
RESPONSE

E-SPORTS AS A PRISM FOR THE ROLE OF EVOLVING TECHNOLOGY IN INTELLECTUAL PROPERTY

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In response to Dan L. Burk, *Owning e-Sports: Proprietary Rights in Professional Computer Gaming*, 161 U. PA. L. REV. 1535 (2013).

INTRODUCTION

In this Symposium on the Evolving Internet, I have been asked to provide some reflections on Dan Burk's thoughtful Article analyzing proprietary rights in e-sports.¹ E-sports, or professional video gaming, is already big business in South Korea and is becoming increasingly popular in the United States. Professional gaming competitions and their distribution present myriad intellectual property (IP) questions, particularly about the "ownership and control of rights in player performances,"² given that the competitions are publicly performed and often broadcast and streamed online. Professor Burk suggests ways current IP law might analyze some of the

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¹ Dan L. Burk, *Owning e-Sports: Proprietary Rights in Professional Computer Gaming*, 161 U. PA. L. REV. 1535 (2013).

² *Id.* at 1536.

complex questions raised by e-sports.³ In this Response, I focus on what e-sports reveals about how IP law should engage with new industries, technologies, and media of expression.

New industries and new technologies often influence the development of IP law. Copyright law, in particular, has always evolved in the face of new technology, such as the printing press and player piano rolls; however, until recently, copyright's evolution has been slow and the changes to the law ostensibly technologically neutral. Over the last twenty years, however, Congress has shifted gears and repeatedly passed technology-specific legislation to address new inventions and industries.⁴ As a result, copyright law has become unwieldy, overly complex, and incoherent to lay people and experts alike.⁵ Worse still, the law has become ossified in the face of rapidly changing technology that calls for nimbleness and flexibility.

New York Times technology columnist David Pogue has likened keeping up with the pace of new technological developments to "drinking out of a fire hose."⁶ Computers and phones become obsolete almost as soon as they are purchased, and the next big thing could transform markets and industries overnight (as iTunes and the iPhone have). The rapidity of such changes, especially in the context of computer technology and Internet applications, presents many challenges for the law, and for potential legislation in particular. In the context of e-sports and video games, there have already been calls to pass legislation addressing some of the ownership conflicts that have arisen or that are anticipated.⁷

In this Response to *Owning e-Sports*, I consider the ways in which IP law can address the IP questions raised by changing technology and emerging industries. IP laws cannot shift with every new invention or business. If Congress relies on industry-specific legislation, trying to intervene in each emerging or anticipated problem wrought by new technology, then our IP system will fail us. Instead, the common law and broader principles of IP law are tools better designed to address these novel IP questions.

³ See *id.* at 1544-77 (analyzing e-sports through the lens of copyright and alternative legal regimes, such as the right of publicity and "neighboring rights").

⁴ See *infra* notes 59-65 and accompanying text.

⁵ See David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233, 1331 (2004) (describing the current state of copyright law as a "hopeless mishmash").

⁶ David Pogue, Tech. Columnist, N.Y. TIMES, Keynote Address at the University of Pennsylvania Law Review Symposium: The Evolving Internet, at 47:21 (Oct. 20, 2012), available at https://www.law.upenn.edu/cf/newsroom/its_player.cfm?path=/pennlaw/temp/Evolving/Law_Review_Evolving_Keynote.mov.

⁷ See, e.g., Tyler T. Ochoa, *Who Owns an Avatar? Copyright, Creativity, and Virtual Worlds*, 14 VAND. J. ENT. & TECH. L. 959, 991 (2012) (advocating new amendments to the Copyright Act to address ownership issues for video game players and providers).

E-sports presents a useful case study of alternative ways of thinking about technological changes and challenges to the IP system. My analysis focuses on two primary insights. First, by revealing the inadequacy of the initial analytical or doctrinal move made by courts, new industries and technologies can illuminate missteps taken in IP common law. I consider two examples in the context of e-sports: the use of “persona” in right of publicity law, and the “initial interest confusion” doctrine in trademark law.

Second, a new context can highlight open and unanswered questions in IP law that need to be addressed, sometimes by legislation, but more often by applying existing law and focusing on the basic principles that underlie the relevant area of law. I consider the example of how copyright law addresses increasingly public uses of copyrighted content.

I. PEERING OVER THE PRECIPICE

New contexts sometimes reveal the need to recalibrate or overthrow a flawed doctrine. I focus on two examples of this effect, both of which are raised in the context of e-sports: first, the use of persona in right of publicity law; and second, the initial interest confusion doctrine in trademark law. Both doctrines have expanded in recent years, and I have criticized them both elsewhere, at some length.⁸ Considering both examples in the context of e-sports provides further proof of the bankruptcy of these doctrines and the ways in which new technology pushes them to their logical extreme, thereby revealing their fundamental flaws.

A. *Persona and the Right of Publicity*

The right of publicity provides a cause of action when a person or entity uses another’s identity without permission.⁹ Although Professor Burk suggests that the right of publicity usually requires a physical manifestation of the person,¹⁰ in recent years, the right of publicity has swept more

⁸ See, e.g., Jennifer E. Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 CARDOZO L. REV. 105, 122 (2005) [hereinafter Rothman, *Initial Interest Confusion*] (“The bulk of my criticism of initial interest confusion is directed at the use of the term when there is no finding of likely confusion, but instead only a finding of initial *interest*.”); Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199, 206 (2002) [hereinafter Rothman, *Copyright Preemption*] (“The application of persona to right of publicity actions allows publicity holders to take property rights in an idea—in contravention of the principles behind copyright law [and] severely constrain[ing] the creative ability of authors, the public, and copyright holders who wish to create both original and derivative works.”).

⁹ Rothman, *Copyright Preemption*, *supra* note 8, at 202.

¹⁰ See Burk, *supra* note 1, at 1569-70 (“[A]pplicability of [publicity] rights is often clearest when the personal trait at issue relies on material, usually bodily, portrayal.”).

broadly. Initially, liability was limited to uses of a person's name, likeness, or image; however, the scope of the right has expanded (at least in common law jurisdictions) to include the concept of "persona."¹¹ Persona encompasses anything that evokes the person of an "identity-holder" (the person upon whom the right of publicity is based).¹² The breadth of the concept leads to liability even when an identity-holder's identity has not, in fact, been used; instead, a defendant can be held accountable for causing a mere mental association with the identity-holder.¹³ Such an expansion of the scope of the right of publicity raises serious First Amendment concerns, often conflicts with copyright holders' rights, and expands the right beyond the heartland personality and economic interests that justify protecting the right of publicity in the first place.¹⁴

The case most prominently associated with the concept of persona is *White v. Samsung Electronics America, Inc.*, decided in 1992 by the Ninth Circuit Court of Appeals.¹⁵ *White* involved a Samsung advertisement for its videocassette recorders (VCRs) that promoted the products' longevity.¹⁶ To bring this point home, the commercial featured a robot wearing a dress and a blond wig, turning letters on the *Wheel of Fortune* set (or at least a recognizable replica of the show's set).¹⁷ On-screen with the robot was a caption reading, "Longest-running game show. 2012 A.D."¹⁸ Neither White's name, nor likeness, nor voice was used in the commercial; therefore, no viewer was likely to think that she had appeared in the commercial. Nevertheless, the Ninth Circuit held that because the Samsung robot evoked White's identity, her right of publicity claim was sufficient to overcome Samsung's summary judgment motion and proceed to trial.¹⁹

¹¹ Rothman, *Copyright Preemption*, *supra* note 8, at 204-05.

¹² *Id.* at 205. I have coined the term "identity-holder" to distinguish the person upon whom the right of publicity is based from the "publicity-holder," who is the person who owns the right. If the right of publicity is transferable, these two people need not be the same. See Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 187, 234-37 (2012) (providing an in-depth discussion of this terminology and contending that the right of publicity should not be transferable *inter vivos*).

¹³ Rothman, *Copyright Preemption*, *supra* note 8, at 205.

¹⁴ *Id.* at 205-06, 222-25, 252-53, 257-58.

¹⁵ 971 F.2d 1395 (9th Cir. 1992).

¹⁶ *Id.* at 1396.

¹⁷ *Id.* *Wheel of Fortune* is the television game show in which Vanna White turns letters on a game board to help contestants solve word puzzles.

¹⁸ *Id.* The year 2012 has now come and gone, but when the commercial was made it seemed far off, in a future filled with spaceships and robots.

¹⁹ *Id.* at 1397-99.

Judge Alarcon dissented in part from the decision.²⁰ Regarding the right of publicity, he concluded that it was “patently clear to anyone viewing the commercial advertisement that Vanna White was not being depicted. No reasonable juror could confuse a metal robot with Vanna White.”²¹ Alarcon criticized the majority for allowing White’s right of publicity claim to go to a jury solely on the basis that viewers would make an association between the Samsung robot and White (and, in particular, the role that she plays on *Wheel of Fortune*).²² Judge Kozinski similarly criticized the decision in his dissent from the denial of Samsung’s petition to rehear the case en banc.²³ He objected to the possibility of liability for merely “evok[ing] the celebrity’s image in the public’s mind.”²⁴ Kozinski warned that this “Orwellian” notion of persona would give “every famous person . . . an exclusive right to anything that reminds the viewer of her.”²⁵

Judge Kozinski’s fears have proven well founded as subsequent cases have built upon *White*’s expansive interpretation of publicity rights.²⁶ In *Wendt v. Host International, Inc.*, for example, the Ninth Circuit permitted a right of publicity case to go forward against the operators of airport bars designed to remind customers of the set from the hit television series *Cheers*.²⁷ Each bar featured two animatronic robots that were dressed similarly to the characters of Norm and Cliff from the series.²⁸ George Wendt and John Ratzenberger, the actors who portrayed those characters on the show, sued, claiming that their likenesses and identities had been used without their permission.²⁹ The District Court for the Central District of California concluded that the robots did not look like the actors and that no

²⁰ White sued Samsung under three theories: the right to privacy, the right of publicity, and the Lanham Act. *Id.* at 1402 (Alarcon, J., concurring in part, dissenting in part). Judge Alarcon concurred in the majority’s denial of White’s right to privacy claim, but dissented from the majority’s holding that White’s right to publicity and Lanham Act claims could go to the jury. *Id.*

²¹ *Id.* at 1404.

²² *Id.* at 1405.

²³ *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1514 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc).

²⁴ *Id.*

²⁵ *Id.* at 1514-15.

²⁶ See, e.g., *Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 811 (9th Cir. 1997) (noting that the “common-law right of publicity protects more than the knowing use of a plaintiff’s name or likeness It also protects against appropriations of the plaintiff’s identity by other means” (citing *White*, 971 F.2d at 1398)).

²⁷ *Id.* at 808-09.

²⁸ Responding Brief of Defendant and Appellee Host International, Inc. at 1, *Wendt*, 125 F.3d 806 (No. 96-55243). The defendant, Host International, had licensed the use of the characters and the *Cheers* set and name from Paramount Pictures, the producer and copyright holder of the show and its characters. *Id.*

²⁹ *Wendt*, 125 F.3d at 809.

reasonable jury could find otherwise.³⁰ The Ninth Circuit reversed this grant of summary judgment and decided, without elaboration, that the case should proceed to trial because there were “material facts . . . that might cause a reasonable jury to find [the robots] sufficiently ‘like’ the appellants.”³¹

Judge Kozinski dissented from the denial of rehearing en banc in *Wendt*, bemoaning “[r]obots again.”³² He described the panel’s conclusion as a “curt assertion,” offered with “little explanation,” and one that was unjustified in light of the usual deference to district courts on findings of fact.³³ More importantly in the context of this discussion, Kozinski concluded that the panel’s analysis could only make sense under a broad understanding of likeness and identity.³⁴ He interpreted the panel’s decision as allowing liability for the mere evocation of the actors in the minds of the bar’s customers: “[T]he panel allows the plaintiffs to pick up where Vanna left off: . . . anyone who wants to use a figure, statue, robot, drawing or poster that *reminds* the public of *Wendt* and *Ratzenberger* must first obtain (and pay for) their consent.”³⁵

Reading *White* and *Wendt* together demonstrates that a right of publicity claim may arise not only when the names, signatures, voices, and likenesses of plaintiffs are used, but also when the use of a character simply brings to mind an actor who played such a character. Such an effect is likely to occur frequently with respect to characters from television shows or movies.³⁶ Much as *White* was able to recover more than \$400,000 from a jury for a “robot [that] looked nothing like her,”³⁷ *Wendt* left open the door for *Wendt* and *Ratzenberger* to recover even if the robots were found not to look like them. Unsurprisingly, rather than take their chances with a jury, *Host* and *Paramount* settled out of court with the two actors.³⁸

³⁰ *Wendt v. Host Int’l, Inc.*, No. 93-0142-R, 1996 WL 34448499, at *1 (C.D. Cal. Jan. 19, 1996), *rev’d*, 125 F.3d 806; *see also Wendt*, 125 F.3d at 809-10 (noting that the district court could not find “any similarity at all” between the robots and the actors).

³¹ *Wendt*, 125 F.3d at 810.

³² *Wendt v. Host Int’l, Inc.*, 197 F.3d 1284, 1285 (9th Cir. 1999) (Kozinski, J., dissenting from denial of rehearing en banc).

³³ *Id.*

³⁴ *See id.* at 1285-87 (attributing the Ninth Circuit’s holding to the “unbounded right of publicity announced in *White*”).

³⁵ *Id.* at 1286 (emphasis added).

³⁶ *See id.* at 1286-87 (arguing, as an illustration of the implications of *Wendt*, that the copyright holders of the television series *Seinfeld* could be prevented from recasting the character of Newman in a spin-off series); *see also Wendt*, 125 F.3d at 811 (citing with approval *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (9th Cir. 1974), in which the court held that the use of an image of a race car similar to one driven by the plaintiff could give rise to a right of publicity claim even though neither the plaintiff’s name, nor likeness, nor image were used); *Rothman, Copyright Preemption*, *supra* note 8, at 210-14, 222-25, 252-54, 257-62.

³⁷ *Wendt*, 197 F.3d at 1287.

³⁸ *Norm and Cliff Cheered by Lawsuit*, CHI. TRIB., June 22, 2001, at C2.

In the context of e-sports, the doctrine of persona is taken to its logical extreme in a way that demonstrates the concept's hollowness. With new technologies, what constitutes a "persona" is virtually limitless. In her study of e-sports, sociologist T.L. Taylor suggests that e-sports players have specific, recognizable styles of play.³⁹ Burk raises the possibility that the right of publicity—or a similar right—might protect these distinctive styles and prevent others from adopting similar styles.⁴⁰ This prospect is not far-fetched, given that persona has been used to protect a singer's vocal style, even though neither his voice nor his music were used in an advertisement for tortilla chips.⁴¹

Protecting a unique playing style under right of publicity law would severely constrain other players who might wish to adopt a similar style (perhaps because they want to pay homage to a successful pro or because the style itself might make them more likely to succeed at the game) or who organically have a similar style of play. Such an extension of the right of publicity highlights the thin ice on which the doctrine of persona sits. The mere evocation of style or the spurring of mental associations should not establish a use deserving of liability.

Similar to e-sports' illumination of the pitfalls of using persona to establish a violation of the right of publicity, new technologies—especially the Internet—have also exacerbated, extended, and highlighted the flawed trademark law doctrine of initial interest confusion.

B. *Initial Interest Confusion and the Overextension of Trademark Law*

The touchstone of trademark infringement is a showing that consumers are likely to be confused as to source, sponsorship, or affiliation when a defendant uses another's mark (or something similar) on its own products or services, or in its advertising.⁴² Over time, however, some courts have created a doctrine called "initial interest confusion," in which they have found trademark infringement—even in the absence of likely consumer confusion—on the basis that a consumer might be initially "interested," "attracted," or "distracted" by a defendant's products or services because of

³⁹ T.L. TAYLOR, RAISING THE STAKES: E-SPORTS AND THE PROFESSIONALIZATION OF COMPUTER GAMING 109-10 (2012).

⁴⁰ See Burk, *supra* note 1, at 1572 (suggesting, albeit somewhat skeptically, that there may be elements of an e-sports professional's game performance that are "sufficiently distinctive" to warrant individualized proprietary consideration).

⁴¹ See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1096-97 (9th Cir. 1992) (affirming a verdict against Frito-Lay for its radio commercial, which featured a vocal performance "imitating [singer Tom] Waits' raspy singing voice").

⁴² Rothman, *Initial Interest Confusion*, *supra* note 8, at 107.

an association with a plaintiff's mark, products, or services.⁴³ This ill-conceived doctrine spread like wildfire in the early days of the Internet as jurists unfamiliar with the new technology thought that confusion was likely to run rampant on the Internet.⁴⁴ Courts described clicking on another's website out of curiosity or actual interest as akin to being hijacked; their concern was that consumers would somehow find themselves unable to navigate back to a trademark holder's official site.⁴⁵

As the Internet has grown, some courts have backed away from this misguided attempt to extend liability. Now that judges and consumers have become more familiar with the Internet, and the Internet's speed and reliability have vastly improved, the notion that the new technology of the Internet justifies extending liability to mere association has been soundly refuted.⁴⁶ The mere diversion of consumers by offering alternative choices or referring to trademarked products is not an appropriate subject for regulation when the consumers know where they are going and what they are buying. Although a trademark holder might lose some business to competitors in these instances, it is appropriate to permit such fair and free competition. The presentation of options and alternatives promotes consumer choice and low-cost, high-quality goods and services. Competitors should be able to divert, attract, or interest consumers as long as they do not mislead them as to sponsorship, source, or affiliation.

In the context of e-sports, Burk notes that video game companies have tried to control uses of and associations with their games under a variety of theories—most notably, copyright law.⁴⁷ Many e-sports competitors and competitions would no doubt appreciate funding and sponsorship from the relevant video game companies, but the absence of such sponsorship should

⁴³ *Id.* at 108 (emphasis omitted). This doctrine originally emerged from an appropriate starting point: after Congress amended the Lanham Act in 1962, thereby eliminating the requirement that "purchasers" be deceived, courts expanded trademark infringement doctrine to take into consideration the likelihood of confusion prior to the time of sale. *Id.* at 160-61. In adopting the initial interest confusion doctrine, however, some courts have ignored the Lanham Act's requirement that there be a likelihood of confusion by holding that the mere diversion of business away from a trademark holder constitutes trademark infringement. *Id.* at 122 & n.57.

⁴⁴ *See id.* at 109-10, 117-21, 168-76.

⁴⁵ *See id.* at 117-21, 168-76 (highlighting the shortcomings of various decisions, including *Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036 (9th Cir. 1999), that radically "overestimate[d] the difficulty in returning to the Internet Highway").

⁴⁶ *Cf. Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1178-80 (9th Cir. 2010) (observing that the sophistication of Internet users weighs against likely confusion when a defendant incorporates another's trademark into its URL).

⁴⁷ *See Burk, supra* note 1, at 1544-69; *see also TAYLOR, supra* note 39, at 167-69 (describing video game developer Blizzard's far-reaching claim that its right to manage its video games extends far beyond broadcast licensing).

not result in legal liability. Lawful purchasers of the games should be able to advertise the nature of the competition at hand without risking liability for mere association with, or initial diversion from, a video game company's product, absent a false or misleading suggestion of endorsement. The ability to use trademarked products in public should be sacrosanct—not only because mere association should not be actionable, but also because such uses should be protected under either statutory or nominative fair use defenses. Statutory fair use (sometimes also referred to as “descriptive fair use”) provides a defense when a defendant uses the plaintiff's trademark to accurately describe the features of its own product or service.⁴⁸ Nominative fair use provides a defense when a defendant uses the plaintiff's trademark to describe the *plaintiff's* product, rather than its own.⁴⁹ In the e-sports context, the competitions and players describe the game they are actually playing, which happens to be trademarked. This should meet the requirements of either statutory fair use (in jurisdictions where the concept embraces references to another's trademark rather than only to underlying qualities) or nominative fair use, so long as nothing is done to expressly indicate official sponsorship.

The examination of the troublesome concepts of persona and initial interest confusion suggests that new technologies, such as the Internet, may magnify and illuminate ill-conceived doctrines in IP by taking them to extremes, or in unexpected directions. As I discuss next, the Internet and e-sports have also revealed undeveloped aspects of IP law that are profoundly important to achieving a better balance between rights of copyright owners and users.

II. ILLUMINATION: THE BREAKDOWN OF THE PUBLIC–PRIVATE DIVIDE IN COPYRIGHT LAW

The Internet has exploded our concept of what is public and what is private. E-sports provides a good example of this phenomenon. While people

⁴⁸ See 15 U.S.C. § 1115(b)(4) (2006) (noting that a party's use of another's trademark does not constitute infringement if the mark “is descriptive of and used fairly and in good faith only to describe the goods and services of such party”); see also Rothman, *Initial Interest Confusion*, *supra* note 8, at 176-77.

⁴⁹ See *New Kids on the Block v. News Am. Publ'g, Inc.*, 971 F.2d 302 (9th Cir. 1992). The nominative fair use defense applies if the following requirements are met:

“First, the product or service in question must be one not readily identifiable without use of the trademark; second, only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and third, the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.”

Id. at 308; see also Rothman, *Initial Interest Confusion*, *supra* note 8, at 177-78.

once played board games and video games in the privacy of their own homes, usually either by themselves or with only a few friends, now video games are played over the Internet with many parties, or in public competitions amid fans and broadcast media. What was once private, solo, and off-the-radar is now very public, communal, and trackable. This shift raises important questions for IP law, especially copyright law. As Burk emphasizes, e-sports involves “user participation, interactivity, and collaboration[, all of which] are common to information and communication technology, [but] with which copyright seems particularly unequipped to deal.”⁵⁰

Copyright law has long created conflicts between the interests of copyright holders and those of the broader public who wish to access, consume, use, comment on, and build upon copyrighted works. Many of these potential conflicts were, until recently, swept under the rug. In a world in which many uses of copyrighted works were private and untraceable, some potentially infringing uses went largely unnoticed. Some scholars, notably Jessica Litman, have concluded that because of the historical lack of enforcement against such “personal” copying, these uses sit outside of copyright law.⁵¹ I have questioned the conclusion that nonenforcement carves out exceptions to copyright law, but more importantly, I have also contended that what is “personal” should not turn on whether a particular use is made in private or in public.⁵² Uses that are personal in nature may take place in public and their legitimacy should therefore be evaluated along other vectors.

In the case of e-sports, many of the potential infringements of copyright take place in the context of individuals engaging in uses of video games that they have been given access to and encouraged to play—in fact, most of the potentially infringing acts involve playing those games in public for both pleasure and competition. As I have noted in my work on custom and the common law in the context of IP, community-building leisure activities and sports competitions were among the traditional bases for permitting public

⁵⁰ Burk, *supra* note 1, at 1537.

⁵¹ See Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1878-94, 1908, 1911-20 (2007) (arguing that a broad conceptualization of lawful personal use strikes the appropriate “equilibrium between copyright owners’ rights to exploit works and individuals’ liberties to enjoy them,” but favoring noncommercial and private uses for this personal-use privilege); see also L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS’ RIGHTS* 193-96 (1991) (relying on historically unenforced zones of personal use to argue that there should be no infringement of copyright when an individual uses a copyrighted work for his own “personal” or “private” use).

⁵² Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463, 471-74 (2010).

use of real property owned by others.⁵³ Such activities were deemed to merit an exception to private property laws on the ground that they facilitated the ability of communities to come together.⁵⁴ E-sports is about such communal uses of video games.⁵⁵ Taylor's study reveals that one of the central features of e-sports is a desire to connect to others.⁵⁶ In the context of IP, such communal activities and competitions should be in the heartland of uses that are given extra latitude and protection.

I do not intend to draw individual conclusions about possible uses of copyrighted video games and whether they would be infringing or fair. Instead, my focus is on the larger point that the Internet has changed the way we use copyrighted works. Uses of copyrighted works are now more easily trackable, blockable, and removable than ever before. This new reality requires copyright law to confront whether fair use is an affirmative right or merely a defense. Technology could spell the end of fair use, not only because of its ability to track uses, but also because of its ability to limit access to and uses of copyrighted works.⁵⁷ We will need to decide if, and how, the law should intervene to constrain this potential of the evolving Internet.⁵⁸ We need to think deeply about the values that we wish to promote with fair use and what it means to give some use rights to the public—not just when such uses cannot be detected, but also when they are front and center. New legislation may be required in the long run, but first we should see if the guiding principles of copyright law can direct us toward an equitable balance between protecting copyright holders and providing room for continued fair use.

⁵³ Jennifer E. Rothman, *Copyright, Custom and Lessons from the Common Law* (manuscript at 2), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2183317, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* (Shyamkrishna Balganeshe ed., forthcoming 2013).

⁵⁴ *Id.*; Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 758-59, 766-71, 779-81 (1986).

⁵⁵ See Burk, *supra* note 1, at 1540-41 (describing the communal nature of e-sports).

⁵⁶ See TAYLOR, *supra* note 39, at 86-89 ("From the earliest days of PC gaming this desire to connect to others and play head-to-head or cooperatively has been present. The old work-around of dragging machines to each others' houses has been significantly supplanted via online networked capability. The multiplayer aspect of e-sports is central.")

⁵⁷ Undoubtedly, some sophisticated parties will be able to circumvent many of these technological efforts, but the general public may face significant hurdles in doing so.

⁵⁸ Another significant challenge in the Internet era is created by licensing regimes that limit fair use and ownership of copyrighted works via contract (e.g., clickwrap licenses). See Viva R. Moffat, *Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking*, 41 U.C. DAVIS L. REV. 45, 87-108 (2007) (arguing for preemption of the enforcement of adhesion contracts that place limitations on copyright's fair use doctrine); Ochoa, *supra* note 7, at 964-66 (discussing the impact of end-user license agreements on copyright ownership of avatars).

CONCLUSION

E-sports provides a prime example of how new industries and new technologies can reveal new facets of IP law, as well as flaws in its current articulation. Many of the doctrinal challenges for IP law that Burk raises in his Article reveal where, and how, the law has overextended itself—for example, in relying on persona or initial interest confusion to find liability. E-sports also highlights the Internet's shift from a private world of engagement with IP to a public one. This shift requires a back-to-basics approach, in which new technology should be seen as facilitating the development of IP law rather than requiring new, industry-specific legislation.

New technologies and industries provide both opportunities and challenges. IP law should not rush into the breach when such challenges arise. Instead, new technologies provide an occasion for thinking deeply about broader guiding principles that are not wedded to any particular technology. If we become overly focused on specific technologies and specific industries, we will find ourselves reproducing the failings of recent amendments to the Copyright Act, such as the Audio Home Recording Act of 1992 (AHRA).⁵⁹ When it was passed, the AHRA sought to address an emerging, but now-defunct, digital audio technology known as “DAT” (Digital Audio Tape). Even if such laws are not immediately outdated, they can quickly lock in regimes that could—and should—have evolved differently. Consider the Online Copyright Infringement Liability Limitation Act (OCILLA),⁶⁰ passed as part of the Digital Millennium Copyright Act of 1998 (DMCA).⁶¹ OCILLA sought to immunize internet service providers (ISPs) from copyright liability for the posting of infringing materials by third parties.⁶² One of the main purposes of the legislation was to temper the Wild West atmosphere of the Internet by encouraging self-monitoring—behavior that, without the immunity provided by OCILLA, could have placed ISPs at risk

⁵⁹ Pub. L. No. 102-563, 106 Stat. 4237 (1992) (codified as amended at 17 U.S.C. §§ 1001–1010 (2006)). At the time it was passed, David Nimmer called this legislation the “worst thing that had ever happened to the Copyright Act.” Nimmer, *supra* note 5, at 1331. The AHRA was applied so narrowly to the specific DAT technology for which it was passed that it was held not to cover other digital recording devices, such as MP3 players, which turned out to be a much more successful technology. See *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1081 (9th Cir. 1999) (holding that the Rio, an MP3 player, is not a digital audio recording device subject to the restrictions of the AHRA).

⁶⁰ Pub. L. No. 105-304, 112 Stat. 2877 (1998) (codified at 17 U.S.C. § 512 (2006)).

⁶¹ Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.).

⁶² See 17 U.S.C. § 512 (exempting service providers from liability for copyright infringement for, inter alia, transmission of material or system caching, if the material is submitted by a third party; and storing information or referring or linking users to infringing material, if the service provider is not on notice of the infringing material).

of liability under the common law for the postings of third parties.⁶³ The law was enacted in an era when it was extremely difficult, if not impossible, to monitor sites for infringing material. Now, sophisticated fingerprinting technology has made identifying and removing infringing material not only possible, but fairly easy for ISPs.⁶⁴ Why, then, should ISPs continue to get a free ride? Moreover, OCILLA created problems where none existed before. In its effort to provide some limited speech protections through a take-down and put-back process, it created a system that in practice has largely been speech-limiting.⁶⁵ Such unintended consequences are difficult to undo and the law more generally has become antiquated in the face of new technology.

As new challenges arise in e-sports and in the context of other emerging technology-based industries, legislatures should take serious pause before adopting new laws. Courts should take the lead in this arena and should consider how longstanding, undergirding principles shed light on a path forward. There will be instances in which new legislation is required, but it should be the path of last resort. When necessary, legislation should be undertaken only once some degree of technological stabilization has been reached; the statutes must then be written, as much as possible, with broad principles—rather than industry-specific considerations—in mind.

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⁶³ See H.R. REP. NO. 105-551, pt. 2, at 49-66 (1998) (explaining that Title II of the DMCA (OCILLA) “preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements,” but “[a]t the same time, . . . provides greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities”); cf. *Batzel v. Smith*, 333 F.3d 1018, 1028-29 (9th Cir. 2003) (describing one of the goals of 47 U.S.C. § 230, a provision analogous to OCILLA, as “encourag[ing] interactive computer services and users of such services to self-police the Internet for obscenity and other offensive material”).

⁶⁴ I am not contending that current monitoring technology is foolproof, but rather that content providers are now fairly confident that most copyrighted material that is posted without permission can be identified and removed within minutes of posting, as long as ISPs cooperate fully (as they increasingly do). See Charlie Warzel, *Pirates of the Olympian*, ADWEEK, July 23, 2012, at 14 (describing YouTube’s sophisticated Content ID technology in the context of NBC’s coverage of the 2012 London Olympics).

⁶⁵ See Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 681-92 (2006) (discussing the results of a study of OCILLA notices that reveals that the law has been used to take down material in “numerous questionable situations”).