any preference I may have with regard to the objects I own, including altering their attributes in any manner I please.

If, on the other hand, the Sierra Club owns a conservation easement over my land that specifically prohibits certain kinds of development, they are entitled to enforce their bare preference that the land not be so used.<sup>33</sup> Should I build on my land anyway, their claim to enjoin me will not involve any showing of interference with some interest in property other than my land. Their claim will, however, require them to identify the specific attributes of my land that distinguish it from other objects of ownership, so as to establish the existence of a preexisting entitlement giving them the claimed discretionary power over the specific parcel so identified. We have recognized such an entitlement as a superseding ownership interest in my land, which necessarily derogates from my own status as owner.

We can attempt to formalize this by positing that a rights claim which is operationalized in context as forbidding an owner to take action X with respect to her owned object Y is consistent with the sovereign use principle (i.e., does not conflict with her ownership of Y) so long as both:

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31. *See, e.g.,* *Hendricks v. Stalnaker*, 380 S.E.2d 198, 200 (W. Va. 1989) (defining private nuisance as “a substantial and unreasonable interference with the private use and enjoyment of another’s land”).

32. *See* MERRILL & SMITH, *supra* note 21, at 975 (discussing “significant harm” requirement).

33. *See* JAMES W. ELY, JR. & JON W. BRUCE, *THE LAW OF EASEMENTS & LICENSES IN LAND* § 12:2 (2016).

- (1) The identifying characteristics of object Y are irrelevant to the question whether the asserted right is violated; and
- (2) The claimant is required to show that action X constitutes interference with the claimant's own preexisting interest in some other recognized property Z.<sup>34</sup>

On the other hand, a claim forbidding an owner to take action X with respect to her object Y clearly does violate the sovereign use principle if both:

- (1) The identifying characteristics of object Y form part of the statement of the claimed right; and
- (2) The claimant is not required to show actual interference with his own preexisting interest in any recognized property other than Y.

We have identified two formal criteria for distinguishing between claims that assert control over your property and claims that merely seek to protect someone else's. One can map the possible combinations of these criteria as follows:

Table 1: Nature of Claim Forbidding Owner of Y from Use X

		Identification of Owned Property Y Part of Claim?	
		No	Yes
Identified Interference with Property Z Part of Claim?	No	(1): General criminal prohibition (victimless crime).	(3): Assertion of property right in Y as servitude in gross; land use regulation.
	Yes	(2): Assertion of property right in Z; criminal prohibition of harm to person or property.	(4): Appurtenant servitude; specific criminal prohibition (for example, assault with a deadly weapon).

34. I include within this category claims to be free from personal injury, because people have *in rem* rights in their own person.

Category 1 contains claims that are asserted only by the state as a matter of public law. These are prohibitions on conduct defined without reference either to the use of identified objects owned by the dutyholder or to any identified harm to cognizable property interests. A general prohibition on gambling would fall into this category, and we generally regard such a prohibition as a restriction of liberty rather than a qualification of property entitlements, even though it has the effect of significantly restricting the use and enjoyment of one's slot machines and playing cards.<sup>35</sup>

Category 2 contains claims that merely protect property interests in Z, and therefore do not conflict with the sovereign use-privilege of Y's owner. The action for nuisance over a pig farm discussed above would fall into this category, as would a trespass action based on my act of driving a car over your land. In either case, my breach of duty is not defined by any use of my own land or vehicle, but only by the resulting interference with your property rights. Claims falling into this category might be enforced as a matter of either private or public law. For example, both the tort claim and the criminal charge for the act of assault using a baseball bat would fall into Category 2, and in neither event would this constitute an assertion of discretionary control over use of the bat.

Category 3 contains claims asserted by someone who is not regarded as the owner of property Y, but who nevertheless has some freestanding entitlement giving him a right to forbid the owner of Y from engaging in particular uses. As mentioned above, the conservation easement would fall into this category, as would a profit or any other servitude whose benefit is "in gross" — that is, not tied to ownership of any property other than Y. The scope of the conservation easement will be defined in purely negative terms, as it serves only to prevent the owner of the land from altering it certain ways, without giving the holder of the easement any corresponding possessory use-privileges.<sup>36</sup> In the case of the profit, the claim right forbids only acts that would interfere in the possessory uses of property Y that the profit privileges its owner to pursue.<sup>37</sup> Either way, no harm to any interest in any property other than Y is relevant to the claim. While the holders of these interests are not generally termed owners of Y, they clearly own interests in Y that derogate from the sovereign use-privilege. The possibility of such interests does not, however, contradict the claim that the sovereign use-privilege is vested, because they can be

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35. See, e.g., *Interactive Media Entm't & Gaming Ass'n Inc. v. Attorney Gen. of U.S.*, 580 F.3d 113, 113–15 (3d Cir. 2009) (listing numerous arguments raised by Internet gambling trade group against constitutionality of federal Internet gaming ban, which did not include either takings or deprivation of property interest).

36. See ELY & BRUCE, *supra* note 33, at § 12:2.

37. See RESTATEMENT (THIRD) OF PROP. (SERVITUDES) § 1.2 (AM. LAW INST. 2000).

created only as the result of actions by an owner of Y,<sup>38</sup> or else by prescription or condemnation.<sup>39</sup> These contingencies are consistent with the concept identified above as a vested property interest, for they cannot take place without triggering the owner's power to prevent or demand compensation for the expropriation.

Category 3 also arguably contains land-use regulations such as those requiring preservation of wetlands or forbidding development of beachfront property. When such a regulation forbids actions defined solely by reference to property having specific identified characteristics, and does so regardless of any showing of harm to other recognized property interests, it is the operational equivalent of a negative easement. Unless the regulation denies the property owner all "economically viable use of his land,"<sup>40</sup> however, current takings doctrine is unlikely to require compensation unless the Court determines the burden to be one "which, in all fairness and justice, should be borne by the public as a whole."<sup>41</sup> This, then, is an area in which the sovereign use principle is seriously compromised. When it comes to expropriation via state regulation, an owner's use-privileges are not fully vested under the prevailing positive law.

Category 4 is an interesting hybrid in that it contains claims that involve both specific identification of the property used and violation of an interest in some other property. The key private law example here is a claim for enforcement of an appurtenant servitude, such as a right-of-way. As discussed above, a right-of-way easement consists of use-privileges (along with a concomitant right of non-interference) over a servient tenement that are held by someone other than its owner. Usually, such an easement is appurtenant to a dominant tenement, meaning that it is regarded as an integral part of the estate that cannot be transferred independently of its title.<sup>42</sup>

Traditionally, most appurtenant easements come into existence because they protect some interest in use and enjoyment of the dominant tenement — where effective use and enjoyment of one piece of property depends on some measure of control over another. Certainly easements by necessity fit this description,<sup>43</sup> as would covenants and servitudes whose benefit is subject to a "touch and concern" requirement.<sup>44</sup> The creation of an appurtenant easement need not be justified by the type of harm that would support a claim of nuisance, and once

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38. This would include easements created by express grant, implication, estoppel, or necessity. *See id.* at §§ 2.1–2.15.

39. *See id.* at §§ 2.16–2.18.

40. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1004 (1992) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980)).

41. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978).

42. *See* RESTATEMENT (THIRD) OF PROP. (SERVITUDES) § 1.5.

43. *See id.* at § 2.15.

44. *See MERRILL & SMITH, supra* note 21, at 745.

it exists it may be enforced on its terms without a showing of actual harm to use and enjoyment of the dominant tenement.<sup>45</sup> In this sense, it amounts to a property right conferring a degree of discretionary control over use of the servient tenement. At the same time, however, it is a property right belonging to the dominant tenement, such that violation of the easement may be termed interference in the owner's interest in his own property. The creation of such a servitude is subject to the same limitations as those in Category 3, demonstrating that it constitutes a derogation of vested use-privileges.

### III. VESTED USE-PRIVILEGES AND COPYRIGHT

Because copyright law restricts the actions persons can take with respect to their own tangible property, the question arises whether it too should be regarded as imposing a form of servitude.<sup>46</sup> Such a determination may appear troubling, because imposition of servitudes on chattels has been highly disfavored.<sup>47</sup> One may resist the characterization by arguing that the duty imposed by copyright is never defined in terms of compliance with the copyright owner's discretionary preferences as to someone else's tangible property, but rather expressed as an obligation not to take actions impinging on the copyright owner's *in rem* interests in the copyrighted work. As Part II suggested, however, further analysis is required.

#### *A. The Object and Scope of Ownership in Copyright*

Copyright is a system of property rights pertaining to "works of authorship."<sup>48</sup> No work of authorship comes into existence without being embodied in a physical object, but no physical object constitutes

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45. See RESTATEMENT (THIRD) OF PROP. (SERVITUDES) § 8.3 cmt. b. In these respects, an appurtenant easement is similar to land use regulations that seek to protect adjacent natural resources from harm that is categorically likely to occur from certain activities, but that would be difficult to causally trace to any specific such act. An example would be the building moratorium at issue in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

46. I have so characterized it in earlier writing. See Christopher M. Newman, *Patent Infringement as Nuisance*, 59 CATH. U. L. REV. 61, 68 (2009) ("IP rights thus amount to negative easements in gross that appropriate specific use-privileges that tangible property owners would otherwise control with respect to their own property.").

47. See Glen Robinson, *Personal Property Servitudes*, 71 U. CHI. L. REV. 1449, 1455–65 (2004).

48. See 17 U.S.C. § 102(a) (2012) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . ."). The statute does not define the term "work of authorship." For an attempt to offer a definition, see Christopher M. Newman, *Transformation in Property and Copyright*, 56 VILL. L. REV. 251, 292 (2011) ("A work of authorship is a planned sensory experience, designed by its author to give rise to an expressive experience in the mind of one or more intended audiences.").

the “work.” Even the original object in which the work is first instantiated — the painted canvas, sculpted piece of marble, or typewritten page — has no unique status as far as the operation of copyright law is concerned. It is merely a “copy,” one of an indefinite number of copies that may exist at any time.<sup>49</sup> Ownership of the work and ownership of any particular copy thereof are two distinct interests that need never be united in the same person, even as an initial matter.<sup>50</sup>

What exactly is the nature of the use and enjoyment that copyright law seeks to protect on behalf of authors? It is not their ability to read, view, or listen to the work themselves, for that form of enjoyment is not threatened by myriad others doing the same. Instead, copyright law protects an author’s interest in using her productive labor as the basis for an exchange of value, which requires the ability to control access to the expressive experience the work is designed to convey. Copyright law does this by securing a set of enumerated exclusive rights:

- (1) To reproduce the copyrighted work in copies . . . ;
- (2) To prepare derivative works based upon the copyrighted work;
- (3) To distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) . . . to perform the copyrighted work publicly;
- (5) . . . to display the copyrighted work publicly; and
- (6) . . . to perform the copyrighted work publicly by means of a digital audio transmission.<sup>51</sup>

Note that, with the exception of the distribution right, each of these rights is defined in terms of a category of actions taken with regard to “the copyrighted work” as direct object. In subsection (1), the forbidden activity is defined as one that is both directed at the work as object, and that results in a copy. The distribution right appears unique, in that the copies themselves are the direct object of the forbidden

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49. See 17 U.S.C. § 101 (2012) (“‘Copies’ are material objects, other than phonorecords, in which a work is fixed . . . The term ‘copies’ includes the material object, other than a phonorecord, in which the work is first fixed.”).

50. See 17 U.S.C. § 202 (2012) (“Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.”).

51. 17 U.S.C. § 101 (omitting qualifiers that distinguish between different types of works). There are also a few other *in rem* rights enshrined elsewhere, such as the rights of attribution and integrity accorded to works of visual art in § 106A, the (now largely eviscerated) importation right in § 602, and the right against circumvention of technical access controls in § 1201.

activity. In fact subsection (5) shares this characteristic as well, as we are told elsewhere that “[t]o display a work means to show a copy of it.”<sup>52</sup> The others do not mention the use of copies at all, though as a practical matter all of them will involve such use.

### *B. Analysis of the Copyright Holder’s Exclusive Rights*

#### 1. Performance Rights

The copyright entitlement easiest to distinguish from a servitude is the exclusive right of public performance.<sup>53</sup> This is because a public performance is defined solely in terms of activities that affect the author’s interest in the work via actions defined by their likely tangible effect on objects the performer does not own — namely, the senses of other people. To “perform” a work requires deliberate activity making its contents perceptible to others,<sup>54</sup> and to do so “publicly” means that the performance is located or transmitted in such a way that it is likely to be actually perceived by persons with whom the performer has no personal connection.<sup>55</sup> The public performance right protects the copyright owner’s interest in the opportunity to satisfy demand for the experience of the work by means of making its contents perceptible to an audience. The identities of any objects the performer uses in the course of performing are irrelevant to the question of infringement.

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52. 17 U.S.C. § 101.

53. 17 U.S.C. § 106(4) secures this right with respect to “literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works,” while § 106(6) secures it for sound recordings, but only with respect to public performances that take place “by means of a digital audio transmission.”

54. *See* 17 U.S.C. § 101 (“To ‘perform’ a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.”).

55. *See id.* (defining “public” performance as either “to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered;” or “to transmit or otherwise communicate a performance or display of the work to a place specified by clause . . . or to the public . . .”). It is true that technically one might “publicly perform” a work in a place that one owns and that is “open to the public,” but not currently occupied by anyone else. (Or transmit such a performance without anyone tuning in.) Doing so however, at least makes it likely that at any moment someone will perceive the performance, much as one’s emissions can constitute nuisance even though there may be various moments in time during which no one is on the affected property to perceive them.

## 2. The Reproduction Right

17 U.S.C. § 106(1) gives a copyright owner the exclusive right to “reproduce the work in copies.”<sup>56</sup> Restated, this is effectively the exclusive right to fix the sensory data of which the work is composed in a material object from which it can be made perceptible.<sup>57</sup> As a practical matter (unless one has memorized the work), in order to do this one would need to start with a pre-existing copy. There are thus two categories of objects whose use might be characterized as restricted by the reproduction right: (1) pre-existing copies of the work, and (2) the materials out of which new copies are made.

Some might assert that if you own a book,<sup>58</sup> the command not to make a copy of it is a prohibition on something you might otherwise do with your property. But consider what specific acts comprise the making of a copy. First of all, to make a copy of a thing is not something you do to *that thing*, it is something you do to *other things*. To make a copy of the work embodied in a book, you must take some physical object or objects other than the book and cause *them* to embody the work as well. To do this “by hand,” you will need first to apprehend the work (or part of it) by mentally processing the images contained in the book, and then to transcribe that information onto some other object by, say, writing it down or typesetting it. If the second step never occurs, no amount of reading the book will ever constitute reproduction of the work. If the second step does occur, it is the acts resulting in creation of the new copy that violate the copyright, not the act of reading that enabled them.<sup>59</sup> There is, in other words, no physical activity with respect to the book itself that the owner of the reproduction right has discretion to forbid you from taking as such. She can forbid you only from engaging in courses of conduct that bring new copies of her work into existence.

But what of the ink and paper (or copier, or computer) used to create the infringing copy? Is the reproduction right a servitude on them? One might think so on the ground that making a copy depends entirely on whether one has imparted certain physical characteristics to her own tangible property. In this respect, the reproduction right

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56. The analysis given here will also apply to the exclusive right to prepare derivative works (under § 106(2)), which can be said to burden owned chattels only to the extent that it impedes their owners from using them to fix the derivative work being prepared.

57. See 17 U.S.C. § 101 (definition of “copies”).

58. To avoid confusion, I will use the term “book” to refer only to a physical object consisting of bound sheets of paper bearing images, not to the literary or other work that may be embodied in such an object.

59. If I read the book aloud over the phone in order to enable someone else to make a copy, I may be liable for contributory infringement, but here too it is clear that the relevant command is not “don’t read your book aloud” but “don’t help someone else create infringing copies.”



seems similar to a land-use regulation: it forbids uses of one's own property without a showing that they cause actual harm to anyone else.

This analogy is ultimately flawed for the same reason that the command not to punch another's nose is not a servitude on one's hand. The command not to create copies does not pertain *ex ante* to any specific materials in one's possession, but only to actions having certain consequences regardless of whether they are carried out with ink, paper, Crayola, or silicon, and regardless of whether one owns the materials used. The consequences, moreover, are defined in terms of the copyrighted work. "Do not cause any additional copies of my work to come into existence" is no more an assertion of discretionary control over use of your property than "Do not cause my nose to break." On this reasoning, the reproduction right belongs in Category 2.

This categorization is not to deny that the reproduction right is a restriction on liberty that may be attacked as overbroad. As we have noted, the interest we wish to protect on behalf of copyright owners does not consist in control over the number of copies of the work that exist *per se*, but rather in the ability to control access to the expressive contents of the work. Reproduction matters only because copies are the means by which such access takes place. To the extent that copies may come into existence without affording access to anyone otherwise lacking it, the ban on reproduction is therefore overinclusive. A similar form of overinclusion pertains to the landowner's bright-line right to exclude, which serves to relieve her of the need to prove that each individual incursion on her property interferes with her actual or planned use and enjoyment of it, even though many such incursions will not demonstrably do so. This overinclusive ban on harmless activities is nevertheless justified because the possessory uses to which it applies are categorically likely to interfere with owners' ability to plan or to engage in spontaneous use; a bright-line boundary rule greatly lowers information and enforcement costs and reduces the risks of opportunism for both owners and non-owners.<sup>60</sup> The trespass rule, however, is likely to enjoy strong normative support only as long as these benefits are generally perceived to outweigh the extent and value of the innocuous activities impeded by it.<sup>61</sup>

The categorical reproduction right is most easily defensible when applied (as it originally was) to physical manufacturing of hard copies, each of which is likely to satisfy demand for the work on the part of multiple persons. In the digital realm the analysis becomes more

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60. See Henry Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719 (2004).

61. For an argument that the traditional bright-line trespass rule should be replaced by a more case-specific test, see Ben Depoorter, *Fair Trespass*, 111 COLUM. L. REV. 1090 (2011).

complex. Some incidental reproduction is essential to certain legitimate uses of the work, such as an ebook purchaser's creation of a copy of the work in the memory of the device used to read it.<sup>62</sup> Digital copies may also be created as a step in valuable activities that do not result in the consumption of the author's expressive content by persons who have not been authorized to do so.<sup>63</sup> Much of this potential overbreadth, however, is restrained by fair use, which exempts from the scope of copyright a number of uses found to serve socially valuable purposes without unduly harming "the potential market for or value of the copyrighted work."<sup>64</sup> The practical implication of fair use is that copyright owners — unlike the state when it enforces land-use regulations — will often have to demonstrate actual harm to the use and enjoyment of the underlying property interest.<sup>65</sup>

### 3. Distribution and Display Rights

As defined in Sections 106(3) and (5) (supplemented by Section 101), the exclusive distribution and display rights look much more like servitudes. Each applies to a set of objects specified *ex ante* by their distinguishing characteristics — that they are copies of a work — and forbids a set of actions defined solely in terms of what is done with those objects themselves: either "to distribute [them] to the public" in specified types of transactions,<sup>66</sup> or to "show" them publicly.<sup>67</sup> To allege a violation of one of these rights, a copyright owner need only identify some object as a copy of her (registered) work and some act of distribution or display.<sup>68</sup> The effect of the distribution and

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62. 17 U.S.C. § 117 (2012) removes this problem for users of computer programs who own legitimate copies of them, but it remains for other works used in digital format.

63. *See, e.g.*, Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 NW. U. L. REV. 1607 (2009).

64. 17 U.S.C. § 107 (2012).

65. The anticircumvention right contained in 17 U.S.C. § 1201 is far more subject to objection on this score. It too is a prophylactic bright-line rule that seeks to protect the copyright owner's interest in controlling access to the work by interdicting actions that are a step or two removed from the actual provision of such access, in this case the circumvention of technical measures that effectively control access to a protected work. *See* 17 U.S.C. § 1201(a)(1)(A) (2012). Like the reproduction right, this provision applies to many actions that would not in themselves harm the copyright owner's interest, but it is not subject to the fair use defense. *See* 17 U.S.C. § 107 (referencing only sections 106 and 106A). Instead, its potential overbreadth is moderated by a form of regulatory oversight in which the Copyright Office triennially considers and approves exemptions sought by affected parties. *See* 17 U.S.C. § 1201(a)(1)(C)–(D). The question whether the anticircumvention right grants copyright owners power that is unjustified by their recognized interest in their works is beyond the scope of this Article. To the extent that one thinks it does, this provision would resemble a servitude as well, at least to the extent that the technical measures in question are incorporated into chattels owned by users.

66. 17 U.S.C. § 106(3).

67. 17 U.S.C. §§ 101, 106(5) (definition of "display").

68. *See* 6 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 19:10 (2016) (discussing pleading standards for infringement).

display rights is thus to treat objects embodying a copyrighted work of authorship as servient tenements subject to an appurtenant negative easement in which the work is the dominant tenement. As with other appurtenant servitudes, the justification for the easement is that there is a relationship between the work and the copies such that certain uses of the latter categorically threaten to impede use and enjoyment of the former. Public distribution and display of copies will nearly always have the direct consequence of providing third parties with access to the expressive content of the work, which goes to the core of the copyright owner's protected interest.<sup>69</sup>

Owners of tangible copies, then, are correct to perceive the copyright owner's exclusive rights to public distribution and display as derogating from the sovereign use-privilege they would otherwise have over those copies. As with all the exclusive rights conferred by Section 106, the potential overbreadth of this burden is largely ameliorated by the fair use doctrine, but here the servitude-like effect of the right is also directly addressed by the first sale doctrine. This doctrine, codified in Section 109, places copies that have been lawfully made and transferred mostly outside the scope of the copyright owner's distribution and display rights.<sup>70</sup> Once the first sale doctrine is applied, the nominally broad distribution right turns out to be little more than a backstop to the reproduction right, one that prevents only distribution of unauthorized copies, or of ones whose creation was authorized but whose first authorized sale has not yet taken place.<sup>71</sup> Owners who purchased lawfully-made copies are allowed to sell or otherwise dispose of them, but in the case of sound recordings and computer programs (which can easily be duplicated by short-term users) are not allowed to rent them out commercially.<sup>72</sup> Similarly, once the first sale doctrine is applied, the display right really only prevents the owner of a lawful copy from transmitting images of it to viewers not "present at the place where the copy is located,"<sup>73</sup> which is essentially a form of transient reproduction.

As a practical matter, then, the only persons who find their desire to publicly distribute their tangible property impeded by the copyright owner's easement are: (1) persons who make their own copies unlaw-

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69. *See supra* note 55.

70. *See* 17 U.S.C. § 109 (2012).

71. *See* 17 U.S.C. § 109(a) ("Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.").

72. *See* 17 U.S.C. § 109(b).

73. *See* 17 U.S.C. § 109(c) ("Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title . . . is entitled, without the authority of the copyright owner, to display that copy publicly . . . to viewers present at the place where the copy is located.").

fully, (2) persons who acquire copies that were unlawfully made by others, (3) persons who make their own copies lawfully but lack authorization to distribute them, and (4) persons who acquire lawfully-made copies whose first sale was never authorized. None of these cases amounts to an expropriation of privileges by unilateral action of the copyright owner. The requirement of actual copying<sup>74</sup> means that it is impossible to create a copyrighted work that converts pre-existing objects into copies subject to the servitude. Only after the copyrighted work has been created is it possible to convert tangible objects into copies by fixing the work in them. Persons in categories (1) and (3) are therefore responsible for deliberately choosing to subject their own tangible property to the easement. One may, on the other hand, possibly find herself in categories (2) or (4) inadvertently, much as one may possibly purchase land without realizing that it is subject to an easement. While this predicament can often be avoided with some diligence, there is nothing like a land registry that would enable a definitive title search.

One instance in which distribution rights *are* newly imposed on preexisting copies, thus effecting an uncompensated taking of vested use-privileges, is when works previously in the public domain are placed under copyright, as was done for certain works by foreign authors under the Section 514 of the Uruguay Round Agreements Act.<sup>75</sup> Arguably something similar occurs when the copyright term is retroactively extended, as it was in the Copyright Term Extension Act of 1998.<sup>76</sup> Here the argument would be that because the appurtenant copyright easement is time-limited (as required by the Constitution) the owner of a copy has a vested future interest in unencumbered use upon expiration, part of which is expropriated by the extension.

Some advocates of “digital first sale” wish to conceive of digital copies as objects of ownership that, if lawfully made and acquired, should be freely alienable as a matter of the first sale doctrine.<sup>77</sup> The merit of such a rule as a matter of policy is beyond the scope of this Article. Any suggestion that a failure to implement this policy conflicts with tangible property rights, however, is flawed. Strictly speaking, a digital file is not itself an independent object of ownership, but an attribute of one — much as one may own a towel, but we would not say he owns the shape into which it is currently folded. One can own a copyright in the intellectual work represented in the file, and one can own the physical chattel in which the file is encoded. Copies

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74. See PATRY, *supra* note 68, at § 9:16.

75. Uruguay Round Agreements Act, Pub. L. No. 103-465, § 514, 108 Stat. 4809, 4976–81 (1994) (codified as amended at 17 U.S.C. §§ 104A, 109).

76. Sonny Bono Copyright Term Extension Act, Act of Oct. 27, 1998, Pub. L. No. 298, 105th Cong., 112 Stat. 2627 (extending 17 U.S.C. § 304(b)).

77. See, e.g., Siy, *supra* note 5.

governed by the Copyright Act are defined as “material objects . . . in which a work is fixed . . . and from which the work can be perceived[.]”<sup>78</sup> For the purposes of copyright law, then, each video file on my computer hard drive is not itself a copy — rather, the hard drive is simultaneously a copy of each of the works encoded in those files. The first sale doctrine applies to my hard drive just as it does to any other copy and permits me to transfer it, along with all the files saved on it. What “digital first sale” advocates want is not the privilege to transfer any material object, but the privilege of facilitating remote acts of unauthorized reproduction. Such a privilege may be desirable, but it presents considerations that differ from those disfavoring servitudes on physical chattels.

#### 4. Moral Rights

Section 106A of the Copyright Act, known as the Visual Artists Rights Act,<sup>79</sup> is another clear instance where copyright law imposes servitudes on identified tangible objects. Here, the servient tenement class consists of limited-edition copies of paintings, drawings, prints, sculptures, or photographs.<sup>80</sup> Persons who acquire ownership of such objects are forbidden to engage in any actions with regard to them that result in “intentional distortion, mutilation, or modification” of the works they embody.<sup>81</sup> If the work is one of “recognized stature,” the servitude also forbids the object’s destruction.<sup>82</sup> The interest that these restrictions serve to protect — and which thus serves as the dominant tenement — is the artist’s “honor or reputation.”<sup>83</sup> While VARA rights are subject to the fair use provisions of Section 107,<sup>84</sup> they are not subject to the first-sale doctrine<sup>85</sup> and thus act as true servitudes that run with the chattels.

### IV. CONCLUSION

Does property law support the claim that owning something means you can “do what you want with it”? Not exactly. But this Article has shown that it mostly does mean that other people may not dictate what you do with it. All they can demand is that, whatever you do, you do not interfere with their ability to use the things they own. Property law also allows people to place their own property into a

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78. 17 U.S.C. § 101 (definition of “copy”).

79. 17 U.S.C. § 106A.

80. 17 U.S.C. § 101 (definition of “work of visual art”).

81. 17 U.S.C. § 106A(a)(3)(A).

82. 17 U.S.C. § 106A(a)(3)(B).

83. *Id.*

84. 17 U.S.C. § 106A(a).

85. *Id.*; 17 U.S.C. § 109.

relationship with that of someone else such that use of the one depends on restricting certain uses of the other. So long as your property is not placed under such a restriction without your voluntarily taking the actions that trigger it, your immunity to discretionary control is not abrogated.

By and large, the interaction of copyright and tangible property follows the same principles. The vision of copyright owners looming over us with strings of arbitrary power attached to our “printing presses, guitars, and throats,”<sup>86</sup> is largely spurious, standing on similar footing as the claim that if I can forbid you to drive on my land, you do not really own your car, or that by telling you not to smash my nose, I enslave your fist. All property rights necessarily function by curtailing the liberty of others, including the liberty to use their own property. There is always room for debate as to whether any given property right is justified, whether its effective scope should be recalibrated, and whether enforcing it is worth the candle. But there is no essential conflict between intellectual property rights and tangible property rights that would require us to put a thumb on one side of that discussion.

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86. BELL, *supra* note 5, at 12.