RIGHT ON TIME, BUT HOW MUCH DOES IT COST?

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Professors Dotan Oliar and James Y. Stern have written an excellent article about the appropriate beginning time for intellectual property ("IP") rights.[1] They argue that the correct timing involves a trade-off between too-early allocation (rights go to someone who may not finish) and too-late (other potential creators may be scared off for too long, or alternatively, they may freeload). In an intriguing comparison, the authors map those choices onto first possession considerations in more conventional property, or what I am going to call "POP" for "plain old property." By analogy to POP's several "first possession" possibilities, they argue, the efficient IP timing trade-off depends on whether rights should accrue relatively early to the "first committed search," or later to something like completion of the creation, or "capture."

This thesis is interesting for POP as well as for IP. But at least one big issue is missing in the trade-off calculus.[2] That is the cost to the IP regime itself of the different rights-granting scenarios.

Property regimes are not free, as Professor Harold Demsetz reminded everybody some time ago,[3] which means that there is another trade-off here: between the benefits of having property protection and the costs of providing that protection under various circumstances. With that, let me go back a minute to that category of "first committed search." To a POP scholar, this looks like a pretty fuzzy matter. Since the authors use a famous hunting example, so will I: when does someone "first commit" to hunt for a fox? Surely that point is later

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[1] Dotan Oliar & James Y. Stern, *Right on Time: First Possession in Property and Intellectual Property*, 99 B.U. L. REV. 395 (2019).

[2] Some other issues may be missing too. Where is the anticommons of fragmented rights? Perhaps that can be shoehorned into the "too early" category. But what about "snowballing" of creativity to and from third parties in knowledge communities? Do these positive externalities favor early or late accrual of rights? POP folks will also think that Oliar and Stern's fishing chart is, well, fishy, since it does not appear to reflect the stock depletion that leads to a "tragedy of the commons" as more fisherfolk show up. But then, the tragedy is about finite POP, and not about more or less limitless IP subjects, so perhaps that is why the chart shows a non-depleting fishery. *See* Oliar & Stern, *supra* note 1, at 410 tbl.1.

[3] Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347 (1967); *see also* Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163, 163 (1975).

than the hunter's purchase of dogs, and maybe sometime after she mounts a horse or sounds a bugle; perhaps the point is when she sights the fox—but then, perhaps not, if no one sees her making the sighting. The category of capture, on the other hand, has fewer ambiguities. Capture in this case is an act of claiming that is likely to be clear to everybody: killing the animal or at least trapping it.

The thing to notice here is the impact of information costs on the property-rights regime. Those of us in the POP world have discussed a lot of areas where fuzziness gets opposed to clarity: trespass vs. nuisance (Professor Thomas Merrill),[4] rules vs. standards (Professor Duncan Kennedy),[5] and even—may I say it—crystals vs. mud (me).[6] There are lots of reasons for fuzziness in law, but in a world of formal rights, clarity is administratively cheaper. That fact has consequences for the most efficient timing of formal rights. For example, it might be just right for the IP trade-off to grant a patent to the first committed searcher, i.e. the inventor, but it can be awfully expensive to decide who that is, so the patent regime now uses capture instead, i.e. the first to register. In fact, the authors mention several times that the IP deciders tend to veer toward the capture-end of the time chart. No wonder. Capture is a lot easier to figure out than first committed search.

The more general point is that because property regimes are not costless, the ideal timing for IP rights does not depend simply on promoting invention or creation. The ideal timing also depends on the administrative costs of providing the rights, and different rules for gaining rights have different administrative costs. Maybe those costs figure into the authors cost-benefit chart—they do mention information many times—but I didn't see them in the trade-off calculation.

There are some other things I didn't see either, although maybe I just didn't notice in an article full of insights on important issues. The authors key off two important writings in POP to make their points about first possession in IP, but I think the authors missed something in both. The first of those writings is the old property warhorse about hunting, Pierson v. Post;[7] and the second is Professor Bob Ellickson's much-cited 1989 article about property norms in the nineteenth-century whaling industry.[8] With respect to *Pierson*, the case where the hunter lost his claim to a fox because an interloper shot the fox at the last minute, the authors say that the court's majority went with a clear rule, i.e., capture, favoring the interloper; but that the dissenter would have allocated the

[4] Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J.L. STUD. 13 (1985).

[5] Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

[6] Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

[7] 3 Cai. 175, 175 (N.Y. Sup. Ct. 1805).

[8] Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. 83 (1989). A slightly revised version is in ROBERT ELLICKSON, ORDER WITHOUT LAW 191-206 (1991).

right at an earlier point, something like the first committed search, favoring the hunter. They are right about the majority, but at least somewhat misleading about the dissenter. The dissenter (Judge Livingston) did talk a good deal about the importance of encouraging effort and repressing free-riding, and he did come down on the side of an earlier rights allocation. But before any of that, he said right up front that the decision should have been made differently—not by formal law in a court, but by a community of "sportsmen."

First possession has no natural meaning. First possession just designates a signal that someone gives to claim ownership, and it has to be convincing to some audience. Livingston would have preferred a signal that a limited group of knowledgeable practitioners found appropriate. The majority apparently had a larger audience in mind—more or less the world at large—and opted for the least ambiguous signal, that is, capture.

The authors here quite rightly point out that there can be a variety of different first possession rules, sometimes even orchestrated in stages, but what they do not flag sufficiently is that the signals really ought to vary with the characteristics of the intended audiences. This brings me to Ellickson's article on whaling norms in the nineteenth century. As Ellickson observes, some kinds of relatively easily killed whales were subject to a rule of capture—property went to the killer—whereas in the hunt for the big, dangerous sperm whales in the open ocean, the first whalers to land a spear got a provisional entitlement to continue to finish the kill if they could. This is what the authors would call a first-committed-searcher rule. The reason for this more complicated claiming norm was that the first ones to land a spear had to take great effort and risk, and all the whalers clearly recognized the importance of that effort and risk in their staging rule.

But then, what our authors don't stress enough is that this claiming system only worked because of the characteristics of the audience. No great hordes of tyros were hanging around the polar seas trying to kill sperm whales. This was a pretty specialized undertaking, and the men who were there all knew one another. In fact, an awful lot of them lived on Nantucket Island, and if they had misbehaved at sea, they might be unwelcome at the Quaker meeting when they got back home.[9]

The point is that a more indefinite rule like first commitment works perfectly well in limited groups of people who know about one another and who have regular interactions about similar activities, and who have a good idea of how seemingly fuzzy criteria should apply. Professor Molly Brady has just made this point brilliantly in her new article in the Yale Law Journal on "metes and bounds."[10] Colonial New England's property measures by metes and bounds were complicated, using records loaded with information and details about the

[9] ELLICKSON, *supra* note 8, at 194-95; see also NATHANIEL PHILBRICK, IN THE HEART OF THE SEA 1-27 (2000), for a description of Nantucket during the whaling era.

[10] Maureen E. Brady, *The Forgotten History of Metes and Bounds*, 128 YALE L.J. 872 (2019).

properties and the neighbors, and they were very useful and comprehensible in small communities of people who knew one another. But this situation changes when strangers enter and more heterogeneous groups have to read the signals. Then the signals have to become simpler and more formulaic—more like what is called capture, which is characteristic of formal, or what I have called "modernist," property regimes.[11] Professor Henry Smith has theorized this matter in still another trade-off, this time between informational richness and the extent of the audience. The pattern is that limited audiences can use richly detailed and complicated property signals that seem vague or fuzzy to outsiders (like first committed search), whereas extended and more heterogeneous audiences will only comprehend much thinner signals (like capture).[12]

IP is already a formal, modernist system, aimed at extended audiences, so it is no wonder that IP gravitates toward clear, thin signals like capture. But there are plenty of informal property regimes among smaller groups, where the seemingly fuzzier signals of first committed search work reasonably well. Professor Oliar knows one of those regimes well: standup comics' jokes, for which there is no formal IP protection, but for which the middling-close-knit community of comics enforces its own norms of ownership.[13] Informal systems like these break down when the insiders follow the rules but outsiders violate them, sometimes inadvertently. That is what happens in surfing areas, when the "locals" get into punching matches with ignorant intruding outsiders. Other conflicts arise when the signals are too vague even for insiders, or when insiders themselves get greedy. That is what happens among academics, when professors squabble over which one should get credit for some idea.

To be sure, even formalist systems like IP tolerate some fuzziness in rights criteria, often for reasons of fairness and deservingness—as in the case of earlier patent law's favor to the first-to-invent, sometimes a debatable issue. Informationally richer and more detailed inquiries are costly, however, and their expense regularly pushes formal legal institutions toward more sharply defined proxies like first-to-register, a.k.a. capture. Even when the formalist IP system admits provisional stages of property acquisition, as in copyright preregistration prior to completion of, say, a movie, one notes that the stages themselves have fairly sharp edges—like preregistration itself.

So my bottom line is this: these authors have written a very important and creative article, and I hope no one will get me wrong on that. But I do have quibbles, and they all revolve around points that I think the authors slight. The

[11] Carol M. Rose, *Big Roads, Big Rights*, 50 ARIZ. L. REV. 409 (2008); Carol M. Rose, *Ostrom and the Lawyers*: *The Impact of* Governing the Commons *on the American Legal Academy*, 5 INT'L J. COMMONS 28 (2011).

[12] Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105 (2003).

[13] Dotan Oliar & Christopher John Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-up Comedy*, 94 VA. L. REV. 1789 (2009).

first is that "first possession" does not mean anything except as a signal that some relevant audience understands. The second is that different kinds of signals are most efficient for different kinds of audiences, taking into account size, closeness, and interaction levels in the group. And the third is that whatever the signal system for initiating a property right, it will have some costs. Those costs, too, deserve a role in the trade-off for the best timing for intellectual property.