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***629** COPYRIGHT AND THE PUBLIC INTEREST FROM THE PERSPECTIVE OF BROWN V. BOARD OF EDUCATION

Steven D. Jamar [FNa1]

INTRODUCTION

This Essay examines the extent to which some of the seminal ideas and principles from and underlying Brown v. Board of Education [FN1] can be used to provide a perspective that may help develop intellectual property law in ways that advance the cause of social and economic justice. The social justice-conscious approach of the Court in Brown can inform our understanding of and can inform the development of the public interest as a way to rebalance the rights of intellectual property right holders, users, and the public at large. The principles the Court used in Brown that are examined and applied in this Essay include: (1) Use current circumstances to evaluate law, keeping in mind the effect on the public good; (2) Importance affects analysis--the importance of intellectual property today is analogous to the importance of education fifty years ago; (3) Abuse of power to exploit or exclude others is improper and may rise to the level of being unconstitutional; and (4) Intangible effects matter. [FN2] Ultimately, these principles, like the Brown decision itself, derive from human rights principles of the inherent dignity, worth, and equality of each person. The issue is justice, not merely legal rights instrumentally conceived.

***630** In some sense this Essay is a response to the challenged posed by one of the foremost thinkers on copyright issues, Pamela Samuelson:

> It is possible to construct a new politics of intellectual property that has regard for the public domain and fair uses. To be successful, a new public-regarding politics of intellectual property must have a positive agenda of its own. It cannot just oppose whatever legislative initiatives the major content industry organizations support (although it almost certainly will need to this as well). It should be grounded on the realization that information is not only or mainly a commodity; it is also a critically important resource and input to learning, culture, competition, innovation, and democratic discourse. Intellectual property must find a home in a broader-based information policy, and be servant, not a master, of the information society. [FN3]

However, this Essay is intended to be more of a provocative look at some ways of thinking about setting that positive agenda than a rigorous proof of the value of looking outside the traditional confines of intellectual property law for ideas to create new boundaries. It is not intended so much to set the agenda as it is intended to offer a way to approach setting the agenda from outside the constraints of typical current intellectual property law analysis. Echoing Professor Samuelson's call, this Essay is not limited to considering the public domain per se, but looks more broadly at the public interest and how analysis of it may be informed by principles from Brown.

In recent years, significant academic attention has been directed toward defining the proper limits of legal protection for intellectual property. This attention is due to several converging trends. [FN4] First, there is the trend toward corralling more space off from the public by expanding private rights over information, works, and other intellectual property by extending

the terms of protection (for example, copyright from 75 to 95 years [FN5] and patent from 17 to 20 years [FN6]); by including more kinds of items within the general field of intellectual property through creating new forms of intellectual property [FN7] such as ***631** protecting maskworks for semiconductor chips [FN8] or expanding existing types of protection to new areas (for example, business methods patents, [FN9] and patenting genes [FN10]); and by aggressive assertion of rights over intellectual property through licensing arrangements, [FN11] through limiting access to databases of public domain works, [FN12] and through aggressive litigation to defend intellectual property. [FN13]

A second trend counterpoised to the first is the ever-expanding opportunity to copy and distribute copies of protected works through new, improved, and easy-to-use technologies. Photocopiers, computers, networks, the Internet, and various software applications make sharing files easy and inexpensive. The related facts of the constantly increasing power of computers and software, and the constantly lower prices for affected technologies make copying increasingly easy. The music industry has claimed to be plagued by the ease of copying and distribution, but it has finally stopped fighting the Internet and is actively seeking ways to make money distributing music on it. [FN14]

A third trend is the increasing amount of information and works being made readily available online [FN15]--some of which is in the public domain, [FN16] some of which seems to be (because it is so widely available) but is not, [FN17] and some of which is clearly not in the public domain, ***632** but is available as if it were. [FN18] This phenomenon contributes to the reconfiguration of the de facto contours of the public domain.

Counterbalanced to this broadening of access are the actions, as noted above, of some companies that limit access to public domain works by the creation of privately owned databases of such works, perhaps mixed with some copyrighted works. The database owners then limit access to the public domain works in the database by license agreements and fees. Of course, this sort of compilation can also make obscure or hard-to-find public domain works more available, albeit for a fee, but it also can work to seem to re-privatize public domain works.

A fourth trend that makes serving the public interest through intellectual property law a matter of contemporary significance is the increasing importance of intellectual property in law, business, and education. [FN19] Intellectual property matters to many interested groups such as authors of intellectual property, users, publishers, distributors, and the public, each having disparate interests.

One way of balancing the competing interests is through drawing the contours of the limits of the reach of intellectual property rights. Once the limits of the reach of the intellectual property rights are known, the space beyond those limits defines in a negative way the contours of the public domain. [FN20] That is, the public domain is whatever is not captured by intellectual property rights.

Drawing a line between what is protected and what is in the public domain is not the only means to accommodate the various interests and is not the only means to address the challenges raised by the tugs and shoves noted above. Other methods of limiting the reach of intellectual property, such as fair use, compulsory licensing, and law relating to the exploitation of patents, also serve to limit the reach of the owners of intellectual property.

***633** Of course, the grant of intellectual property rights can also serve the public interest; indeed, the Constitution mandates that Congress consider the effect of intellectual property regimes on the public:
The Congress shall have Power . . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. [FN21]

This mandate is reflected in copyright cases in a variety of ways, but most often through words to this effect:

The interest of the copyright law is not in simply conferring a monopoly on industrious persons, but in advancing the public welfare through rewarding artistic creativity, in a manner that permits the free use and development of non-protectable ideas and processes. [FN22]

In the patent area the quid pro quo is more explicit:
Describing Congress' constitutional authority to confer patents, Bonito Boats noted: "The Patent Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the 'Progress of Science and useful Arts.'" [Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146 (1989)]. Sears similarly stated that "[p]atents are not given as favors . . . but are meant to encourage invention by rewarding the inventor with the right, limited to a term of years fixed by the patent, to exclude others from the use of his invention." [Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 229 (1964)] . . . Rather, Bonito Boats reiterated the Court's unclouded understanding: "It is for Congress to determine if the present system" effectuates the goals of the Copyright and Patent Clause. 489 U.S., at 168. . . .

We note, furthermore, that patents and copyrights do not entail the same exchange, and that our references to a quid pro quo typically appear in the patent context. [See, e.g., J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc., 534 U.S. 124, 142 (2001) ("The disclosure required by the Patent Act is 'the quid pro quo of the right to exclude." (quoting Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974))]; Bonito Boats, 489 U.S., at 161 ("the quid pro quo of substantial creative effort required by the federal [patent] statute"); Brenner v. Manson, 383 U.S. 519, 534, (1966) ("The basic quid pro quo . . . for granting a patent monopoly is the benefit derived by the public from an invention with substantial utility."); ***634**Pennock v. Dialogue, 2 Pet. 1, 23, 7 L. Ed. 327 (1829) (If an invention is already commonly known and used when the patent is sought, "there might be sound reason for presuming, that the legislature did not intend to grant an exclusive right," given the absence of a "quid pro quo"). This is understandable, given that immediate disclosure is not the objective of, but is exacted from, the patentee. It is the price paid for the exclusivity secured. See J.E.M. Ag Supply, 534 U.S., at 142. For the author seeking copyright protection, in contrast, disclosure is the desired objective, not something exacted from the author in exchange for the copyright. Indeed, since the 1976 Act, copyright has run from creation, not publication. (citation omitted). [FN23]

In what follows, I present some ideas about how to think about drawing the line between the interests of copyright owners on one hand and the public interest in the property on the other hand, especially the public interest in access to and use of intellectual property. Though I generally focus on copyright, some ideas apply to other forms of intellectual property, and other forms of intellectual property at times provide superior illustrations of the points being made. In order to better appreciate how exploring the ideas from Brown may contribute to our approach to intellectual property and the public interest, I first summarize in very truncated form the contours of the public domain and highlight some of the other limits on intellectual property rights. With this doctrinal background in place, I move to a summary of the core ideas from Brown that I subsequently connect explicitly to concerns about the public interest in the realm of intellectual property.

I. THE PUBLIC DOMAIN AND OTHER LIMITS ON INTELLECTUAL PROPERTY RIGHTS

Intellectual property rights are limited. While an owner's rights over an item of tangible personal property are essentially unlimited (although even such property may be subject to regulation through licensing or subject to claims of spouses, creditors, and others), intellectual property is not so unfettered. Intellectual property, depending upon the kind, is subject to numerous sorts of limits such as duration (copyright and patent), specific permitted uses (the Copyright Act grants many limited rights to users such as the right to perform someone's ***635** music under a compulsory license), [FN24] fair use (copyright), [FN25] disclosure (patent), and unprotectability of ideas and certain other categories of information (facts, scientific formulas) [FN26] that are involved in some way, often intimately, with the intellectual property itself. For some intellectual property there are other sorts of limits. For example, the owner of trade secrets must act to keep them secret,

[FN27] and an owner of a trademark must defend it or it may be lost (for example, aspirin, cellophane, and the escalator). [FN28]

Determining how to properly limit intellectual property has become a perennial problem. Congress is constantly lobbied to change the Copyright Act and to provide various other specialized intellectual property protection. [FN29] Balancing the incentive to create information, products, and works, which may be enhanced by stronger protection, against the desire to benefit the public broadly through wide, inexpensive dissemination of the creations is always difficult. The interests of the public and considerations of public welfare should be taken into account along with the claims of the authors and other owners of the intellectual property rights. Questions about the proper limitations on intellectual property are further complicated by the multiple interests of various groups; it is not merely a matter of owners and the public. Interest holders beyond owners and the public as the public include end users, exploiters (those who use it to create something else), artists, creators (who are often not the owners of their works or creations), distributors, agents, and others. For example, in the music industry interest holders include songwriters, performers, studio recording technicians, distributors, the big record companies, nightclubs, agents, managers, restaurant owners, consumers, and more, all of whom ought to be taken into consideration in crafting the law.

At times the most vexing questions relate to deciding even what are the appropriate considerations to bring to the table to work out ***636** the proper limits. This is perhaps where Brown can be of most service.

A. The Public Domain

Intellectual property that is off limits to being owned is in the public domain. Important as this categorical limitation is, the contents or even the contours of the public domain are difficult to describe and even harder to define in an affirmative way. Developing a rigorous or even merely complete affirmative definition is perhaps not possible and is beyond the scope of this essay. Nonetheless a brief summary of some of the current thinking about the public domain and its importance, and a sketch of some of its contours will be useful in providing something for the Brown principles to push against.

Although defining the public domain in an affirmative way that allows it to contest directly with assertions of intellectual property rights is difficult, defining it in a negative or limited way is not--merely define the contours of the intellectual property rights and what is left is in the public domain. Professor Pamela Samuelson defines the public domain "as a sphere in which contents are free from intellectual property rights." [FN30] Her definition is just such a "not-this" definition. This definition is, of course, true, and it helps put some boundaries on the map of intellectual property. [FN31] But it is dissatisfying because it does not help us decide where to place the boundary; it merely describes what the public doman is and how to find it after it is defined. Defining the boundary in the first place is what matters. Will the public interest be better served by placing the boundary for what is in the public domain in one place or in another? Will expanding the public domain by shrinking the duration of copyright better serve the public interest or will shrinking the public domain by increasing the duration of copyright better serve the public interest?

As Samuelson notes, there are many aspects of intellectual property that affect the functional boundaries of the public domain. [FN32] Viewed functionally instead of formally (as in the "whatever is not intellectual property" definition), the public domain may be more meaningful albeit less certain. Statutory and court-made limits on intellectual property rights like fair use do not put the works into the ***637** public domain, but rather give the public access to works or information without infringing the property rights of the owner.

Another limit on rights that functionally expands what is available to the public is the widespread availability of some works, especially some works of perhaps low value in the sense that it is not worth suing to defend the intellectual property right.

The cost of litigation itself places some functional limit on the assertion of intellectual property rights and so affects the functional boundary of the public domain. Certain broad licenses put material into an almost unrestricted public domain in terms of access to and general use of the works--for example, open source software and "copyleft." [FN33]

The contours of the functional public domain are also affected in ways that restrict the public domain. Limits on access to information can make the status of a work as being in public domain illusory. For example, a painting for which the copyright has expired but which is held in a private collection and not shown to the public is technically in the public domain, but since it is difficult to access, it is functionally restricted.

There is a significant body of work surrounding issues about the public domain, [FN34] including the set of articles published from the November 2001 Duke Conference on the Public Domain. [FN35] As one might expect, the articles are provocative and interesting, are of varying quality, and display a variety of approaches to understanding the public domain. Among the ways of thinking about the public domain presented are the public domain (1) as analogous to the English commons of four centuries ago; [FN36] (2) as the negative image of what is protected (whatever is left after one defines what is protected); [FN37] (3) as an affirmative thing (the "claims" of the public domain compete with the claims of intellectual property rights holders); and (4) as a kind of ***638** status. [FN38] Other ideas, such as thinking of proprietary rights not as grounded in property but rather as grounded in a "liability regime," [FN39] considerations of moral rights, First Amendment limits, [FN40] and various rights like publicity rights, all affect thinking about the public domain. To this polyglot mixture I am adding the use of robust conceptions of the public interest from a very different direction--from the realm of civil rights.

One of the main functions of the public domain is to provide raw material for other works. [FN41] Very few works spring fully formed from the head of Zeus. The benefits of a robust public domain are related to the constitutional purpose for protecting intellectual property: to advance the general welfare by promoting "the Progress of Science and useful Arts." [FN42] Allowing people to build on the works of others advances the general welfare by allowing for more rapid creation and dissemination of new information and products. But, if all works and inventions entered the public domain as soon as they were created or discovered, then the incentive to create would be lessened for that large segment of the population driven by the desire to make money. To focus more narrowly on copyright, public domain material is in no small measure the very stuff from which copyrighted works are created. The public domain with respect to copyright includes primarily works in the following categories: works for which the duration of the copyright has expired; works for which the copyright is abandoned to the public domain; and the aspects of works that are not within the protectable subject matter of copyright, such as ideas, facts, formulas, recipes, processes, methods of operation, discoveries, and the like. It should be noted that although these items are in the public domain with respect to copyright, some of them may, under some circumstances, be protectable by patent (for example, processes) or trade secret (for example, formulas) and, therefore, may not be fully in the public domain for all purposes.

***639** B. Other Limits

There are many limits on the exercise of intellectual property rights other than the public domain. A few are noted briefly below followed by more extended discussion of the fair use doctrine and the first sale doctrine in the copyright context.

The Copyright Act creates a number of rights that attach to original works of authorship fixed in a tangible medium of expression. [FN43] But, many of those rights are subject to limitations and exceptions in the Copyright Act itself for reasons of public policy. [FN44] These limitations serve to balance some of the competing interests among creators, owners, marketers, users, consumers, and others. In some instances, the limitations affect the public interest in developing information and advancing the arts and sciences. [FN45] That is, Congress decided that the rights should be limited and

various uses that would otherwise infringe should be permitted. These limitations do not result in the works being put in the public domain, but they do make lawful certain uses of the works that would otherwise be infringing. [FN46]

The compulsory license for the performance of music balances the interest of making music available while compensating the composer. [FN47] In order to allow many people to record and perform music without directly obtaining permission to do so, the Copyright Act creates a compulsory license under which the copyright owner of the music is compelled to allow others to perform the music in exchange for a compulsory license fee.

There are many other provisions in the Copyright Act which give protection to some users. For example, the Copyright Act gives libraries archival rights in some circumstances where making a copy would otherwise infringe. [FN48] There are also detailed provisions balancing interests with respect to cable and satellite communications systems, [FN49] archiving digital works, [FN50] and much more. As a simple ***640** example, people can photograph architectural works without infringing the copyright in the work itself. [FN51]

The ability of a second comer in the patent area to use the information in the patent to create another, more advanced version of the patented item also serves the aim of progress in the art or science. [FN52] The prevalence of cross-licensing, especially between the underlying patent holder and the holder of the improvement patent, means that some items are more available than they might otherwise be simply because of economic incentives to make and sell the better product. [FN53] This too is outside of the public domain, but serves to meet the public interest in making useful information available.

Note that the concept of the public domain in its narrow sense is not used in the foregoing examples as the tool to define the contours of permitted use. Instead, equitable principles (for example, fair use) and negotiated limits (for example, compulsory licensing) are used to accomplish the aim of making not only the ideas in the works but also the works themselves available. The public interest is addressed not only through defining the contours of the public domain, but also through placing non-public domain limits on the intellectual property rights. Two of the more significant limits in copyright law are explained below in order to provide a somewhat deeper understanding of the non-public domain balancing that exists in intellectual property law.

1. Fair Use

Fair use allows people to use a work without permission provided that the use meets the multi-factor test. [FN54] Use of a work for criticism, comment, news reporting, teaching, scholarship, and research are generally allowed, although each of these uses is in turn limited. For example, one cannot reproduce an entire book which is in print and distribute it to one's students under the rubric of "fair use" even if the use is purely for teaching purposes. Whether a use qualifies as fair depends on the particular facts and circumstances of the case. [FN55] There is no use which will be presumed fair, though a number of uses, for ***641** example, parody [FN56] and use for news purposes, [FN57] are close to presumptively fair. The Copyright Act identifies four factors to be used to determine fair use: [FN58]
1.Purpose and character of the use. Is the use for commercial gain, education, or other non-profit use? Commercial uses are less likely to be found to be protected, with the important exception of parody.

2.Nature of the copyrighted work. Unpublished and published works are treated differently from each other as are works generally considered scientific as opposed to works of pure entertainment.

3.The quantity and the substantiality or importance to the work of the portion taken or used. The greater the amount of the work taken and the greater the importance of that portion to the work as a whole, the more likely the court is to find no fair use. Sometimes a very small part can be so much the essence of a work that taking just a small part could be considered not

fair use. The use of this factor varies tremendously from case to case and with the type of work involved.

4.The effect of the use on the potential market for or the value of the copyrighted work. This is often considered the most significant factor in determining fair use. Since the U.S. copyright law has an economic underpinning, tying fair use to the economic effects on the copyright holder makes some sense. But the lack of an adverse effect on the value of or market for the copyrighted work does not insulate the user from infringement.

The fair use doctrine advances the public interest by making available works that would otherwise be off limits. The roles of criticism, news, comment, teaching, and scholarship in serving the public interest are self-evident. These typically involve the use and limited reproduction of a portion of a work, or if all the work is reproduced (for example, a photograph), then the reproduction is limited to quantities related strictly to the need for the use such as criticism. But there is another category of works seeking the protection of the fair use doctrine which are more in the nature of works of the same type as the work being drawn upon by the putative infringer. For example, ***642** a musical parody or satire of an earlier musical work is partially a commentary on the first work, but is also a work of music in itself. [FN59]

One of the rights a copyright holder owns is the right to control making of derivative works. However, if interpreted too broadly or if some exceptions were not allowed, the right to control the creation of derivative works could remove the first work from the raw material available to make other works. An example of this is the book, The Wind Done Gone, which is a derivative work of Gone with the Wind. [FN60]

A problem with fair use, however, is that it is decided on a case-by-case basis with little predictability. Though the Pretty Woman and The Wind Done Gone cases have created a greater comfort zone and sense of predictability, there remain many works which still inhabit the netherworld of uncertainty. The public interest is served by the doctrine of fair use by allowing information and knowledge to be further developed without authors needing to be overly concerned about the idea/expression dichotomy and by allowing the creation of new works that are in some significant way derived from or take as part of their raw material the pre-existing copyrighted works.

2. First Sale Doctrine

The first sale doctrine addresses what the lawful owner of a copy of a copyrighted work can do with it. [FN61] The lawful owner of a copy can generally dispose of that copy by selling it, giving it away, or renting it out. Hence libraries can loan books, second hand booksellers can buy and sell books, and video stores can rent movies and video games. For other kinds of works, like paintings and sculptures, the first sale doctrine permits the owner of the copy to display the work, even to the public, so museums and businesses do not need additional permission to display works they own.

The first sale doctrine has a number of complexities, two of which arise from special provisions in the Copyright Act that prohibit the rental of sound recordings (for example, CDs) and computer software, even though such rentals would have been permitted under the general first sale doctrine. [FN62] Other complexities arise when copyright holders attempt to limit the effect of the first sale doctrine through licensing. For example, some computer software "shrink-wrap" or ***643** "click-on" licenses purport to limit the licensor from being able to resell or assign that license to another. The efficacy of this sort of attempt to circumvent the first sale doctrine is affected by one's sense of the sort of analysis that should be used. If the principles discussed below are used, one would be more likely to find such attempts to avoid the first sale doctrine illegal. If one takes a stronger property perspective or ignores the broader view, then they might be allowed.

In Part III below, I will return to some of these topics about limitations on copyright and examine them more closely in order both (1) to illustrate the application of the ideas from Brown and to test the limitations in light of the Brown principles as

well as (2) to test the utility of using some of the Brown ideas as a basis for assessing appropriate limits on intellectual property rights, especially in the field of copyright.

II. THE BROWN APPROACH TO SOCIAL JUSTICE AND THE PUBLIC GOOD

In this Part I seek to provide the context for understanding the principles from Brown that I chose to use. This section does not apply the principles to the intellectual property sphere nor is it a full critique or analysis of Brown. It is focused for the narrow purpose stated.

Brown is a remarkable decision in a number of ways--some obvious to everyone at the time of the decision; some discernable only after the passage of time; and some revealed only after careful study by experts. One of the curiosities of Brown is that it does not really explain much about the legal reasons for why it was decided as it was. [FN63] In part this is because at the core Brown was a very simple case premised more on facts than on law: legally forced separation did not in fact ever result in equal education, and the stigma attached to a legal badge of inferiority means that it never can. But even this paucity shows something profound about the legal justification: equal protection under law under the Fourteenth Amendment is rooted in substantive equality, not just in formal notions of nominally equal process. That is, for some kinds of cases and under certain rare circumstances, under the Fourteenth Amendment we look deeper than superficial aspects to see the effects and causes of inequality in conditions ***644** that contribute to or are caused by law. Framed as a question, we sometimes ask: Does a particular law or set of laws contribute to or undermine equality?

Although this overt, explicit consideration of the substantive effects of a law is rarely used in constitutional interpretation, Brown shows us that in the right circumstance it does have power. Brown permits or maybe even demands us to examine laws for their substantive effects. Though Brown shows that the substantive effects attack can even be used as a means of constitutional interpretation, we need not make our review a constitutionally based one; indeed, the constitutional attack is properly extremely difficult to make. But Brown legitimates using a direct social justice perspective to critique law for the purpose of seeking change through judicial interpretation as well as through legislative amendment. Where interpretation has gone wrong, for example, by being too focused on individual property rights and not sufficiently sensitive to the public interest, Brown provides an example of using the substantive results or effects of that law on the public good to critique and change the direction of the law. Judges can rely on the public interest aspects of intellectual property as mandated by the Constitution itself to interpret and even limit the Copyright Act. This approach has particular force in the intellectual property area because the copyright and patent clause clearly identifies the grant of limited property rights for a limited time as a means to the end of advancing the public interest through advancing and distributing information and knowledge. The end is not wealth for the creators of intellectual property; the end is advancing the general welfare of the nation.

Another curiosity is that Brown does not provide much guidance as to the contours of the world after the elimination of "separate but equal" as a constitutionally permissible principle. [FN64] It does not tell us when, if ever, separate can be lawful. [FN65] It does not tell us when, if ever, race can be used in a benign or beneficial way to assist excluded groups to gain full participation in the social, economic, and political life of the nation. [FN66] This is in part a result of the difference between ***645** judicial decisions which decide cases before them and which are in some sense looking backwards to past events on the one hand, and legislative action deciding on laws to govern conduct in the future on the other. Nonetheless, judicial decisions, especially constitutional Supreme Court decisions, need to provide guidance as to the standards to which people may conform their actions in the future and therefore unavoidably have this legislative aspect to them. In a decision that makes and marks a sea change like Brown, one cannot always foresee or develop the rules to govern future conduct. The elimination of legal apartheid in America led to an application of the law of unintended consequences. Where necessity had once created a second economic system run by and for African Americans, particularly in the hospitality industry in certain parts of the South, the removal of bars from the doors of the White hotels and restaurants led to the demise of much of that

second economy. On the other side of the unintended consequences coin, White resistance to the end of de jure desegregation led to increased de facto segregation in many places.

In short, Brown did not accomplish complete justice and did not necessarily set up the legal principles conducive to sufficiently progressive programs to accomplish equality in fact. As significant as Brown is, it may be that Brown's meaning is simpler and more modest. As stated by Professor Sunstein:
Suppose that this is the real meaning of the Court's decision: states may not, by law, separate citizens from one another by race, simply because forcible separation imposes a kind of stigma, or second-class citizenship, that offends the most minimal understanding of human equality. [FN67]

Thus Brown teaches, in part, that the inability to foresee the full impact of a decision in the public interest is not a sufficient reason not to make the right decision. Sometimes we need to be bold. Education in the time of Brown (as well as today) was too important not to decide the case in the public interest. Intellectual property is today similarly too important to ignore the public interest.

Despite its limits, Brown accomplished much. Brown directly prohibited states from requiring separation as a matter of law. It made illegal that which was commonplace in some parts of the country. ***646** Brown paved the way for the Civil Rights Act of 1964. Ultimately Brown led to federal action enforcing the prohibition on states from supporting discrimination through restrictive covenants, contracts, and other private means with public effects. [FN68] Making state-supported separation of the races illegal was critical to the future moves toward integration and legal equality and continues to be a cornerstone for continued progress toward social and economic justice.

Brown also provided a boost to the spirit of those seeking social justice. As so eloquently put by Martin Luther King in 1960: "For all men of good will May 17, 1954, came as a joyous daybreak to end the long night of enforced segregation . . . . It served to transform the fatigue of despair into the buoyancy of hope." [FN69]

The success of Brown and the African American civil rights movement has inspired others, including women and gays and lesbians, to use the levers of law, including courts and arguments based on constitutional rights, to advance the cause of social justice. [FN70] The current ferment in marriage rights [FN71] is not happenstance; it is the result of Brown-like planning and action among other things. All of these impacts show how a fundamental decision can inform the development of the law in a variety of areas. The area I examine below from the Brown perspective is intellectual property.

Today one of the main concerns with respect to equality relates to economic justice, and one major component of the economy is intellectual property. Thus principles of equality and economic justice should inform our understanding of intellectual property law. Some stark statistics illustrate how important it is to address economic equality. African Americans make up about 12.3% of the United ***647** States' population. [FN72] Only about 4% of the attorneys in the United States are African American and 2-3% of the physicians. [FN73] Statistics concerning relative wealth are equally telling and more compelling as they show the huge group disparities across the entire spectrum of the economy. In 1992, African Americans had a median net worth of only 8% of Whites. [FN74] Though this number has possibly improved, even if doubled, it is still very troubling. The median African American household income is about two-thirds of the median White American household income. [FN75] With the removal of legal barriers and dramatic reductions in social ones (though not yet eliminated), the pressing need of progress toward economic justice becomes increasingly obvious. [FN76] One area where African Americans need to participate fully is in intellectual property and its economic, social, and artistic fruits because intellectual property is so central to the economy and development of wealth today. [FN77]

***648** The main question examined in this Essay is the extent to which ideas mined from Brown may help in understanding or

in approaching thorny issues of economic justice in the area of intellectual property. Among the ideas from Brown (though not necessarily unique to nor originating in Brown in some instances) of possible use include:
Principle 1. Use current circumstances to evaluate law keeping in mind the effect on the public good.
Principle 2. Importance affects analysis. The importance of intellectual property today is analogous to the importance of education fifty years ago
Principle 3. Abuse of power to exploit or exclude others is improper and may rise to the level of being unconstitutional.
Principle 4. Intangible effects matter.

III. CONSIDERING COPYRIGHT AND THE PUBLIC INTEREST IN LIGHT OF PRINCIPLES UNDERLYINGBROWN

Principle 1. Use Current Circumstances to Evaluate Law Keeping in Mind the Effect on the Public Good.

In Brown, the Court examined the role of public education in the United States in the mid-twentieth century and concluded that public education was too important to allow exclusion of an entire segment of the public from it. The growth in size and importance of public education from the time of Plessy v. Ferguson [FN78] in the late nineteenth century justified a change in the constitutional interpretation of equality. Perhaps it seems unremarkable to assert that this principle as used in Brown ought to be used vigorously today, that we ought to judge intellectual property and the needs and interests of the public with respect to it by circumstances today, not those of 50 or 100 years ago. This principle has been followed in expanding copyright and patent to adapt to new technologies [FN79] and a changing world [FN80] in favor of the rights of the holders of the intellectual property, but it has not been applied as vigorously in favor of the public interest or the general welfare. That is, the aspect of intellectual property which is for ***649** the benefit of the public at large has been treated as less valuable than the protection of the claimed property rights of certain holders of the rights. The developments have not been all one-sided--the continued vitality of fair use and the creation of statutory limitations on rights are evidence of ongoing recognition of the limits of protection to be granted, but the undeniable trend is toward greater protection for more things.

Instead of a broad perspective which privileges the needs of society, instrumental approaches to interpretation are used to expand patent law to anything that seems useful and somewhat new (genes are not new--only knowledge of them is; business methods are not the stuff of historical patents--machines, process, chemicals, and the like--and including them ignores historically given meaning). [FN81] Is the public benefited by granting a particular vendor a patent in a method of doing business online which will exclude others from doing so? Should Sears (or whoever actually was first) have been granted a patent on the mail-order catalog business? Or should the competition be waged on the value of the implementation and service provided? Allowing patents for the human genome, the very code of life itself, and for mere ways of doing business clearly favor those asserting the rights over the direct interests of the public. New methods of doing business will be developed without patent protection; the search for understanding the human genome will continue without patenting it. Indeed, the public interest seems to barely enter the equation. The public is better served by widespread dissemination of new business models, not by internecine fights among businesses that tax methods like one-click shopping. Because intellectual property rights have become so important, as education had become by 1954, a more vigorous examination of assertions of rights as against the interests of the public at large should be undertaken.

Of course the public interest is arguably served by encouraging research into novel business methods or the human genome. But there is no evidence that the former is motivated or enhanced by intellectual property protection, and the latter may be simply wrong-headed when considering granting a limited few rights over the birthright of us all. Given the complexity of the world today, the rapid pace of change, the sheer quantity of inventions and the creation of ***650** works, the ill fit of many of the historical types of intellectual property to ongoing developments in software (especially utilitarian programs), in business methods, in genetic research, etc., and the widespread ignoring of or even active subversion of some forms of intellectual

property today, the idea of the public domain as being what is left after the intellectual property field contours are mapped does not meet our needs. As was the case in Brown, where access to public education was recognized as critically important to a fair and just society, so access to information and intellectual property, and the ability to protect one's own creations in appropriate cases, is important to social and economic justice.

In some cases the need to restrain overweening copyright has been recognized and the public good has been explicitly recognized in justifying these limits. For example, in the Pretty Woman case the value of satire and parody and the need to use the copyrighted work to make the parody work was recognized and supported. However, it was an after-the-fact assessment under the doctrine of fair use. Though the law is now more predictable in this respect, the use of fair use as the statutory basis makes the foundation somewhat tenuous given Congress' support for ever-increasing corporate rights in intellectual property. One can easily imagine fair use being restrained by Congress.

Another case in which the story of Gone with the Wind was told from the slave's perspective in The Wind Done Gone similarly relied upon the after-the-fact kind of analysis of fair use. There was little certainty even after the Pretty Woman case that courts would allow that sort of derivative parody to be made without permission.

In the recent peer-to-peer internet document transfer case, [FN82] we see the courts using a Brown-like underpinning with respect to the need to assess matters in light of current conditions to support the decision to permit such software in the face of the contrary decision in the Napster litigation. [FN83] Indeed, as stated by the Ninth Circuit,

[W]e live in a quicksilver technological environment with courts ill-suited to fix the flow of internet innovation. AT & T Corp. v. City of Portland, 216 F.3d 871, 876 (9th Cir. 1999). The introduction of new technology is always disruptive to old markets, and particularly to those copyright owners whose works are sold through well-established ***651** distribution mechanisms. Yet, history has shown that time and market forces often provide equilibrium in balancing interests, whether the new technology be a player piano, a copier, a tape recorder, a video recorder, a personal computer, a karaoke machine, or an MP3 player. Thus, it is prudent for courts to exercise caution before restructuring liability theories for the purpose of addressing specific market abuses, despite their apparent present magnitude. [FN84]

In specifically addressing the value to the public of such peer-to-peer software, the court cited, within the context of a substantial non-infringing use, evidence of those who benefit from it.

One striking example provided by the Software Distributors is the popular band Wilco, whose record company had declined to release one of its albums on the basis that it had no commercial potential. Wilco repurchased the work from the record company and made the album available for free downloading, both from its own website and through the software user networks. The result sparked widespread interest and, as a result, Wilco received another recording contract. Other recording artists have debuted their works through the user networks. Indeed, the record indicates that thousands of other musical groups have authorized free distribution of their music through the internet. In addition to music, the software has been used to share thousands of public domain literary works made available through Project Gutenberg as well as historic public domain films released by the Prelinger Archive. In short, from the evidence presented, the district court quite correctly concluded that the software was capable of substantial noninfringing uses and, therefore, that the Sony-Betamax doctrine applied. [FN85]

A close corollary of this first point is another important aspect of Brown that is less overtly stated, but equally significant: The Constitution is a living document dedicated to advancing social justice. In Brown, the Court was willing to examine an important constitutional doctrine from the perspective of the extent to which one idea or another is conducive to social justice. In Brown, the issue for social justice was racial equality; the field of dispute was education.

In the area of intellectual property, the social justice issue may not cut along racial lines per se, but rather along lines of exploited and disenfranchised groups regardless of race. Intellectual property law should serve to further social and economic justice as well as pocketbooks of property owners.

***652** Principle 2. Importance Affects Analysis. The Importance of Intellectual Property Today Is Analogous to the Importance of Education Fifty Years Ago.

A corollary to the first principle is that the importance of the matter affects the analysis. The Court is more likely to step in where the matters at stake are relatively important. In Brown, the importance stemmed from the long history of the denial of equality and from the ever-increasing importance of education to success in society. Though the intellectual property regime and its relationship to access to information and to the ability to protect one's creative works are not of the same magnitude as ending Jim Crow, intellectual property protection is nonetheless, in today's world, of extraordinary importance.

The very dissatisfaction with the current IP regime, its pervasiveness, and its importance are all indicators that even the basic ideas should be rethought. They ought not be changed merely for the sake of change, but perhaps the importance of intellectual property today changes the need for protection of the public domain and other limits on intellectual property. In Brown, the idea of "separate but equal" was overthrown in the field of education in no small part because of the importance of and wide-spread existence of public education by that time.

Intellectual property is important and touches people directly today in a way that it did not fifty years ago. People are more intimately users of and consumers of and purveyors of works and other intellectual property than ever before. We not only listen and watch, but we use. We play video games and use software on computers. We can now own movies that we previously only could watch in theaters. We can make copies of music and transfer it better and more easily than ever before. The ever-expanding frontiers of knowledge take us ever closer to the blueprint of life itself. The international commerce makes trade names and trademarks different from when business was mostly local.

Another point of contact might be the opportunity that digital technology provides as a means by which to utilize intellectual property regimes to link the goals of social equality and economic empowerment. [FN86] The Internet and all forms of digital technology are very ***653** important for success today. Online banking, online commerce, online communication, and online exchange of images and text and ideas are part of the daily fabric of the lives of tens-of-millions of U.S. citizens and indeed of millions more around the world. The dangers of granting too large a monopoly without some restrictions have already been seen in the Microsoft cases. [FN87] For functional works like operating systems and other sorts of software, copyright ought not permit a greater monopoly than sound principles of economics would support.

One area of obvious importance is the provision of drugs at affordable costs. Though well beyond the scope of this modest Essay, something seems seriously amiss when taxpayers fund research on drugs that are then brought to market and exploited at extraordinary prices for decades, especially in the face of crises like worldwide AIDS. [FN88] Indeed, the recent responses to the AIDS crisis in the lowering of prices of some drugs, and the conduct of many foreign countries of not protecting drug patents [FN89] show the application of a balance of the social good against corporate profit perhaps differently from the party currently ascendant in the United States. In the case of AIDS, the importance of the health issue is of the first order worldwide.

One other connection exists between the subjects of Brown then and intellectual property today: Education and intellectual property are both concerned with generating and disseminating information and knowledge. Every citizen should have effective access to both. One of the main justifications of protecting intellectual property is encouraging the generation and dissemination of information and knowledge. As was done in Brown where the Court carefully rethought fifty years of

standing law, courts and Congress should carefully scrutinize demands to expand copyright and other intellectual property rights.

***654** Principle 3. Abuse of Power to Exploit or Exclude Others Is Improper and May Rise to the Level of Being Unconstitutional.

Brown also teaches that the improper exploitation of and disempowerment of one group by another under sanction of law is contrary to the fundamental principles undergirding the United States. Under the facts of Brown, this principle rose to constitutional dimensions because of the Fourteenth Amendment equal protection implications. While the current regime of protection of intellectual property--particularly patent and copyright--may well be seen as exploitive by some groups over others, including, in particular, exploitation by corporate owners of intellectual property of traditionally weaker groups, the degree of exploitation does not rise to constitutional dimensions. But, neither the courts nor Congress should ignore the constitutional roots of intellectual property protection and the public good purpose of it. Allowing it to become unbalanced and exploitive would be contrary to the constitutional function of intellectual property protection and could ultimately reach constitutional dimensions. [FN90]

Principle 4. Intangible Effects Matter.

The Court in Brown teaches that intangible and non-economic but nonetheless real effects on people matter. The Court focused away from tangible aspects, like the bricks and mortar, the pay scale for teachers, and the transportation facilities available, and toward the psychological effects of the prior rule. Earlier, in the context of legal education, the Court had written of the importance of intangible aspects of a legal education: "his ability to study, engage in discussions and exchange views with other students, and, in general, to learn his profession." [FN91]

In Brown, the Court went even further to state, in the context of elementary and secondary education:
To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on ***655** their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

"Segregation of [W]hite and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system."

Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. [FN92]

As in education, intellectual property law, especially patent and copyright, is concerned with the "ability to study, engage in discussions and exchange views with other students, and, in general, to learn . . . ." [FN93] This exchange is part of what peer-to-peer exchange software is about. [FN94]

If this principle of attending to effects is followed in intellectual property matters, courts and Congress should focus away from a strict property analysis to broader social impacts, including economic, educational, and informational aspects. The impact of a particular law on the creativity of artists, on the needs of users, on the ability to use information contained in prior

works, and the like is not easy to quantify. As the dissents pointed out in Eldred, direct cause and effect between intellectual property regimes and results are difficult to assess and links are hard to draw. [FN95] But in some instances, the effects of the regime can be seen. Starting a suit or threatening to sue or actually pursuing a suit, as in The Wind Done Gone case, undoubtedly dissuades some from undertaking such creative projects. The abuse of controlling access to public domain material through asserting copyright ***656** in page numbers as in the Westlaw-Lexis litigation [FN96] (notwithstanding the too-clever-by-half argument based on the idea of protecting the concatenation which was used to deceive the Eighth Circuit) [FN97] similarly highlights the dangers inherent in ignoring effects tangible and intangible. How many works have not been made because of the threat of suit? How many works have not been made because of the raw economic power of Microsoft as supported by its copyrights? These intangible effects matter and should be taken into account.

CONCLUSION

The aim of this modest Essay is less to prove than to provoke. The idea is to seek fresh sources of inspiration to examine the public interest aspect of the increasingly important area of law called intellectual property. As some have sought to analogize to the idea of a commons, I have sought some guidance from outside the domain of intellectual property law from what is perhaps the most important Supreme Court decision of the twentieth century. As the Court did with respect to education and racial discrimination in Brown, so should we do in intellectual property law. We ought not examine intellectual property only from a property perspective or only from the perspective of the creator or funder or exploiter of the rights or only from the perspective of conservative stare decisis. Instead we should examine intellectual property issues from the perspective of social good and the public interest and the interests of all groups involved. We need intellectual property law to be a transformative force for social and economic justice like the statutory actions of Congress in the Civil Rights Act of 1964 and the actions of the Supreme Court in Brown forty and fifty years ago.

As stated by Justice Breyer in dissent in Eldred, the Court
must seek "to promote the Progress" of knowledge and learning; and . . . they must do so both by creating incentives for authors to produce and by removing the related restrictions on dissemination after expiration of a copyright's "limited Tim[e]" a time that (like "a limited monarch") is "restrain[ed]" and "circumscribe[d]," "not [left] at large," 2 S. Johnson, A Dictionary of the English Language ***657** 1151 (4th rev. ed. 1773). I would examine the statute's effects in light of these well-established constitutional purposes. [FN98]

[FNa1]. Professor of Law and Associate Director of the Institute of Intellectual Property and Social Justice (IIPSJ), Howard University School of Law. I am indebted to the Howard University School of Law for its financial support for this work and to Associate Professor Lateef Mtima, Director of IIPSJ, for his encouragement and support and comments on earlier versions of this Essay.

[FN1]. See Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

[FN2]. See infra Part III.

[FN3]. Pamela Samuelson, The Public Domain: Mapping the Digital Public Domain: Threats and Opportunities, 66 Law & Contemp. Probs. 147, 170-71 (2003).

[FN4]. See generally Paul Goldstein, Copyright's Highway: From Gutenberg to the Celestial Jukebox (1994).

[FN5]. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified at 17 U.S.C. § 302).

[FN6]. 35 U.S.C. § 154 (2004).

[FN7]. See generally J.H. Reichman, Legal Hybrids Between the Patent and Copyright Paradigms, 94 Colum. L. Rev. 2432 (1994).

[FN8]. See 17 U.S.C. ch. 9 (prec. § 901).

[FN9]. U.S. Patent & Trademark Office, Patent Business Methods, at http:// www.uspto.gov/web/menu/pbmethod/ (last visited Feb. 3, 2005) (information page) [hereinafter Patent Business Methods].

[FN10]. See Diamond v. Chakrabarty, 447 U.S. 303 (1980).

[FN11]. See New York Times Co. v. Tasini, 533 U.S. 483 (2001); see also Microsoft Volume Licensing, at http://www.microsoft.com/licensing/default.mspx (last visited Feb. 3, 2005).

[FN12]. European Database Directive, Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, at http://europa.eu.int./ISPO/infosoc/legreg/docs/969ec.html (last visited Feb. 3, 2005).

[FN13]. See Eric J. Sinrod, RIAA Music Lawsuits Chill Online Downloading, USA Today, Cyberspeak (Jan. 14, 2004), available at http:// www.usatoday.com/tech/columnist/ericjsinrod/2004-01-15-sinrod_x.htm.

[FN14]. See, e.g., Apple iTunes and iPod, at http://www.apple.com/itunes/ (last visited Feb. 3, 2005).

[FN15]. See Danny Sullivan, Search Engine Sizes, Search Engine Watch (Sept. 2, 2003), at http://searchenginewatch.com/reports/article.php/2156481; University of California BerkleySchool of Information Management and Systems, How Much Information?, 2003 Executive Summary (2003), at http:// www.sims.berkeley.edu/research/projects/how-much-info-2003/execsum.htm (Oct. 27, 2003).

[FN16]. E.g., U.S. Supreme Court Cases, available at http:// www.supremecourtus.gov/ (last visited Feb. 3, 2005).

[FN17]. See The Internet Movie Database, at http://www.imdb.com/ (last visited Feb. 3, 2005).

[FN18]. For example, some of the author's professional scholarship is available for downloading from his website, http:// www.law.howard.edu/faculty/pages/jamar/scholarship/index.html (last visited Feb. 3, 2005).

[FN19]. E.g., Julie E. Cohen, Intellectual Property and the Information Economy, in Cyber Policy and Economics in an Internet Age 94-112 (William Lehr & Lorenzo Pupillo eds., 2002); Mike Musgrove, Microsoft to Share Source Code with Governments, Wash. Post, Sept. 21, 2004 at E5, available at http:// www.washingtonpost.com/wp-dyn/articles/A36880-2004Sep20.html; see also International Information Programs, various publications, at http:// usinfo.state.gov/products/pubs/intelprp/progress.htm (last visited Feb. 3, 2005).

[FN20]. See Dennis S. Karjala, The Relative Roles of Patent and Copyright in the Protection of Computer Programs, 17 J. Marshall J. Computer & Info. L. 41 (1998) (arguing to limit copyright protection to the literal elements of computer programs).

[FN21]. U.S. Const. art. I, § 8, cl. 8.

[FN22]. Computer Assoc. Int'l, Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992).

[FN23]. Eldred v. Ashcroft, 537 U.S. 186, 215-17 (2003).

[FN24]. 17 U.S.C. § 115 (2004).

[FN25]. Id. § 107.

[FN26]. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345- 48 (1991).

[FN27]. Uniform Trade Secret Act § I (4)(ii) (1985); National Conference of Commissioners on Uniform State Laws, available at http:// www.law.upenn.edu/bll/ulc/fnact99/1980s/utsa85.htm.

[FN28]. See Bayer Co. v. United Drug Co., 272 F. 505 (S.D.N.Y. 1921). Xerox publishes advertisements to protect its trademark from becoming a generic term for photocopying. See Jane C. Ginsburg et al., Trademark and Unfair Competition Law 317-28 (3d ed. 2001) (reproductions of various advertisements over the years trying to protect trademarks).

[FN29]. E.g., Vessel Hull Design Protection Act, 17 U.S.C. § 1301 et seq.; see also Reichman, supra note 7.

[FN30]. Samuelson, supra note 3, at 149.

[FN31]. Id. at 151.

[FN32]. Id. at 148-50.

[FN33]. GNU Project, What is Copyleft?, at http:// www.gnu.org/copyleft/copyleft.html (last visited Feb. 3, 2005).

[FN34]. E.g., David Lange, Recognizing the Public Domain, 44 Law & Contemp. Probs. 147 (1981); Jessica Litman, The Public Domain, 39 Emory L.J. 965 (1990).

[FN35]. Collected Papers, Duke Conference on the Public Domain, 66 Law & Contemp. Probs 1 (2003) (James Boyle ed.), available at http:// www.law.duke.edu/journals/lcp/indexpd.htm.

[FN36]. James Boyle, The Second Enclosure Movement and the Construction of the Public Domain, 66 Law & Contemp. Probs., 33, 62-69 (2003). Boyle argues that the enclosure of old English village commons or grazing commons centuries ago provides a useful analogy to the current trend to "fence off" or otherwise enclose information with property rights. The privatization of the commons then is analogized to the effect of expanding intellectual property rights in privatizing information today.

[FN37]. See Samuelson, supra note 3.

[FN38]. David Lange, Reimagining the Public Domain, 66 Law & Contemp. Probs. 463, 474-76 (2003).

[FN39]. Boyle, supra note 36, at 62-69.

[FN40]. Jed Rubenfeld, The Freedom of Imagination: Copyright's Constitutionality, 112 Yale L.J. 1 (2002).

[FN41]. Litman, supra note 34.

[FN42]. U.S. Const. art. I, § 8, cl. 8.

[FN43]. 17 U.S.C. §§ 102, 106 (2004).

[FN44]. Id. §§ 107-122.

[FN45]. Especially fair use, discussed below.

[FN46]. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (Pretty Woman); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001) (The Wind Done Gone).

[FN47]. 17 U.S.C. § 115 (compulsory license for performance of music after first performance).

[FN48]. Id. § 108.

[FN49]. Id. §§ 111, 114, 122.

[FN50]. Id. § 117.

[FN51]. Id. § 120.

[FN52]. See Robert Merges, Intellectual Property Rights and Bargaining Breakdown: The Case of Blocking Patents, 62 Tenn. L. Rev. 75 (1994).

[FN53]. See, e.g., Carpet Seaming Tape Licensing v. Best Seam, Inc., 616 F.2d 1133 (9th Cir. 1980).

[FN54]. 17 U.S.C. § 107 (2004).

[FN55]. See Harper & Row, Publishers, Inc., v. Nation Enter., 471 U.S. 539 (1985).

[FN56]. E.g., Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (Pretty Woman); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001) (The Wind Done Gone).

[FN57]. But see Harper & Row, Publishers, Inc., 471 U.S. 539 (directly quoting from President Gerald Ford's book before it was published not fair use despite newsworthiness of the information).

[FN58]. 17 U.S.C. § 107 (2004).

[FN59]. Campbell, 510 U.S. 569 (Pretty Woman).

[FN60]. Suntrust Bank, 268 F.3d 1257 (The Wind Done Gone).

[FN61]. 17 U.S.C. § 109(b).

[FN62]. Id.

[FN63]. See Bruce Ackerman et al., What Brown v. Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision (Jack M. Balkin ed., 2001) (presenting various alternative opinions).

[FN64]. Some view this as a deep failure. E.g., Derrick Bell, Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform (2004).

[FN65]. Schools segregated because of housing demographics arising from uncoordinated personal decisions about where to live are not unconstitutional. Sch. Dist. No. 1, Denver, Colo. v. Keyes, 413 U.S. 921 (1973).

[FN66]. Affirmative action programs designed to redress subordination should be legal. But Brown does not by its terms prohibit a court moving in the direction of color-blindness as a constitutional principle. See Cass R. Sunstein, Did Brown Matter?, New Yorker, May 3, 2004, at 102, 106. On the fiftieth anniversary of the fabled desegregation case, not everyone is celebrating.

[FN67]. Sunstein, supra note 66, at 106.

[FN68]. Civil Rights Act of 1964, 42 U.S.C. § 2000a-2000h-6 (1988); Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3619, 3631 (1988).

[FN69]. Martin Luther King, Jr., The Rising Tide of Racial Consciousness, in I Have a Dream: Writings and Speeches That Changed the World 65 (James Melvin Washington ed., 1986).

[FN70]. See Sara Evans, Personal Politics: The Roots of Women's Liberation in the Civil Rights Movement and the New Left (1980); Devon W. Carbado & Donald Weise, The Civil Rights Identity of Bayard Rustin, 82 Tex. L. Rev. 1133 (2004); Serena Mayeri, "A Common Fate of Discrimination": Race-Gender Analogies in Legal and Historical Perspective, 110 Yale L.J. 1045 (2001); Judy Scales-Trent, Equal Rights Advocate: Addressing the Legal Issues of Women of Color, 13 Berkeley Women's L.J. 34 (1998). The limits of using civil rights strategy has itself been the topic of academic discussion. See, e.g., Odeana R. Neal, The Limits of Legal Discourse: Learning from the Civil Rights Movement in the Quest for Gay and Lesbian Civil Rights, 40 N.Y.L. Sch. L. Rev. 679 (1996).

[FN71]. E.g., Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

[FN72]. Overview of Race and Hispanic Origin, Census 2000 Brief, Issued March 2001, at 3, available at http://www.census.gov/prod/2001pubs/c2kbr01- 1.pdf (last visited Feb. 3, 2005); U.S. Census Bureau, Uncle Sam's Reference Shelf: Mini Historical Statistics, available at http:// www.census.gov/statab/www/minihs.html (last revised Jan. 18, 2005).

[FN73]. Statistical Abstract of the United States, 2003 (Section 12, Labor Force, Employment and Earnings), available at http:// www.census.gov/prod/2004pubs/03statab/labor.pdf (See table 615 for detailed breakdowns of the racial categories and occupational titles.).

[FN74]. Lisa A. Keister, Family Structure, Race, and Wealth Ownership: A Longitudinal Exploration of Wealth Accumulation Processes, Working Paper No. 304 (forthcoming May 2000), at http:// ideas.repec.org/p/wpa/wuwpma/0004051.html (last updated Feb. 1, 2005); see also Sharmila Choudhury, Racial and Ethnic Differences in Wealth and Asset Choices, tbl.3, at http://www.ssa.gov/policy/docs/ssb/v64n4/v64n4p1.html (last visited Feb. 3, 2005) (showing that even for those households with net worth, Blacks have about 50% the net worth of Whites).

[FN75]. Sharmila Choudhury writes:
Although wealth varies substantially by race and ethnicity, little of that disparity can be explained by differences in income or demographic characteristics. In fact, the wealth gap far exceeds the income gap. The large body of empirical studies on wealth (for example, Wolff 1998, 2000; Hurst, Luoh, and Stafford 1998; and Blau and Graham 1990) shows that [W]hite households have at least five times the wealth of minority households yet earn, on average, just twice as much as minority

households.
Chodhury, supra note 74 (internal cites are to: Edward N. Wolff, Recent Trends in Wealth Ownership, Working Paper No. 300 (New York: Jerome Levy Economics Institute 2000); Edward N. Wolff, Recent Trends in the Size Distribution of Household Wealth, 12 J. Econ. Persp., 131-50 (1998); Erik Hurst et al., The Wealth Dynamics of American Families, 1984-94, I Brookings Papers on Economic Activity 267-329 (1998); Francine D. Blau & John W. Graham, Black-White Differences in Wealth and Asset Composition, 105 Q. J. Econ. 321-39 (1990)).

[FN76]. See generally, Melvin L. Oliver & Thomas M. Shapiro, Black Wealth, White Wealth: A New Perspective on Racial Inequality (1997); Thomas M. Shapiro, The Hidden Cost of Being African American: How Wealth Perpetuates Inequality (2004); W. Sherman Rogers, The Black Quest for Economic Liberty: Legal, Historical, and Related Considerations, 48 How. L.J. 1 (2004).

[FN77]. See Robert M. Sherwood, Intellectual Property and Economic Development (1990).

[FN78]. 163 U.S. 537 (1896).

[FN79]. Trotter Hardy, Property (and Copyright) in Cyberspace, 1996 U. Chi. Legal F. 217 (1996).

[FN80]. Ruth Gana Okediji, Copyright and Public Welfare in Global Perspective, 7 Ind. J. Global Legal Stud. 117 (1999).

[FN81]. AT&T Corp. v. Excel Comms., Inc., 172 F.3d 1352 (Fed. Cir. 1999); State Street Bank & Trust Co. v. Signature Fin. Group, Inc., 149 F.3d 1368 (Fed. Cir. 1998); Patent Business Methods, supra note 9.

[FN82]. Metro-Goldwyn-Mayer v. Grokster Ltd., 380 F.3d 1154 (9th Cir. 2004).

[FN83]. A&M Records, Inc. v. Napster, Inc. 284 F.3d 1091 (9th Cir. 2002) (Napster II); A&M Records, Inc. v. Napster, Inc. 239 F.3d 1004 (9th Cir. 2001), aff'd, 284 F.3d 1091 (Napster I).

[FN84]. Grokster Ltd., 380 F.3d at 1167.

[FN85]. Id. at 1161-62.

[FN86]. See Lateef Mtima, African-American Economic Empowerment Strategies for the New Millennium-Revisiting the Washington-DuBois Dialectic, 42 How. L.J. 391 (1999).

[FN87]. E.g., United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001); see also Andrew I. Gavil, The End of Antitrust Trench Warfare?: An Analysis of Some of the Procedural Aspects of the Microsoft Trial, 13 SUM Antitrust 7 (1999); U.S. Department of Justice Antitrust Division Website, at http://www.usdoj.gov/atr/cases/ms_index.htm.

[FN88]. Firms to Offer Low-Cost AIDS Drugs in Africa, Wash. Post, Oct. 24, 2003, at A2; U.S. Plan Puts Generic AIDS Combinations on Fast Track, Wash. Post, May 16, 2004, at A18.

[FN89]. E.g., Rosemary Sweeney, The U.S. Push for Worldwide Patent Protection for Drugs Meets the AIDS Crisis in Thailand: A Devastating Collision, 9 Pac. Rim L. & Pol'y J. 445 (2000).

[FN90]. See Eldred v. Ashcroft, 537 U.S. 186 (2003).

[FN91]. McLaurin v. Oklahoma State Regents, 339 U.S. 637, 641 (1950) (quoted with approval in Brown v. Bd. of Educ.,

347 U.S. 483, 493 (1954)).

[FN92]. Brown, 347 U.S. at 494.

[FN93]. McLaurin v. Oklahoma State Regents, 339 U.S. 637 (quoted with approval in Brown, 347 U.S. at 493).

[FN94]. Metro-Goldwyn-Mayer v. Grokster Ltd., 380 F.3d 1154, 1167 (9th Cir. 2004).

[FN95]. Eldred, 537 U.S. at 239-40 (Stevens, J., dissenting), 248-50 (Breyer, J., dissenting).

[FN96]. Matthew Bender & Co., Inc. v. West Publ'g Co., 240 F.3d 116 (2d Cir. 2001); West Publ'g Co. v. Mead Data Cent., Inc., 616 F. Supp. 1571 (D. Minn. 1985), aff'd, 799 F.2d 1219 (8th Cir. 1986), cert. denied, 479 U.S. 1070 (1987).

[FN97]. Id.

[FN98]. Eldred, 537 U.S. at 247-48 (Breyer, J., dissenting).

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