Reading Group: Property in the Age of Artificial Intelligence

Harvard Law School, Spring 2022

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Wednesdays, 6:45pm - 8:15pm, WCC Room 3012

Meetings: Jan. 26, Feb. 2, Feb. 16, Feb. 23, Mar. 2, Mar. 23, Mar. 30, Apr. 13 (makeup: Apr. 20)

Course Description

Overview

Property rights, understood broadly, are entitlements to exclude others from using things or information. Rights of this sort are at the heart of some of today's most exciting legal problems—from transactions in non-fungible tokens (NFTs), to the regulation of likeness-synthesizing "deepfake" videos and facial recognition technology, to AI's status as an "author" under copyright law, to market power in the digital economy.

This reading group explores how emerging technology is reshaping the doctrine and theory of property law and rights to exclude in general. The syllabus examines three areas unsettled by recent technological change: (1) privacy and control over one's likeness, (2) intellectual property, and (3) competition in a networked economy.

Using facial recognition technology and deepfakes as case studies, the course's section on privacy considers the following questions: in what ways do privacy interests overlap with and diverge from ownership interests? To what extent should we be able to control uses of our likenesses or personal information, and through what legal mechanisms? Which of the interests plausibly at stake—privacy, reputation, authorship, ownership, and so on—best justify rights to exclude uses of one's likeness in technologies like facial recognition and deepfakes?

The course's section on intellectual property explores how AI is disrupting various creative industries. Will AI capable of generating images, text, and music necessitate an overhaul of copyright law's concept of "authorship?" As machine learning improves at extracting expressive value from preexisting works, should copyright's fair use defense allow AI to train on copyrighted works without rightsholders' permission?

Finally, the reading group examines how the law of physical trespass has adapted to the digital age. This section of the class features a slate of readings that show how trespass law governs access to, and use of, valuable information posted on the public Internet.

Materials

All reading assignments are either directly accessible as hyperlinks on the syllabus or, where noted, posted to the course Canvas page. Some resources may require you to log in with your

HarvardKey in order to access them. Most caselaw is hosted on the OpenCasebook platform; where possible, cases have been edited and condensed specifically for use in this reading group.

There is one book on the syllabus, excerpts of which are assigned for Week 4: JENNIFER ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD (Harvard 2018). This book is available in full online to HLS students, and the online version is linked in the "Library Reserves" section of the Canvas site. Hard copies of Professor Rothman's book are available from the HLS Coop.

Please read the assigned materials before each class. Readings designated as <u>optional</u> are entirely optional. If you have any trouble accessing an assigned reading, please email bsobel@law.harvard.edu.

Classes and Assignments

1. **Introduction** (<u>January 26</u>)

   Note: the Grimmelmann reading sets forth, in provocative terms, some general themes of this reading group. The focus of the first class will be a discussion of Emily Ratajkowski's 2021 work, "Buying Myself Back: A Model for Redistribution," which the remaining readings describe and contextualize.

   - Kate Dwyer, *Emily Ratajkowski Is Selling an NFT at Christie's*, N.Y. TIMES (May 12, 2021).
   - *Buying Myself Back: A Model for Redistribution*, CHRISTIE'S (May 13, 2021) (study the image and read the lot essay).
   - James Grimmelmann, *Real + Imaginary = Complex: Toward a Better Property Course*, 66 JOURNAL OF LEGAL EDUCATION 930 (2017) (read pp. 935–44).
   - <u>Optional</u>: Emily Ratajkowski, *Buying Myself Back*, THE CUT (Sept. 15, 2020) **(please note: this optional reading contains a first-person account of nonconsensual pornography and sexual assault)**.
   - <u>Optional</u>: Justin Cone, *The Skeptics' Introduction to Cryptoart and NFTs for Digital Artists and Designers*, JUSTIN CONE (last updated Aug. 10, 2021) (this is an informal, accessible, general introduction to NFTs, with special reference to art; bear in mind that its brief discussions of legal topics are not authoritative).

Part I: The Property-Privacy-Dignity Interface

2. **Introducing the Property-Privacy-Dignity Interface** (<u>February 2</u>)

   Scholarship
   - Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (read pp. 957–68, 971–79, 984–88, 991-1002, 1013–15).

   Cases
   - Moore v. Regents of University of California, 793 P.2d 479 (Cal. 1990).
   - Boring v. Google Inc., 362 F. App'x 273 (3d Cir. 2010).

- Peruto v. Roc Nation, 386 F. Supp. 3d 471 (E.D. Pa. 2019).

Other materials
- Optional: Lora Pabst, *North Oaks tells Google Maps: Keep out – we mean it*, STAR TRIBUNE (June 2, 2008) [https://perma.cc/CHU9-ZA8T].

3. Rights to Control One's Likeness: Privacy? Property? The Case of Facial Recognition (February 16)

Scholarship
- Benjamin L. W. Sobel, *A New Common Law of Web Scraping*, 25 LEWIS & CLARK L. REV. 147 (2021) (read pp. 147–79, 182–83; rest of article is optional).

Other materials
- Squibs and images for weeks 3-5 (please familiarize yourself with this short document; we will not discuss all of it this week, but we will revisit it in weeks 4 and 5).
- Kashmir Hill, *The Secretive Company That Might End Privacy as We Know It*, N.Y. TIMES (Jan. 18, 2020, updated Nov. 2, 2021).
- Olivia Solon, *Facial Recognition's "Dirty Little Secret": Social Media Photos Used Without Consent*, NBC NEWS (Mar. 12, 2019).

4. Deepfakes and Rights to Control One's Likeness (February 23)

Scholarship
- JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD (Harvard University Press 2018) (read pp. 11–29, 45–64, 96–112). [Full text available online through Harvard Libraries].
- Optional: Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights*, 2001 U. ILL. L. REV. 151 (2001).

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

Other materials
- Review squibs and images for weeks 3–5.
- Sally Adee, *What Are Deepfakes and How Are They Created?*, IEE SPECTRUM (Apr. 29, 2020).
- CAL. CIV. CODE § 1708.86.
- S.B. 435 — THE ENDING ONLINE SEXUAL TRAFFICKING AND EXPLOITATION ACT (CA Jan. 3, 2022).
- Optional: *Le Grange Brown's Pictures*, N.Y. TIMES (Sept. 26, 1888).

Part II: Copyright

5. **Rights to Control One's Likeness Continued: Copyright?** (March 2)

   Scholarship
   - Amanda Levendowski, *Using Copyright to Combat Revenge Porn*, 3 NYU J. INTELL. PROP. & ENT. L. 422 (2013) (read pp. 421–26, 439–446).
   - Also of possible interest this week (but not required) is Levendowski, *Resisting Face Surveillance with Copyright Law*, listed as optional reading for Week 7.

   Cases
   - Burrow-Giles Lithographic Company v. Sarony, 111 U.S. 53 (1884).
   - Garcia v. Google, Inc., 786 F.3d 733 (9th Cir. 2015).
   - Memorandum of Law in Support of Defendant's Motion to Dismiss, Xclusive-Lee, Inc. v. Hadid, No. 19-CV-520-PKC-CLP, 2019 WL 3281013 (E.D.N.Y. July 18, 2019) (read pp. 1–3, 7–13).
   - Optional: Falk v. Donaldson, 57 F. 32 (S.D.N.Y. 1893).

   Other materials
   - Review squibs and images for weeks 3–5 (pay special attention to the images).

6. **A.I. and Copyright: Authorship, Ownership, Subject Matter** (March 23)

   Scholarship
   - Annemarie Bridy, *Coding Creativity: Copyright and the Artificially Intelligent Author*, 5 STAN. TECH. L. REV. 1 (2012).

   Cases
   - Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340 (1991).
   - Naruto v. Slater, No. 16-15469 (9th Cir. 2018) (read pp. 4–6, 12–18 of PDF opinion).

7. **Fair Use and A.I.** (March 30)

   Scholarship
   - Benjamin L. W. Sobel, *Artificial Intelligence's Fair Use Crisis*, 41 COLUM. J.L. & ARTS 45 (2017) (skip Part III).
   - Optional: Mark A. Lemley & Bryan Casey, *Fair Learning*, 99 TEX. L. REV. 743 (2021).
   - Optional: Amanda Levendowski, *Resisting Face Surveillance with Copyright Law*, __ N.C. L. REV. __ (forthcoming 2022).

   Cases
   - Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169 (2d Cir. 2018).
   - Optional: Google LLC v. Oracle America, Inc., 93 U. S. ____ (2021) (pay special attention to the "Purpose and Character of the Use" section on pp. 24–27 of the PDF opinion).

Other materials
- *Jukebox, OPENAI* (browse the website to learn about the project and listen to a few sample recordings).

Part III: The Property–Competition Interface

8. **Tangible Property and Trespass Law and Policy in the Digital Age** (April 13)

Scholarship
- Kevin Gray, *Property in Thin Air*, 50 CAMB. L. J. 252 (1991).

Cases
- hiQ Labs, Inc. v. LinkedIn Corp., No. 17-16783 (9th Cir. 2019).
- Optional: eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058 (N.D. Cal. 2000).
- Optional: Villarreal v. Grant Geophysical, Inc., 136 S.W.3d 265 (Tex. Ct. App. 2004).
- Optional: Van Buren v. United States, 593 U. S. ____ (2021)