

## 21. INTANGIBLE PROPERTY

Here are some final thoughts on property rights especially property rights to intangible and hard to define things. First, a follow-up note on patents and copyrights.

### A. BMI and ASCAP

These two organizations pool copyrights for musical performers. There was a semi-famous antitrust case that held that these copyright pools were ok.<sup>1</sup> I am skeptical. The pools allow for musicians to collect royalties on songs from people who play a lot of music more or less as background. The argument is that musicians couldn't afford to go around collecting royalties from these individual entities. However, another question is, If individual musicians tried to sell their songs to these places, what would they receive? The answer, in my opinion, is nothing. There are only a very few bars that really care if they play a particular song. Competitive bidding would drive the price way down. Probably, bars, restaurants, office buildings, radio stations, and the like would not have to pay to play except for a few titles.

Should music copyright pools be allowed?

### B. Nontradeable Pollution Rights

One, possibly unintended result of the 1970 Clean Air Act was that polluters were given grandfather rights to pollute that were not transferable. A predictable and observable result of this inalienable property right was its inefficient exploitation. Predictably, firms with a right to scare property that could only be capitalized by productive employment of that property did exactly that. We found that as a consequence of the CAA, electricity generation facilities that were grandfathered out of installing more stringent pollution control devices were operated longer.<sup>2</sup> In this way the owners of these pollution rights were able to capital the value of the environmental resource.

### C. Property Rights to Regulation

Regulation of price has been a common place governmental activity in this country since the beginning. It has taken various forms, though the standard today is rate of return by regulatory commissions. Rate regulation vests a kind of property right with the regulated firm. The extent of this property right has been a contentiously litigated point.

There are several legal cases that apply:<sup>3</sup>

#### Indemnification of Assets:

*Charles River Bridge (Proprietors of) v. Proprietors of Warren Bridge*, 36 U.S. 420 (1837).

*Market Street Railway Co. v. Railroad Commission of California*, 324 U.S. 548 (1945).

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<sup>1</sup> *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 US 1 (1979). This case involved a blanket license for music by copyright owners. BMI and ASCAP are the copyright agents for almost 100% of the music played outside of actual performances. Bars, restaurants, and radio stations must pay a license fee to BMI or ASCAP. The place then has the right to publicly pay the music for their customers. CBS sued under antitrust law for price fixing. Court said this was rule of reason because blanket license was a new product. Under rule of reason, arrangement was efficient. (The licenses are cheap, cost about \$500 per year.)

<sup>2</sup> "Capital Turnover and Marketable Pollution Rights," with Gordon Brady, *Journal of Law & Economics*, April 1988.

<sup>3</sup> See Alfred Kahn, *The Economics of Regulation*, MIT Press, 1996, for a good discussion of the major case law affecting regulation.

*Duquesne Light Co. v. Barasch et al.*, 488 U.S. 299 (1989)

#### The Takings Clause:

*Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

*Dolan v. City of Tigard*, 512 U.S. 374 (1994).

*United States, Petitioner, v. Winstar Corporation et al.*, 518 U.S. 839 (1996).

#### Regulation in general:

*Munn v. Illinois*, 94 U.S. 113, 125-126 (1877).

*Smyth v. Ames* 169 US 466 (1898).

*Nebbia v. New York*, 291 U.S. 502 (1934).

*Federal Power Commission v. Hope Natural Gas Co.*, 320 US 591 (1944).

*FPC v. Texaco Inc.*, 417 U.S. 380 (1974).

The economics of the issue may be best summed up in the *Charles River Bridge*. There the court explicitly dealt with the balancing of equity versus efficiency. Property rights that are too generally defined and too broad in scope create a monopoly power that stifles economic progress. On the other hand, property rights that are capriciously expropriated or social contracts that are willfully abrogated discourage investment. The challenge of public policy is to maximize investment without creating monopoly.

Some evidence can be drawn from the telecommunications industry as well as the electric industry.<sup>4</sup>

#### D. Property Rights to Information

Many institutions create information. In other instances, information is a by product, but a valuable one. Sports broadcasts often carry the copyright claim that "All transmission, reproduction, and *accounts* of the game are the express property of ..." Interesting. Presumably, these sports leagues are attempting to capture the property right to the knowledge about the game itself. Is this possible?

What about the NYSE and other securities markets? Do they do? How do they do it? What property rights do they have in the process?<sup>5</sup>

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Fancy Big Board Club Plans to Honor  
Key Lawmaker on Stock-Quote Issue

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<sup>4</sup> I have a couple of new papers on this topic. One on investment by non-utility generators is forthcoming in the *Electricity Journal*. Another is an overview of the issues and a discussion of the legal background. These are available on my web site.

<sup>5</sup> See Mulherin, J. Harold, Netter, Jeffery M., and Overdahl, James. "Price are Property: The Organization of Financial Exchanges from Transaction Cost Perspective" in *Journal of Law and Economics*. Vol 34. 1991. P591.

By MICHAEL SCHROEDER  
Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON -- At \$1,000, the meal at the elegant Luncheon Club of the New York Stock Exchange on May 7 will be a tad rich, even for the club's wealthy Wall Street members.

But Big Board heavy hitters will be attending not because of what is on the menu, but because of who will be the guest of honor and sponsor of the fund-raiser: Howard Coble, a 68-year-old Republican congressman from rural North Carolina. And there's good reason to honor him. Rep. Coble has sponsored a bill that could give the Big Board new property rights over stock quotations that it gathers and distributes throughout the trading day, quotes that the Big Board sold to various customers for \$111 million last year.

The bill also would protect stock-market quotes -- as well as loads of databases of other industries -- from being pirated by hackers or customers. The measure is expected to come up for a vote before Mr. Coble's Judiciary subcommittee as early as mid-May.

The night before the Luncheon Club shindig, Liz Robbins, a prominent lobbyist, is hosting a \$1,000-a-plate fund-raising dinner for Mr. Coble and 35 guests at her Manhattan residence on Broadway. For \$1,500, a donor can attend both events. The invitation, which resembles a Broadway-show program, is titled, "Playhill, The Cloak Room Theatre" and reads, in part, "My dinner with Howard."

Holding back-to-back fund-raisers raises a timing issue. Mr. Coble's subcommittee on courts and intellectual property is expected to vote on the legislation soon. Traditionally, it has been considered poor form for a committee chairman to solicit constituents for contributions shortly before action on a bill.

"It's not a prevalent practice, but a growing one," said Holly Bailey of the Center for Responsive Politics. "It certainly raises questions about ethics."

Ed McDonald, a spokesman for Mr. Coble, says the events have long been in the works and only coincidentally happened to be scheduled not long before a vote is expected. The scheduling, he notes, relates to an April 9 invitation from Big Board Chairman Richard Grasso to Mr. Coble to have breakfast with exchange officials and ring the opening bell on May

7.

Mr. McDonald says Mr. Coble's campaign staff decided to peg the congressman's Big Board visit to a few fundraisers. He adds that the exchange made the Luncheon Club available for the event, which was planned by Mr. Coble's campaign staff. Rather than targeting groups with a specific interest in the database legislation, the spokesman said they invited 300 to 400 New York political-action committees.

"I don't know if we've even gotten any R.S.V.P.s," he says.

Meanwhile, the New York Stock Exchange, which has lobbied hard for the bill, has distanced itself from the fund-raiser. Ray Pellecchia, a spokesman, says the exchange isn't sponsoring the event. While the club resides in the exchange's building, he notes it is operated as a private club, primarily by exchange members.

When the original invitations made reference to the lunch at the "NYSE's Luncheon Club," exchange officials asked the organizers to remove references to the exchange, which was subsequently done.

Ms. Robbins, who represents clients supporting the bill, strongly denies the events are unseemly. "It sounds like something it's not," she says. Ms. Robbins explained that she is an old friend and Capitol Hill neighbor of Mr. Coble's and agreed to host a dinner months ago.

The bill would provide antipiracy protection to commercial-database owners and is supported by scores of industry groups, including publishers and real-estate companies. But critics argue that certain vague passages, which amount to only a tiny part of the bill, would also give exchanges ownership of their market data and allow them to sue in federal court to prevent data theft.

Selling stock quotes is big business. The exchanges sell quotes to commercial-information vendors like Reuters Group PLC and Dow Jones & Co., which publishes The Wall Street Journal and the Interactive Journal. Dow Jones makes the information available in its print and online publications. The Nasdaq Stock Market sells its data separately to vendors.

The price of data has become a hot issue with the explosion of online trading. Although all broker-dealers have long wanted stock markets to lower fees for quote data, online brokers have been most vocal because their customers seek stock quotes so frequently.

Sheila Bair, a Big Board lobbyist, says the exchanges believe they already own the quotes and that the legislation would bestow no additional property rights. She says the Big Board supports the bill because of the antipirating protections.

Online trading firms, led by Charles Schwab & Co., and several Nasdaq brokers have lobbied vigorously against the legislation. Schwab and others argue that the bill would give the Nasdaq Stock Market and the exchanges monopoly ownership of stock-quote rights for the first time.

Sen. John McCain (R., Ariz.) has introduced a bill that would amend federal law to assure that there is no limitation on the public dissemination of stock-ticker data. David Pottruck, Schwab's co-chief executive, is an adviser to Mr. McCain.

Industries and groups most affected by the legislation were Mr. Coble's biggest contributors last year. They included media and entertainment firms (\$54,000), lawyers (\$37,000) and pharmaceutical companies (\$31,000), according to the Center for Responsive Politics. The New York Stock Exchange PAC contributed \$1,000 to Mr. Coble last year and \$2,000 this year.