ACCESSION ON THE FRONTIERS OF PROPERTY

I'm a skilled painter who recently survived a debilitating accident. Now incapacitated, I've become depressed because I'll never paint again. You, a good friend, decide to cheer me up. You buy an expensive set of oils, brushes, and canvas. You plop me in front of the canvas and ask me to instruct your every movement, as though you were an extension of me. Engulfed in artistic fervor, I eagerly dictate every mixture and stroke, into the twilight hours of the night. A masterpiece soon sits on the canvas. However, the problem is that we've both grown fond of it: you, because you labored arduously with materials you purchased; and me, because I feel the work is a product of my artistic genius. Between you and me, who owns the painting?

Consider another way to approach the puzzle. The copyright interest vests in me, the "inventive or master mind" of the painting.[1] The personal property interest vests in you, the owner of the supplies and the physical laborer who gave concrete form to the painting.[2] When these interests merge in an indivisible painting, which interest wins and whose claim triumphs?

Once we understand that this puzzle is about resolving competing claims to an indivisible thing, we see that it generalizes across domains of property. When graffiti artists spray-paint works of recognized stature on the walls of a dilapidated warehouse complex, do the artists' copyright interests trump the warehouse owner's real property interest in the painted walls? When a copyright licensee creates a derivative work that imitates the voice of a celebrity singer, does the licensee's copyright interest trump the singer's right-of-publicity interest in the new song? When a "cybersquatter" registers the domain name of a famous trademark, does the cybersquatter's interest in the purchased address trump the company's trademark interest in the domain name?

As property interests proliferate, this problem of resolving competing claims to indivisible things will rear its head in still more variegated forms. But despite the ubiquity of this problem, property law has yet to advance a principled, generalizable solution. This Note takes up that task. The goal is twofold: first, to show that these disparate conflicts are instantiations of a general puzzle; and second, to offer a solution grounded in the principle of accession, an ancient property doctrine of both civil and common law.

The accession solution is simple: If one party acted in bad faith, the other party becomes the owner of the thing. If neither party acted in

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[1] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 61 (1884).

[2] *Cf.* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 216–17 (Thomas Hollis ed., London, A. Millar et al. 1764) ("Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*.").

bad faith, the party whose interest is more valuable becomes the owner of the thing and compensates the other party for the value of the other party's interest. This Note will show that, despite its simplicity, this framework embeds deep common law principles that can help resolve all sorts of property disputes efficiently and equitably, without resort to multifactor balancing tests.

This Note proceeds in three parts. Part I fleshes out the accession principle. Part II shows the benefits of using the accession principle to resolve different kinds of property disputes. Part III considers and responds to objections to the accession principle. The Note then concludes with remarks on the role of common law on the frontiers of property.

I. THE ACCESSION PRINCIPLE

A. The Ancient History of Accession

At its most general, the principle of accession assigns ownership of thing *A* to the owner of thing *B* by virtue of her ownership of thing *B*.[3] Although a number of doctrines are nested under this broad umbrella,[4] this Note is concerned with a narrower set of accession doctrines.

When two parties contributed inputs that merged into a new product, Roman civil law applied three doctrines to determine ownership of the commingled product. The doctrine of *specificatio* resolved cases where one labored on the materials of another, transforming the materials into a new product — such as where a sculptor carves another's marble into a statue.[5] The doctrine of *accessio* resolved cases where two separable items from different owners were joined together in a new product that became identified with only one of the preexisting items — such as where one's flour is put into another's sacks.[6] Finally, the doctrine of *confusio* resolved cases where different owners provided similar

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[3] *See* Thomas W. Merrill, *Accession and Original Ownership*, 1 J. LEGAL ANALYSIS 459, 460 (2009). There is debate over whether accession is properly understood as a principle of acquisition or a principle that defines the boundaries of an owner's existing rights. *Compare id.* (describing accession as a principle of acquisition), *with* Henry E. Smith, *The Elements of Possession*, *in* LAW AND ECONOMICS OF POSSESSION 65, 66 (Yun-chien Chang ed., 2015) (describing accession as a principle of "[d]efining thinghood"). This Note takes no stance on this debate because the views churn out functionally identical results. *See* Yael R. Lifshitz, *Rethinking Original Ownership*, 66 U. TORONTO L.J. 513, 522 (2016).

[4] For example, under the doctrine of *ratione soli*, a landowner obtains the rights to wild animals on her land by virtue of her ownership of the land. Merrill, *supra* note 3, at 470; *see, e.g.*, Pierson v. Post, 3 Cai. 175, 178 (N.Y. Sup. Ct. 1805) (distinguishing the case from English cases decided under *ratione soli*). And under the doctrine of increase, the owner of a domestic animal obtains the rights to the animal's offspring by virtue of her ownership of the animal. Merrill, *supra* note 3, at 464; *see, e.g.*, Carruth v. Easterling, 150 So. 2d 852, 855 (Miss. 1963).

[5] Merrill, *supra* note 3, at 466; *see* Earl C. Arnold, *The Law of Accession of Personal Property*, 22 COLUM. L. REV. 103, 103 (1922).

[6] Merrill, *supra* note 3, at 466; *see* Arnold, *supra* note 5, at 103.

inputs that became merged into an indivisible whole — such as where two farmers' grain is combined in a single container.[7]

Early English commentators confusingly grouped *specificatio* and *accessio* together under the doctrine of "accession" and elaborated on the Roman rules. Ordinarily, per Blackstone, when one improves the materials of another, the owner of the original materials also owns the new product.[8] However, when the improver changes the materials into "a different species," the improver becomes the owner of the new product and compensates the original owner for the value of the materials.[9]

B. Accession in America: From Transformation to Disparity of Value

American commentators followed in the Blackstonian tradition and grouped the doctrines of *specificatio* and *accessio* together under the principle of accession.[10] However, American courts modified the English doctrine in two important ways.

First, under the American rule, only innocent improvers can take title to the new product. Thus, if an improver, acting in bad faith, trespasses onto the land of another and converts the landowner's grapes into wine, the owner of the grapes retains ownership of the wine.[11] Moreover, under the majority rule, the grape owner doesn't have to compensate the bad faith improver for the improver's labor.[12]

Second, the transformation rule, under which an improver may take title only by changing the materials into "a different species," gave way to the disparity-of-value rule, under which an improver may take title by substantially improving the value of the materials.[13] The rationale was that the transformation rule was not only "exceedingly difficult to apply," but also prone to producing "arbitrary and unjust" results.[14]

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[7] Merrill, *supra* note 3, at 466; *see* Arnold, *supra* note 5, at 103.

[8] 2 WILLIAM BLACKSTONE, COMMENTARIES *404.

[9] *Id.*

[10] *See, e.g.*, RAY ANDREWS BROWN, A TREATISE ON THE LAW OF PERSONAL PROPERTY § 23 (1936).

[11] *See* Union Naval Stores Co. v. United States, 240 U.S. 284, 291 (1916) ("One who knowingly takes the property of another cannot, by changing its form or increasing its value, or by commingling it with other property of his own, acquire title by accession."); Lampton's Ex'rs v. Preston's Ex'rs, 24 Ky. (1 J.J. Marsh.) 454, 459 (1829) ("[N]o trespasser, who takes property of another wantonly and without the owner's consent, can ever acquire a right to it, by any 'accession' or 'specification,' whatsoever.").

[12] *See* BROWN, *supra* note 10, § 27 ("Where, however, the defendant has proceeded wantonly and willfully knowing of his wrong the majority of the courts, intrigued by a desire to punish the offender, and by the penalty imposed to warn others against like offenses, exact from the defendant the value of the chattel as increased by his labor.").

[13] *See id.* § 24. Following Professor Ray Andrews Brown, this Note is primarily concerned with American courts' preferred disparity-of-value rule.

[14] *Id.* The contours of the disparity-of-value rule existed in the laws of the Roman Emperor Justinian, which were codified in the sixth century. For example, under Justinian law, one who wrote on another's blank parchment could be compensated for the labor of writing but could not

The leading case *Wetherbee v. Green*[15] is illustrative of the American accession principle. There, the defendant, mistakenly believing he had a valid license, chopped twenty-five dollars' worth of lumber from the plaintiff's land and fashioned barrel hoops worth almost seven hundred dollars from the lumber.[16] The plaintiff sued under replevin to recover the hoops.[17] The court noted that the defendant "had a right to show that he had manufactured the hoops in good faith" and was therefore eligible to acquire the hoops by accession "if he should succeed in making that showing."[18] Moreover, the court, noting the "difficult[y], if not impossibil[ity]," of determining whether the hoops were a different species from the lumber,[19] opted for the disparity-of-value rule.[20] Thus, because the value of the hoops created by the defendant's labor surpassed the value of the plaintiff's lumber, the defendant could take title to the hoops — provided he made a showing of good faith — but had to compensate the plaintiff for the converted lumber.[21]

The *Wetherbee* court's two-step approach to accession provides the framework to resolve the problems introduced above. In step one, the court assesses whether the improver acted in bad faith. If so, the owner of the original materials owns the improved product and does not have to compensate the improver. If not, the court moves on to step two and assesses the comparative value of the parties' competing interests in the product. Ownership of the new product is awarded to the party with the more valuable interest, who must compensate the other party for the value of the other party's interest. Henceforth, this Note will use "the accession principle" to refer to the *Wetherbee* framework.

C. General Properties of Accession

Applying the accession principle to the painting dispute, we see that I would own the painting. In step one, we see that neither party acted in bad faith. In step two, we see that the value of my intellectual labor in conceiving the masterpiece exceeds the value of your physical labor

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take title to the written parchment. J. INST. 2.1.33 (George Harris trans., 1761). On the other hand, one who painted on another's blank tablet could take title to the painting after compensating the tablet's owner, on the theory that it was "ridiculous" for a "painting of an *Apelles*, or a *Parrhasius*," to "yield, as an accession, to a *worthless* tablet." *Id.* § 34 (third emphasis added). One way to reconcile the discrepancy between the written parchment and painted tablet is that, as the Institutes intimates, whatever was written on the parchment was not considered to be substantially more valuable than the parchment, whereas the value of the painting was considered to dwarf the value of the "worthless" tablet.

15 22 Mich. 311 (1871).

16 *Id.* at 312–13.

17 *Id.* at 311.

18 *Id.* at 321.

19 *Id.* at 318.

20 *See id.* at 319–20.

21 *See id.* at 321.

and materials, so long as the court concludes that any able-bodied person could have stood in your place. Thus, I would take title to the painting and compensate you for your supplies and labor.

More importantly, our painting dispute accentuates a number of general properties of accession worth further discussion.

1. Equity. — The bad faith rule performs an equitable function by reducing the risk of opportunism.[22] Here, if I insisted on instructing your brushstrokes because I couldn't afford the expensive supplies and saw your gullibility as a way to create a masterpiece to enrich myself, the accession principle would confer ownership of the painting onto you.

2. Desert. — The disparity-of-value rule awards ownership to the party that contributes the most value to the final product, which roughly tracks intuitions of desert. Intuitively, I am more responsible for the painting than you, and the accession principle therefore awards the painting to me. If I dictate a Nobel prize–winning work of literature for you to transcribe in your notebook, I am clearly more responsible for the work than you are, and the disparity-of-value rule would clearly award the writing to me. If I choreograph a difficult dance routine for you to perform, intuitions regarding who's more responsible for the performance become muddier, and the disparity-of-value analysis likewise becomes more fact-intensive. In this way, the accession analysis tracks our intuitions of responsibility.

3. Restitution. — The compensation rule requires that the one who takes title compensate the other for the value of the other's contribution, implementing a restitutionary principle.[23] Here, although I own the painting, I'm not unjustly enriched by your supplies and labor because I paid you the fair market value of your contribution.

4. Divided entitlement. — The combination of the disparity-of-value rule and the compensation rule converts the lesser party's interest from a property interest into a liability interest.[24] Here, by effectively giving me an option on your paints, canvas, and labor, the accession principle reduces the risk that negotiations will break down.[25] Although

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[22] *See infra* p. 2394.

[23] *See* Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1766 (2007) (citing Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149 (1992)).

[24] *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) (distinguishing between property rules, which protect entitlements by injunctive relief, and liability rules, which protect entitlements by monetary damages).

[25] *See infra* pp. 2391–92. In a perfect Coasean world, the case for a liability rule over a property rule is weaker. *See* Richard A. Epstein, *A Clear View of* The Cathedral*: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2092 (1997) ("In a world in which transaction costs were zero . . . the choice between liability rules and property rules would be of little or no importance . . . .").

Professor Carol Rose has argued that the legal system generally protects entitlements with clear property rules to incentivize investment and allow bargaining parties to find each other,[26] liability rules are particularly apt in accession cases. As the painting dispute illustrates, these cases often involve parties who failed to bargain beforehand, creating an accident-like scenario where a court must apportion entitlements ex post. Liability rules promote better resolutions of such cases.[27]

It's worth pointing out that the accession principle discussed here isn't quite the accession doctrine of old. First, accession classically concerns cases where one party supplies labor and another supplies the materials (originally *specificatio*), or cases where both parties supply the materials (originally *accessio*). But when we created the painting, you and I both supplied labor (though different in kind), and you also supplied materials. Neither *specificatio* nor *accessio* quite covers these mixed labor and materials cases.

Second, accession usually involves cases where one party improves the materials of another. But when a cybersquatter registers the domain name of a famous trademark, it's not clear which party is the improver and which party owns the "original materials." The improver/original owner distinction doesn't quite map onto the statuses of the cybersquatter and the company.

Third, accession awards ownership of a new product to a party. But when a celebrity singer sues to stop a copyright holder from using her voice in an advertisement, she doesn't seek ownership of the advertisement. Many of these new disputes revolve around entitlements less than full ownership.

Despite these gaps, this Note will show that the logic of accession nevertheless applies to these conflicts on the frontiers of property. Black letter accession doctrine notwithstanding, the accession principle possesses general properties, described above, that can be conscripted to resolve these new property conflicts efficiently and equitably. That is, this Note hopes to separate black letter accession doctrine from the principles embodied in it. Ultimately, the accession principle isn't about

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However, in the accession context, where parties fight over a fused piece of property ex post, transaction costs are likely high, making liability rules preferable to property rules. *See* Calabresi & Melamed, *supra* note 24, at 1106–07, 1119.

[26] Carol M. Rose, *The Shadow of* The Cathedral, 106 YALE L.J. 2175, 2186–87 (1997).

[27] *See id.* at 2181–82 (discussing the aptness of liability rules in allocating the costs of accidents). Moreover, in Rose's terminology, the "Type I Transaction Costs," or the costs of "find[ing] and assembl[ing] numerous or indistinctly defined interested parties," are irrelevant in accession cases, as the parties have already found each other and mixed their inputs. *See id.* at 2184. By contrast, the "Type II Transaction Costs," or the costs of information asymmetries and holdups, predominate because neither party in an accession case wants to reveal advantageous private information. *See id.* Liability rules mitigate such Type II costs. *See id.* at 2184–85; *see also* Epstein, *supra* note 25, at 2106–07 (discussing the "necessity" of liability rules in the accession context).

dealing with improvers and original owners specifically. Rather, it represents a common law scheme of resolving competing claims, grounded in competing property interests, to an indivisible entitlement.

II. ACCESSION AS THE ARBITER OF COMPETING CLAIMS

Scholars have already proposed applying accession to inevitable misappropriation cases,[28] fair use cases,[29] and patent infringement cases.[30] This Note supplements these proposals by showing that the accession principle can handle disputes involving different kinds of property interests, including conflicts between moral rights and real property, copyright and the right of publicity, and even trademark and domain names. Crucial to this task is the insight that these disputes are instantiations of the problem of resolving competing claims to indivisible entitlements.[31] Along the way, the Note will also show that accession can resolve these cases more efficiently and equitably than the courts' current doctrines do.

A. Moral Rights and Real Property

Public art implicates a number of competing interests. A property owner's real property interest traditionally grants him dominion over the use and modification of his property. But an artist's copyright interest also grants her dominion over the use and modification of any physical embodiments of her artwork. Thus, when artwork is placed on the real property of another, and the real property owner and artist have diverging plans for the work, these two interests collide.

In *Cohen v. G&M Realty L.P.*,[32] the owner of a dilapidated warehouse complex entered into an informal agreement with a group of

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[28] Jay L. Koh, *From Hoops to Hard Drives: An Accession Law Approach to the Inevitable Misappropriation of Trade Secrets*, 48 AM. U. L. REV. 271, 274–75 (1998) (arguing that when an employee with knowledge of her employer's trade secrets seeks new employment, courts should look to accession to balance the competing interests of the employee and employer in determining whether to enjoin the employee from the new employment).

[29] Christopher M. Newman, *Transformation in Property and Copyright*, 56 VILL. L. REV. 251, 280–83 (2011) (arguing that accession can help courts distinguish between infringing derivative works and noninfringing transformative fair use).

[30] Peter Lee, *The Accession Insight and Patent Infringement Remedies*, 110 MICH. L. REV. 175, 178–79 (2011) (arguing that when an infringer substantially improves another's patented technology, courts should assess the relative values of the improvement and the original patent in determining whether to grant injunctive relief).

[31] For instance, in patent infringement cases, the improver has a claim to the new invention based on her intellectual labor, and the original patentee has a claim to the new invention based on the original patent. *See id.* at 179–80. These patent infringement cases can thus be understood as another instance where two parties have competing claims, grounded in competing interests, to some indivisible entitlement.

[32] 320 F. Supp. 3d 421 (E.D.N.Y. 2018).

graffiti artists, allowing the artists to spray-paint the walls of the warehouse.[33] The artists carefully curated the art on the walls by implementing a rotating system to determine which pieces would be replaced and when.[34] Eventually, the neighborhood crime rate dropped, and the warehouse "became a major attraction."[35] The owner then sought to convert the warehouse into an apartment complex, which would require whitewashing the spray-painted walls.[36] The artists sued to enjoin the whitewashing, arguing that their works were of "recognized stature" such that destroying them would violate the artists' moral rights under the Visual Artists Rights Act[37] (VARA).[38]

The court denied the artists' preliminary injunction motion.[39] Although some of the works were entitled to VARA's protection, the court reasoned that an injunction would stall development on a complex that would include at least seventy-five affordable housing units, that the artists were always on notice that their works would be temporary, that the works could live on in digital media, and that damages could adequately compensate the artists.[40] Indeed, after the property owner whitewashed the walls, the court awarded the maximum statutory damages to the artists, totaling $6.75 million.[41]

Scholars have criticized the court's convoluted reasoning in denying the artists' motion for a preliminary injunction.[42] The accession principle offers a more straightforward justification of the court's decision. *Cohen* involved a clear instance of the general puzzle described above. VARA conferred a copyright interest to the artists in the painted walls. At the same time, the owner retained a real property interest in the same walls.[43] Thus, the court was tasked with allocating an indivisible entitlement, the painted walls,[44] to one of the parties with competing claims to it.

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[33] *Id.* at 432–33.

[34] *Id.* at 433–34.

[35] *Id.* at 433.

[36] *Id.* at 434.

[37] 17 U.S.C. § 106A (2018).

[38] Cohen v. G&M Realty L.P., 988 F. Supp. 2d 212, 215 (E.D.N.Y. 2013).

[39] *Id.* at 226–27.

[40] *Id.*

[41] *Cohen*, 320 F. Supp. 3d at 447. The Second Circuit affirmed this award of statutory damages. Castillo v. G&M Realty L.P., 950 F.3d 155, 171 (2d Cir. 2020).

[42] *See, e.g.*, Richard Chused, *Moral Rights: The Anti-rebellion Graffiti Heritage of 5Pointz*, 41 COLUM. J.L. & ARTS 583, 596–97 (2018) (taking issue with the court's consideration of the adequacy of damages and the temporary nature of the artwork).

[43] *Cf.* Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 142–43 (1st Cir. 2006) (recognizing that Massachusetts's moral rights statute can conflict with a private property owner's real property interests).

[44] To be clear, the dispute revolved around the privilege of whitewashing the walls. However, that privilege is incident to ownership of the painted walls, so resolving who owned the painted walls also resolved who held the privilege of whitewashing them.

Because neither the owner nor the artists acted in bad faith, the accession principle looks to the relative values of the real property interest and the copyright interest to determine which one trumps the other. Here, the value of the development exceeded $200 million.[45] By contrast, the artists' expert estimated that the works were worth $50,000 to $80,000 each.[46] Even the value of the maximum statutory damages, totaling $6.75 million at $150,000 per work, paled in comparison to the value of the development. Thus, the property owner would acquire the artwork on the walls by accession and compensate the artists for the value of the art.[47]

Although this result tracks the court's disposition, the accession principle offers a simpler justification than the court's multifactor balancing inquiry. Moreover, by comparing relative values, the accession principle awards the entitlement to the owner who can best make use of it,[48] which in turn helps maximize social value. Here, if the court's multifactor balancing inquiry had enjoined the development, not only would the owner have lost hundreds of millions of dollars, but the city would also have lost out on at least seventy-five affordable housing units.[49] And because the artists didn't have the funds to compensate the owner for the value of the stalled development,[50] the artists would have unjustly obtained a windfall if the court had awarded the entitlement to them.[51] The accession principle ensures this doesn't happen.

B. Copyright and the Right of Publicity

In addition to potential conflicts with real property interests, copyright may also conflict with right-of-publicity interests, especially as courts expand the right of publicity beyond merchandising and commercials.[52] Because copyright is a creature of federal law and the right of publicity is a creature of state law, courts apply a muddled test to determine whether copyright law preempts the right of publicity when the two conflict.[53] A pair of Ninth Circuit cases are illustrative.

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[45] *See Cohen*, 320 F. Supp. 3d at 434.

[46] *See id.* at 442. The court didn't credit the testimony of the artists' expert and thus declined to award any actual damages. *Id.*

[47] The artists may also have had an unjust enrichment claim against the owner for their contributions to the property's appreciated value. The court considered this factor to cut in favor of awarding the maximum statutory damages. *Id.* at 446.

[48] *See* Merrill, *supra* note 3, at 495–96.

[49] Cohen v. G&M Realty L.P., 988 F. Supp. 2d 212, 227 (E.D.N.Y. 2013).

[50] *Cohen*, 320 F. Supp. 3d at 434.

[51] This injustice is exacerbated by the idea that the artists, who knew their works would be temporary, in some sense "came to the nuisance." *Cf.* Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700, 706–07 (Ariz. 1972) (en banc).

[52] *See* Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199, 206 (2002).

[53] *See id.* at 207–08.

First, in *Midler v. Ford Motor Co.*,[54] Ford obtained a license from the copyright holder to use a sample of famous singer Bette Midler's "Do You Want to Dance" in a commercial.[55] However, instead of using the original recording, Ford sought to have Midler herself sing the commercial.[56] When Midler refused, Ford hired another singer to imitate her.[57] Midler sued to enjoin the use of her voice in the commercial, and the Ninth Circuit held that she stated a sufficient claim under California's right-of-publicity statute to proceed to trial.[58]

Second, in *Laws v. Sony Music Entertainment*,[59] Sony obtained a license from the copyright holder to use a sample of famous singer Debra Laws's "Very Special" in another song and its music video.[60] Laws sued to enjoin the use of her voice in the other song under California's right-of-publicity statute.[61] The Ninth Circuit affirmed the district court's summary judgment denying Laws's injunction.[62] The panel held that Laws's right-of-publicity claim was preempted by copyright law because copyright law covered the sample licensed to Sony and because Laws's asserted right of publicity was equivalent to the rights protected under the Copyright Act.[63] The panel took great pains to distinguish *Midler*, which came out differently because Ford misappropriated Midler's voice by hiring an imitator; here, Sony did not misappropriate Laws's voice because it used the original sample.[64]

Scholars have criticized courts' use of such preemption tests.[65] The accession principle offers a simpler way to resolve conflicts between copyright and the right of publicity. In *Midler*, Ford had a copyright interest in the commercial by virtue of its license and the resources it expended to create the new sample. Midler had a right-of-publicity interest in the commercial by virtue of the commercial's imitation of her distinctive voice. Because neither party acted in bad faith, the accession principle looks to the relative values of the parties' interests in the commercial. Although the court didn't make explicit findings on relative value, the facts suggest that the value of Midler's voice and identity predominated. Ford sought to "make an emotional connection with Yuppies, bringing back memories of when they were in college," and

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54 849 F.2d 460 (9th Cir. 1988).
55 *Id.* at 461–62.
56 *Id.* at 461.
57 *Id.*
58 *See id.* at 463–64.
59 448 F.3d 1134 (9th Cir. 2006).
60 *Id.* at 1136.
61 *Id.*
62 *Id.* at 1146.
63 *Id.* at 1143–45.
64 *Id.* at 1140–41.
65 *See, e.g.*, Rothman, *supra* note 52, at 208–09.

took great pains to have Midler herself, or someone who could imitate her convincingly, record the commercial.[66] Thus, a court deciding *Midler* under the accession principle would award the injunction to Midler, subject to her compensating Ford for the cost of obtaining the license and recording the commercial.

By contrast, in *Laws*, the sample of Laws's voice constituted a small, ten-second portion of a song and music video featuring Jennifer Lopez.[67] The facts therefore suggest that the value of Sony's contribution to the song outweighed the value of Laws's contribution. Moreover, Laws was already compensated for the use of her voice in her original recording contract and agreed to let the copyright holder license the recording.[68] Thus, a court applying the accession principle would award the entitlement to Sony.

Resolving these cases under the accession principle confers a number of benefits. First, the accession principle promotes negotiation. In *Midler*, Ford circumvented negotiations with Midler, despite the fact that her voice and identity comprised most of the value of its commercial. The accession principle's bad faith and disparity-of-value rules discourage such circumvention and force Ford to obtain a license from Midler.[69] Similarly, if Midler's subjective value in blocking the commercial is less than the cost of Ford's expenditures in producing it, then by forcing Midler to pay Ford, the accession principle's compensation rule incentivizes her to negotiate with Ford to buy out her injunction.[70]

Second, the accession principle reduces the risk of holdout. If Midler's voice had been only one of many in a nostalgic mashup, then Ford's copyright interest in the commercial would likely outweigh her right-of-publicity interest. The accession principle would therefore deny Midler's injunction and have Ford compensate her for the use of her voice and

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66 Midler v. Ford Motor Co., 849 F.2d 460, 461 (9th Cir. 1988).

67 *Laws*, 448 F.3d at 1136.

68 *Id.*

69 There is some intimation of bad faith on Ford's part, though the court made no such finding. Ultimately, it's unclear that Ford's behavior rose to the level of knowing or reckless disregard for Midler's right of publicity, as Ford could have reasonably believed its license conferred the privilege of imitating Midler's voice as well. *Cf.* Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711, 717–18 (9th Cir. 1970) (affirming summary judgment in a similar case in favor of defendants who "paid a very substantial sum to the copyright proprietor to obtain the license for the use of the song and all of its arrangements," *id.* at 717). Thus, this case is better resolved under the disparity-of-value analysis.

70 *See* Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1036–72 (1995) (discussing how liability rules may serve as information-forcing mechanisms and encourage more negotiation than property rules). The benefits of liability rules are especially pronounced in two-party contract-adjacent dealings where the parties "know what they are doing" and "are stuck with each other." Rose, *supra* note 26, at 2187.

identity.[71] In this way, the accession principle prevents a single artist from holding out and blocking the entire commercial.[72]

Third, the accession principle provides flexibility to alleviate some of the injustice that inevitably follows from a rigid preemption regime. If the court had decided that Laws's claim was not preempted, then all subsequent samplers might have been subject to right-of-publicity liability. On the other hand, it seems similarly unjust to hold that a singer's right-of-publicity claim is always preempted when a recording studio licenses a recording of the singer. For instance, if a butcher shop obtained a license for its commercial to use the voice of Sarah McLachlan, a singer and prominent animal rights activist,[73] McLachlan might justifiably object to the association. By eschewing the rigid preemption framework, the accession principle better handles such cases.[74]

That's not to say that the accession principle will always churn out intuitively just results. The butcher shop's copyright interest might in fact outweigh McLachlan's right-of-publicity interest in the commercial. If so, the accession principle would allow the butcher shop to air the commercial. Although this may seem like an affront to McLachlan's public persona, contract and tort law can alleviate some of the injustice. Ex ante, McLachlan might bargain with the recording studio for restrictions on licenses to butcher shops. Ex post, McLachlan may have a false light claim against the butcher shop.[75] What's important is that the accession principle provides some flexibility for McLachlan to enjoin the commercial in cases where the value of her right of publicity predominates, in contrast to the preemption analysis in *Laws*, which summarily dismisses right-of-publicity claims.

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[71] *Cf.* Lee, *supra* note 30, at 202–03 (proposing the same analysis to determine whether an injunction or damages should remedy patent infringement when an infringer improves on an existing patent).

[72] *See* Calabresi & Melamed, *supra* note 24, at 1107, 1119 (describing how liability rules alleviate the holdout problem); Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 793–94 (2007) (noting that the holdout problem is especially acute in the intellectual property realm, where rights aren't clearly delineated and the risk of error in granting injunctions is pronounced).

[73] *See, e.g.*, *Sarah McLachlan Animal Cruelty Video*, YOUTUBE (Oct. 3, 2006), https://www.youtube.com/watch?v=9gspElv1yvc [https://perma.cc/M5NA-Z47T].

[74] The *Laws* court identified other rights, such as privacy, and causes of action, such as defamation and common law fraud, that could justify a suit in this extreme case, *see* Laws v. Sony Music Entm't, Inc., 448 F.3d 1134, 1145 (9th Cir. 2006), but the accession principle simplifies the issue.

[75] *See* RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977) (stating that a person is liable for invasion of privacy if, in giving publicity to another, the person "places the other before the public in a false light").

C. Domain Names and Trademark

Although the preceding sections focus on traditional domains of property and intellectual property, the accession principle can help resolve cases involving new forms of property as well. At the dawn of the internet age, "cybersquatters" raced to register domain names that matched famous trademarks, in the hopes of turning a profit by selling the domain names to the owners of the marks at exorbitant prices.[76]

In *TCPIP Holding Co. v. Haar Communications Inc.*,[77] a cybersquatter registered at least sixty-seven domain names containing some variation of the words "children" and "place" and offered to sell packages of domain names to The Children's Place, a children's clothing chain, for as much as $697,000.[78] The company offered to buy "thechildrensplace.com" alone for $30,000, but the cybersquatter insisted on selling a package of at least sixteen names for $480,000.[79] After negotiations broke down, the company sued to enjoin the cybersquatter's use of the company's mark.[80] The Second Circuit affirmed the preliminary injunction in the company's favor with respect to some of the domain names.[81] The panel reasoned that some of the names were similar enough to create "a genuine likelihood of confusion,"[82] after extended analysis of the strength of the company's mark, the similarity of the names to the mark, the proximity of the products, the likelihood of bridging the gap, the sophistication of the consumers, the quality of the cybersquatter's product, evidence of actual confusion, and evidence of bad faith.[83]

The accession principle offers an alternative to the court's multifactor Lanham Act analysis. The cybersquatter has an interest in the domain name by virtue of his payment of the registration fee.[84] The

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[76] For an early survey of cybersquatting and federal efforts to combat it, see Jonathan H. Gatsik, Note, *Cybersquatting: Identity Theft in Disguise*, 35 SUFFOLK U. L. REV. 277, 287–97 (2001).

[77] 244 F.3d 88 (2d Cir. 2001).

[78] *Id.* at 91.

[79] *Id.*

[80] *Id.* at 91–92.

[81] *Id.* at 104.

[82] *Id.*

[83] *Id.* at 100–03.

[84] There's some debate over whether a party's interest in a domain name is a property interest or a mere contractual interest. Alexis Freeman, LL.M. Thesis, *Internet Domain Name Security Interests: Why Debtors Can Grant Them and Lenders Can Take Them in This New Type of Hybrid Property*, 10 AM. BANKR. INST. L. REV. 853, 857 (2002). This debate is beyond the scope of this Note, but an interest in a domain name is sufficiently property-like for the purposes of this discussion. *See, e.g.*, Caesars World, Inc. v. Caesars-Palace.com, 112 F. Supp. 2d 502, 504 (E.D. Va. 2000) (holding that a domain name can serve as res for in rem jurisdiction); Online Partners.com Inc. v. Atlanticnet Media Corp., No. Civ.A.C98-4146SIENE, 2000 WL 101242, at *9 (N.D. Cal. Jan. 20, 2000) (holding that domain names are intellectual property and can be attached); Freeman, *supra*, at 865–66 (concluding that a domain name is intangible property).

company has a trademark interest in the same domain name by virtue of the company's goodwill and the likelihood that replication of the domain name will confuse consumers. When these interests collide, the accession principle can provide a framework for determining who owns the indivisible domain name.

Here, because the court found that the cybersquatter acted in bad faith,[85] this case can be resolved at step one of the *Wetherbee* framework. The domain name should be awarded to the company, and the company should not have to compensate the cybersquatter. This result tracks not only the court's decision, but also the provisions of the Anticybersquatting Consumer Protection Act[86] (ACPA), which was enacted to supplement courts' holdings in *TCPIP* and related cybersquatting cases.[87]

The accession principle's bad faith analysis serves an important equitable function by reducing the risk of opportunism.[88] Here, it straightforwardly punishes the cybersquatter for his exorbitant, half-million dollar demands during negotiations. Such monopolistic behavior substantially increases the transaction costs of allocating the domain names to the owners who can best use them.[89] The accession principle's bad faith prong mitigates these transaction costs, thereby ensuring that initial allocations don't ossify and that domain names are distributed to companies who can put them to productive use.

The accession principle can handle non–bad faith domain name disputes as well, though the analysis becomes more nuanced. In *Nissan Motor Co. v. Nissan Computer Corp.*,[90] Uzi Nissan, owner of a computer store called Nissan Computer, registered "nissan.com."[91] Nissan Motor sought to purchase the domain name from Nissan Computer, but negotiations stalled, prompting Nissan Motor to sue for trademark infringement, among other claims.[92] The Ninth Circuit upheld the district court's injunction forbidding Nissan Computer from listing automobile

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[85] *TCPIP*, 244 F.3d at 103.

[86] 15 U.S.C. § 1125(d) (2018) (rendering a cybersquatter with a "bad faith intent to profit from [a] mark" liable to the owner of the mark and providing that a cybersquatter can be forced to transfer the domain name to the owner of the mark).

[87] *See* S. REP. NO. 106-140, at 7 (1999) (noting that the ACPA was enacted in response to the inadequacies of then-existing case law); Colby B. Springer, Comment, *Master of the Domain (Name): A History of Domain Name Litigation and the Emergence of the Anticybersquatting Consumer Protection Act and Uniform Dispute Resolution Policy*, 17 SANTA CLARA COMPUTER & HIGH TECH. L.J. 315, 328–29, 341–43 (2001) (describing pre–ACPA cases similar to *TCPIP*).

[88] *See* Henry E. Smith, *Fusing the Equitable Function in Private Law*, *in* PRIVATE LAW IN THE 21ST CENTURY 173, 175–76, 181 (Kit Barker et al. eds., 2017) (describing equity as a second-order safety valve that corrects for opportunistic exploitation of first-order rules).

[89] *See* Clarisa Long, *Proprietary Rights and Why Initial Allocations Matter*, 49 EMORY L.J. 823, 823 (2000) (explaining that initial allocations of entitlements matter when transaction costs are high).

[90] 378 F.3d 1002 (9th Cir. 2004).

[91] *Id.* at 1006.

[92] *Id.* at 1008.

advertisements on its website but otherwise allowed Nissan Computer to keep the domain name.[93]

In contrast to the Ninth Circuit's disposition, because neither party acted in bad faith here,[94] the accession principle would award nissan.com to Nissan Motor, whose trademark interest is likely more valuable than Nissan Computer's interest in the domain name. This result may initially seem unjust. After all, media outlets portrayed the dispute as a David-and-Goliath battle between a small computer store and an automobile giant.[95] However, such superficial narratives overlook the costs of siding with Nissan Computer. As the Ninth Circuit noted, "[a]n internet user interested in purchasing, or gaining information about, Nissan automobiles would be likely to enter nissan.com."[96] When these users land on nissan.com, they may be initially confused and, even if they realize that nissan.com isn't the correct website, must expend extra effort finding Nissan Motor's site. The accession principle, by granting the domain name to Nissan Motor, eliminates these unnecessary search costs.

A moment's reflection also suggests that granting the domain name to Nissan Computer because it was the first to register isn't necessarily more just. When considering public search costs and potential consumer confusion, it becomes clear that Nissan Computer isn't the best owner of the domain name. Indeed, nissan.com has fallen into disuse today, sporting a hideously nineties aesthetic and spotlighting the company's legal battle with Nissan Motor rather than computer services.[97] And there's no reason to think that the first to register a name has a greater moral claim to it than others. Names, unlike minerals or trees, exist to serve public functions, primarily by facilitating communication and identification. Thus, in awarding the domain name to the more famous company, the accession principle arguably reaches a more just result by furthering the public's interest in communicative efficiency and reducing potential consumer confusion.[98]

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[93] *Id.* at 1019–20. Crucial to this holding was the finding that Nissan Computer's use of nissan.com to sell non-automobile-related goods was not infringing because "Nissan is a last name, a month in the Hebrew and Arabic calendars, [and] a name used by many companies." *Id.* at 1019.

[94] *See* Opposition to Petition for a Writ of Certiorari at 8, Nissan Motor Co. v. Nissan Comput. Corp., 544 U.S. 974 (2005) (No. 04-869), 2005 WL 547813 (noting that the district court granted summary judgment to Nissan Computer on the grounds that there was no bad faith).

[95] *See, e.g.*, Justin T. Westbrook, *Uzi Nissan Spent 8 Years Fighting the Car Company with His Name. He Nearly Lost Everything to Win*, JALOPNIK (Feb. 22, 2018, 12:40 PM), https://jalopnik.com/uzi-nissan-spent-8-years-fighting-the-car-company-with-1822815832 [https://perma.cc/EEM9-RG3C].

[96] *Nissan*, 378 F.3d at 1019.

[97] *See* NISSAN.COM, http://www.nissan.com [https://perma.cc/N9FR-VMGX].

[98] Similar considerations appear in the Internet Corporation for Assigned Names and Numbers (ICANN) procedures for allocating new generic top-level domain names. When ICANN expanded top-level domain names beyond .com and .net (to include, for example, .news), it gave trademark holders a sunrise period to purchase domain names corresponding to their marks before the general

The nissan.com dispute is a hard case, and reasonable minds can differ on what constitutes a just outcome. But, regardless of how we come out on the particular dispute, it's also worth stepping back to appreciate that these domain name cases illustrate the versatility of the accession principle. Because these disputes and traditional property disputes share the same general form, using the accession principle allows courts to achieve efficient and equitable results, even in the absence of statutory schemes. This insight will be especially important as new property interests develop. For example, some scholars have advocated giving consumers a property interest in their personal data.[99] However, between me and Facebook, who owns the data collected by Facebook's proprietary algorithms and stored on Facebook's servers but generated by my activity on the platform?[100] Understanding this puzzle as another case of the same general problem, we can turn to the time-tested accession framework to tackle these hard questions of the digital age.

III. OBJECTIONS TO ACCESSION

The preceding Part shows how accession can help allocate entitlements to fit owners, promote negotiation, reduce holdout, and punish opportunism. This Part considers the costs of using the accession principle and responds to potential objections.

At the outset, critics may be concerned with the administrability of the accession principle, given its bad faith and market value inquiries. However, investigations of mental states are commonplace,[101] and, so long as it's uncontroversial which party's interest is more valuable, the market value analysis need only assess the value of the lesser interest.[102]

Other critics may object that other common law solutions work better, that accession's bad faith prong disincentivizes searching, and that accession's focus on market value ignores significant interests such as personhood and autonomy. This Part will address each concern in turn.

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public. *See Rights Protection Mechanisms for New Top-Level Domains (TLDs)*, WORLD INTELL. PROP. ORG., https://www.wipo.int/amc/en/domains/rpm [https://perma.cc/JB9C-L457].

[99] *See, e.g.*, Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055, 2058 (2004).

[100] *Cf.* Sylvia Zhang, Note, *Who Owns the Data Generated by Your Smart Car?*, 32 HARV. J.L. & TECH. 299, 305–19 (2018) (analyzing how different legal regimes would affect the "ownership" of smart car data).

[101] *See, e.g.*, Thomson v. Larson, 147 F.3d 195, 201–02 (2d Cir. 1998) (looking to whether two authors subjectively intended to be joint authors); RESTATEMENT (SECOND) OF TORTS § 822 (AM. LAW INST. 1979) (distinguishing between intentional and unintentional nuisances).

[102] Smith, *supra* note 23, at 1770 (noting how accession "allow[s] the court to concentrate on valuing the lesser contribution, which perhaps is thought to be the one that can be valued more easily and at lower error cost").

A. Alternatives to Accession

While accession represents an attractive approach to resolving these conflicts, it's not the only one, and critics might object that other, more prevalent common law rules do the job better.

1. First Possession. — Patent law awards the patent to the first to file.[103] A first possession regime might also resolve competing claims by awarding the entitlement to the first party to acquire it.

However, first possession is an unattractive solution for these new property conflicts for a number of reasons. For one, first possession encourages wasteful racing.[104] Accession, by contrast, doesn't award ownership to the winner of a race, eliminating such "rent-dissipating" externalities.[105] Second, "entities who win the race . . . are not necessarily the final, or best, or most efficient" users of the entitlement.[106] In *TCPIP*, the cybersquatter was the first possessor of the domain name, but hardly the best owner. Accession's bad faith and disparity-of-value rules alleviate this concern.

2. Joint Tenancy in Common. — Copyright law awards a copyright to joint authors when both combine independently copyrightable contributions into an indivisible work.[107] Joint tenancy may also resolve competing claims to indivisible entitlements here.

However, joint tenancy creates a host of problems. First, because each joint tenant may use or license the work unilaterally,[108] there's a risk that the tenants will grant incompatible licenses. For instance, if you and I owned the painting as joint tenants in common, we might license it for display at the same time at two different museums. Second, under a joint tenancy in common, no single party internalizes all of the costs and benefits associated with an entitlement.[109] This fact can become problematic in cases like *Cohen*, where many parties are involved and collective action problems become more pronounced.[110] Third, an incompatible joint tenancy may be subject to a partition by sale, where the court will force a sale of the property and distribute the proceeds to the former joint tenants.[111] However, in a partition by sale, there's a risk a third party will purchase the entitlement, leaving both parties who

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103 35 U.S.C. § 102(a)(1)–(2) (2012).

104 Merrill, *supra* note 3, at 482–83.

105 *Id.* at 483; *see also* Michael Abramowicz, *The Uneasy Case for Patent Races over Auctions*, 60 STAN. L. REV. 803, 812 (2007) (noting that "if there is some moment of invention that would produce a positive rent for an inventor, then inventors will dissipate that rent by inventing earlier").

106 Long, *supra* note 89, at 823.

107 17 U.S.C. § 201(a) (2018); *see also* Thomson v. Larson, 147 F.3d 195, 199 (2d Cir. 1998).

108 *Thomson*, 147 F.3d at 199.

109 *Cf.* Merrill, *supra* note 3, at 494.

110 *Cf.* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 355–56 (1967) (describing the costs of communally owned property).

111 RESTATEMENT (FIRST) OF PROP. § 178 (AM. LAW INST. 1936).

contributed inputs to the entitlement unhappy. By awarding ownership to a single party, accession avoids these problems.

3. Nuisance. — When the noisy machines on a confectioner's property interfere with a neighboring doctor's need for silence in his clinic,[112] nuisance provides a framework for resolving their competing property interests. Indeed, the flexibility of the nuisance framework can achieve many of the same results as the accession framework can.

However, under the Restatement (Second) of Torts, courts applying the nuisance framework engage in a multifactor inquiry involving, among other things, the reasonableness of the invasion, the gravity of the harm, and the utility of the invading conduct.[113] Under such a regime, it's difficult for parties to predict ex ante who will own the entitlement.[114] The accession principle avoids this problem with the simple disparity-of-value rule. Accession's simplicity thus better allows parties to plan their affairs.

In summary, the accession principle offers a relatively simple rule that awards an entitlement to a single party without the need for wasteful racing. In doing so, it avoids many of the pitfalls of alternative common law solutions to resolving property disputes.

B. Disincentivizing Search

The accession principle punishes willful appropriators. A cybersquatter who knowingly registers the domain name of a famous trademark will lose to the company challenging him. On the other hand, an innocent individual who registers a domain name without knowledge that it coincides with the trademark of a famous company may be allowed to keep the domain name. In this way, the accession principle may disincentivize parties from searching to make sure their uses don't conflict with others' property interests.[115]

However, it bears emphasizing that more searching isn't always good. A strict search requirement may incentivize inefficient searches, where "the cost of acquiring information about the scope of property rights will exceed the social value of that information."[116] The task, then, is to fashion a bad faith standard that induces parties to engage in cost-justified, rather than wasteful, searches.

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112 *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 8–9 (1960).

113 RESTATEMENT (SECOND) OF TORTS §§ 822–828 (AM. LAW INST. 1979).

114 Even under natural rights conceptions of nuisance, where owners are presumptively entitled to an abatement unless the defendant can show her hardship will be far greater, *see* Eric R. Claeys, Response, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889, 935–36 (2009), parties will still have a tough time predicting ex ante whether courts will enjoin an invasion.

115 *Cf.* Lee, *supra* note 30, at 211; Stewart E. Sterk, *Property Rules, Liability Rules, and Uncertainty About Property Rights*, 106 MICH. L. REV. 1285, 1313 (2008) (arguing that a regime that protects innocent encroachers creates "perverse incentives not to search").

116 Sterk, *supra* note 115, at 1288.

In various strands of intellectual property law, courts have developed a willful blindness doctrine that imputes knowledge onto a party who "subjectively believe[s] that there is a high probability that a fact exists" but "take[s] deliberate action to avoid learning of that fact."[117] Incorporating willful blindness into the bad faith analysis would incentivize appropriators to engage in some minimal searches to ensure, say, the walls they spray-paint don't already belong to someone else.

Alternatively, Professor Stewart Sterk has proposed a negligence standard that would require searching if and only if the search is cost-justified.[118] Replacing bad faith with a negligence standard would not drastically increase the search burdens on parties in these new accession cases.[119] Because the boundaries of intellectual property rights tend to be muddy, delineating the scope of these new property interests will usually be costly enough that parties won't be expected to engage in excessive searches.[120] Moreover, Jay Koh has shown that, despite nominally applying a bad faith standard, courts nevertheless hesitate to award entitlements to negligent appropriators in practice.[121]

Thus, whether by incorporating the willful blindness doctrine or by moving to a negligence standard, the accession principle is flexible enough to incentivize cost-justified searches.

C. Ignoring Nonmarket Value

The accession principle's disparity-of-value test looks to the market value of the parties' contributions to determine who should obtain the entitlement. However, in cases where the subjective value of an input far exceeds its market value, a party may feel aggrieved when the accession principle awards the entitlement to an innocent appropriator.

Suppose you lose your wedding ring, and I, a famous artist, find it. After searching for the owner to no avail, I decide to make it the centerpiece of my latest art installation, which becomes a major success. Hearing the buzz, you decide to visit the museum to see it, only to spot your ring at

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117 Glob.-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 769 (2011) (collecting cases); *accord In re* Aimster Copyright Litig., 334 F.3d 643, 650 (7th Cir. 2003).

118 *See* Stewart E. Sterk, *Strict Liability and Negligence in Property Theory*, 160 U. PA. L. REV. 2129, 2133 (2012).

119 That said, a negligence accession principle would eliminate the equitable principles embedded in black letter accession doctrine and move the framework closer to a governance regime. *See* Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S454–55 (2002) (contrasting "rights of exclusion," *id.* at S454, which focus on assigning ownership to a resource, with "governance rules," which "pick out uses and users in more detail," *id.* at S455).

120 *See* Sterk, *supra* note 118, at 2151; *see also* Clarisa Long, *Information Costs in Patent and Copyright*, 90 VA. L. REV. 465, 471–79 (2004).

121 Koh, *supra* note 28, at 327 (citing Nelson v. Graff, 12 F. 389, 391 (C.C.W.D. Mich. 1882)).

the center of it. Because the ring forms an integral part of the installation and because the value of my contribution to the installation exceeds the ring's market value, the accession principle would deny you the ring and have me compensate you for its market value.

However, no amount of money can make you whole. As Professor Margaret Jane Radin argues, personal property like a wedding ring is "closely bound up with personhood" and is "part of the way we constitute ourselves as continuing personal entities in the world."[122] To give the ring to me because I can put it to better use is, in some sense, to force you to sell a piece of yourself to me. In less romantic terms, the accession principle invites injustice by ignoring your subjective valuation of the ring in forcing you to sell it to me.

It's worth pausing to dissect the visceral injustice we feel. To those with libertarian sympathies, the injustice derives from the forced sale of the ring. The state has no business deciding who gets the ring; private parties should negotiate the allocation themselves and needn't confine their valuation to market value in doing so.[123]

However, this objection is too blunt and amounts to an attack on liability rules writ large. Forced sales are necessary in allocating, say, the costs of accidents or competing property uses. Precisely because individuals are unable to negotiate with one another ex ante regarding the value they place on bodily integrity or clean air, courts are frequently called upon to decide who is forced to sell their entitlement to whom.[124] Accession cases are simply another kind of accident. Here, in deciding who gets the ring and on what terms, the court inevitably forces one party to sell to another. Pointing out that in an ideal world you and I would have negotiated over the use of the ring does nothing to resolve this dispute, as this dispute arose precisely because you and I couldn't practically negotiate ex ante.

To more sophisticated critics, then, the injustice arises not from the forced sale per se, but rather because the forced sale looks to market value alone in determining who gets the ring and what the amount of compensation should be. In doing so, the accession principle ignores weighty considerations like personhood and subjective values.[125]

Perhaps the disparity-of-value inquiry could incorporate the parties' subjective values, as well as the market value of their interests. But

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[122] Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982).

[123] *See* Epstein, *supra* note 25, at 2092–94, 2097 (explaining that "liability rules are limited to those circumstances in which property rules work badly," *id.* at 2094, because "the inefficiencies of a [pure] liability system [could] cascade until the security of possession and the security of exchange needed for complex commercial life and a satisfying personal one are no longer available," *id.* at 2093); Rose, *supra* note 26, at 2187 (extolling virtues of property rules).

[124] *See, e.g.*, Boomer v. Atl. Cement Co., 257 N.E.2d 870, 875 (N.Y. 1970) (giving polluting factory an option on plaintiffs' clean air).

[125] *See* Epstein, *supra* note 25, at 2093 (noting that liability rules often fail "to determine with accuracy the losses, both economic and subjective, that follow" when an individual's assets are "plucked away").

doing so complicates the inquiry for courts and erases the rule-like features that make the accession framework more attractive than the nuisance framework. The bad faith standard may help. When I come across a ring with, say, a wedding vow inscribed on it, it might constitute bad faith per se on my part to appropriate it. But the bad faith standard won't protect against appropriation of more mundane items that may nevertheless hold special significance to the original owner.

Ultimately, such cases might justify an exercise of courts' residual equitable powers to alleviate gross injustice. At the remedial stage, courts have turned to the doctrine of disproportionate hardship to deny injunctive relief.[126] The idea would be to apply a disproportionate hardship analysis to cases where an input's subjective value to a party greatly exceeds its market value. Doing so would allow the court to grant the entitlement to the aggrieved, despite the accession principle.

This exercise of residual equitable power would also allow courts to accommodate nonproperty interests. For instance, a client's interest in bodily autonomy or liberty might trump a tattoo artist's copyright interest in a tattoo on the client's body. Although accession's disparity-of-value analysis might overlook these invaluable interests, equity can step in to correct any unduly harsh results.

Appealing to equity also confers second-order benefits. If a court were to consider the parties' subjective value or nonproperty interests in its first-order analysis of who owns the entitlement, the inquiry would become another multifactor balancing of amorphous interests.[127] And, as in nuisance cases, parties will be left uncertain as to who will own the entitlement ex ante. On the other hand, using the accession principle's simple bad faith, disparity-of-value, and compensation rules allows parties to plan their affairs ex ante, and appealing to a court's equitable discretion in cases where nonproperty interests are particularly important corrects grave injustices ex post.

Thus, none of the objections to the accession principle is insurmountable. Accession operates more equitably and more efficiently than other common law regimes. A bad faith standard that incorporates willful blindness can incentivize cost-justified search. And extraordinary cases, where subjective value or nonproperty interests are particularly important, justify an exercise of a court's equitable powers to correct disproportionate hardship. All things considered, then, the accession principle stands as an attractive solution to these new property conflicts.

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[126] *See, e.g.*, Harrisonville v. W.S. Dickey Clay Mfg. Co., 289 U.S. 334, 338 (1933) ("Where . . . issuance of an injunction would subject the defendant to grossly disproportionate hardship, equitable relief may be denied . . . ."); *cf.* RESTATEMENT (SECOND) OF TORTS § 941 (AM. LAW INST. 1979) (noting that the "relative hardship" to the plaintiff and defendant should be considered when evaluating the appropriateness of an injunction).

[127] *See* Smith, *supra* note 88, at 189–91.

CONCLUSION: HOMAGE TO HOHFELD

The bulk of this Note has been aimed at realizing its second goal: showing that the ancient law of accession can be conscripted to offer a principled, generalizable solution to these disputes. This Note now returns to its first goal: showing that these conflicts are instantiations of one general puzzle.

As a thousand new interests proliferate on the frontiers of property, it may be tempting to call for a thousand new statutes to resolve disputes that arise when these interests collide, each statute narrowly tailored to the nuances of each set of property interests. The enactment of the ACPA, dealing with trademarked domain names, represents just this kind of response.

However, these narrowly tailored responses miss something deeper at the heart of these disputes. This Note has shown that the same problem of resolving competing claims to an indivisible entitlement recurs across real property, personal property, copyright, right of publicity, trademark, and even internet domain names.

And though neither Bracton nor Blackstone could foresee the internet, the common law has developed a framework that can resolve these new conflicts intuitively and flexibly. To see that these new conflicts are instantiations of the same ancient problem is to invite broader, more principled solutions, nourished by the wisdom of the ages. Applying a common law solution to these new problems also reveals deeper principles hidden inside common law doctrine. As the forms of property change, using accession to resolve these new property conflicts shows that accession isn't just about improvers and owners or labor and goods, but rather about adjudicating competing claims to indivisible things. To that end, accession's deeper equitable and restitutionary principles implement a fair and efficient solution to this general problem.

Thus, the goal of this Note has been "not only to discover essential similarities and illuminating analogies in the midst of what appears superficially to be infinite and hopeless variety, but also to discern common principles of justice and policy underlying the various . . . problems involved."[128] When we appreciate the universality of the dispute over our painting, we sharpen our "perception of fundamental unity and harmony in the law."[129]

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[128] Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 59 (1913).

[129] *Id.*