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Bright Ideas

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Message from the Chair

Joyce L. Creidy

There is no refuge from the negative news on the radio, television, and the Internet, and, of course, from friends and colleagues whose jobs have fallen victim to the very things that had contributed to the growth in their businesses and in the economy in general. In these very uncertain economic times, we see daily reports of mass layoffs at law firms across the country. Even in-house positions are no longer a safe haven, with legal departments being pressured to report negative overhead growth instead of the usual zero overhead growth. This Message is not meant to contribute to the deluge of gloom. Rather, it is intended as a message of hope through preparation.

According to careermag.com, 20 to 25 percent of available jobs are posted, but the overwhelming majority of jobs are obtained as a result of networking. This factoid should matter to you even if you are not in the ranks of the unemployed. After all, it has been said that the time to look for your next job is the day you start your current one. Now that you know 75 percent of jobs are unadvertised, what should you do next? GET INVOLVED! Write articles for *Bright Ideas*, check our Section activities on the NYSBA Web site and sign up for roundtables and programs, and read the e-mails from our Section before you delete them. You could be deleting an opportunity!

The Annual Meeting full-day program in January provided ample opportunities for making new connections. Sheila Francis and Lisa Rosaya, program co-chairs, created thought-provoking panels that gave attendees a reason to mill around and discuss topics during the coffee breaks, luncheon, and the cocktail reception. In March, the annual Copyright Office Comes to New York program provided a great opportunity to socialize during the program and cocktail reception. Paul Fakler, program co-chair, did a great job on this successful program and worked the entire day to make introductions and talk with attendees. Even the sold-out roundtable on Recent Developments in Trademark Law provided time for introductions and card exchanges during the luncheon at the offices of Loeb & Loeb. In addition, Women in IP have been gathering at Metrazur in Grand Central Station for informal networking on a monthly basis. Coming up in June is the Seventh Annual Women in IP program, and it is never too early to register for the Fall Meeting at the Sagamore in October; both of these educational events offer unique opportunities to make connections and begin new relationships.

Our Section is a reservoir of information and experience at your disposal. You can make it work for you by taking part, getting involved, and volunteering to speak or write. What you put into it will never match what you get out of it.

Joyce L. Creidy

Inside

NYSBA

International Trademark Protection

By Olivia Maria Baratta, Christine P. James, Allisen Pawlenty-Altman, and Jason M. Vogel

I. Introduction

Globalization is perhaps the most significant factor that has affected trademark portfolio practice over the last ten years. Whereas U.S. companies a decade or so ago were primarily focused on the key marketplaces of the United States, Canada, Western Europe, Japan, and Australia, much of the focus has shifted to a more global marketplace. Now even smaller companies in the United States are looking to move manufacturing activities to lower-cost countries throughout the Pacific Rim, Latin America, India, and Eastern Europe, and new marketplaces have opened up for the sales of many companies' products and services throughout much of the world.

One negative aspect of this growth, however, is that counterfeiting has grown to epic proportions as IP protection has lagged behind the growth of manufacturing capability and sophistication in many countries. Thus, whereas previously trademark protection may have been necessary only in key markets, now insuring that your brands are adequately protected requires securing registration in a much larger number of countries, potentially encompassing the markets for your goods, manufacturing territories, and countries where counterfeiting may be a problem.

Unfortunately, trademark protection around the world largely remains a patchwork system of national laws and registries, requiring a country-by-country approach. However, several key developments have internationalized and harmonized trademark practice over the past ten to fifteen years, including the introduction of the European Community Trademark (CTM) system in 1997; the adoption of the Trademark Law Treaty in 1994 (and the accession of the United States in 2000), which reduced many of the formalities of trademark registration; and the recent expansion of the Madrid Protocol to include jurisdictions such as the United States (in 2003) and the European Union (in 2004). These developments, while reducing costs and procedural obstacles to the international protection of trademarks, have introduced a new level of complexity into trademark portfolio management, as they present a number of new options and strategies for protecting marks, each with a complex set of advantages and disadvantages.

II. Evaluating Your Trademark Portfolio

The key to evaluating whether a portfolio of trademark registrations is meeting a brand owner's needs is conducting regular trademark audits. As the first step, one should identify the key brands that require protection. The usual first tier of marks in terms of importance includes house marks that are used across the full range of the company's products or service offerings. The second tier includes important product or service names that are used in all of the company's markets. The third tier consists of sub-brands, regional brands, or marks used on a limited range of goods or services. Rounding out the fourth tier are slogans, marks that will be used for only a limited duration, and nontraditional marks such as product configurations, color marks, and the like.

Having identified the key brands to be protected, one should identify the jurisdictions in which it is important to have protection. As mentioned above, this falls into three categories: (1) the countries that are the present and near-term projected marketplaces for a company's products and services; (2) the countries in which branded products are manufactured; and (3) the countries that are hotspots for counterfeiting. Next, consideration should be given to which marks need to be protected in which territories.

Having gathered this information, a review can be made of the trademark portfolio with an eye to identifying holes in coverage to be patched by new filings as well as filings that may no longer be necessary and can be allowed to lapse.

A further consideration when conducting an audit is the fact that trademark registrations in most countries become vulnerable to challenge if not used within a grace period of, typically, three to five years after registration. Accordingly, one should note those registrations that have moved beyond this grace period and confirm that the marks are in use in the relevant region. If not, and if protection is desired, the filing of new applications to insure valid protection may be needed.

III. Expanding Your Trademark Portfolio

Sometimes a trademark owner may decide to expand its trademark portfolio with the addition of one or more entirely new marks. For instance, a new product launch or a company's desire to update its branding may motivate a trademark owner to seek new trademarks. When expanding a trademark portfolio, one of the first and most important steps is to assess the suitability of the proposed new mark. From a branding perspective, a good trademark will identify the source of a product without immediately describing the products or services associated with it. Descriptive trademarks, while sometimes initially attractive, often end up being very costly and difficult—if not impossible—to register and enforce. In addition, for trademarks that will be used and registered outside the United States, a trademark owner should determine whether the proposed trademark has any meaning or connotation in local languages and dialects. Local counsel, while sometimes costly, can provide invaluable advice on

this issue and can help trademark owners avoid embarrassing situations arising from unintended meanings or connotations.

Equally important is assessing the availability of the proposed new trademark for adoption, use, and registration in the trademark owner's countries of interest. Generally, an "available" trademark can be distinguished from all claims of prior trademark rights, including both registered trademarks and, in countries that recognize "common law" trademark rights, unregistered trademarks.[1] In today's global market, clearing a proposed trademark may involve searching and analyzing trademark use and registration data from a variety of sources, including national trademark registries, business name records, domain name records, and commercial usage. Fortunately, the Internet offers a wide range of easily accessible tools that can be used in assessing the availability of a proposed new trademark. For preliminary searching, informal searches of Internet search engines such as Google, Yahoo, or AltaVista may reveal potentially problematic prior uses of the proposed new trademark or a similar trademark. For more formal searching, trademark owners may turn to subscription databases such as Trademarkscan or Saegis,[2] online records of national trademark offices,[3] or consolidated international screenings searches offered by commercial search vendors.[4] For commercially significant trademarks, such as new brands or spin-off brands, a trademark owner also may decide to obtain in-depth availability opinions from local counsel in foreign countries.

IV. Trademark Filing Strategies

Once a trademark has been selected and cleared for adoption, use, and registration, a trademark owner must decide where to file for registered protection.[5] As mentioned above, key countries for registered protection fall into three categories: (1) current and near-term projected marketplaces; (2) places of manufacture; and (3) counterfeiting hotspots. In the end, obtaining the desired coverage may involve a multiple-country filing program reaching across the globe. Even though there have been notable steps towards harmonization of trademark practice and protection in recent years, a trademark owner still must employ a patchwork approach to secure such coverage. As discussed in greater detail below, the following consolidated filing mechanisms can provide huge cost savings and bring much-desired simplicity to a multiple-country trademark filing program.

A. The Madrid Protocol System

One of the most significant developments over the last several years that has impacted trademark filing strategy is the accession of the United States, the European Community, and a handful of other commercially significant countries to the Madrid Protocol. The Madrid Protocol is a treaty that establishes a multinational trademark filing and registration system. At present over seventy countries are members of the Protocol, including, aside from the United States and the European Union, most of the individual European countries; the Asia-Pacific countries China, Japan, South Korea, Singapore, and Australia; most of the former Soviet Union countries; and a number of Middle Eastern and African countries. Notably absent from the Madrid Protocol are a number of important Western Hemisphere countries, including Canada and virtually all of Latin America.

To take advantage of this system, a company first must file an application or have a registration in its home country. Then, an application for an International Registration (IR) is filed with the home country trademark office, which certifies the application and sends it to the International Bureau of the World Intellectual Property Organization (WIPO). Following examination, the WIPO grants the IR, then transmits it to the trademark offices of those member countries of the Madrid Protocol that are designated by the applicant. The local trademark offices then examine the IR as if it were a national application filed through standard channels, and the resulting extension of protection is equivalent to a national registration.

The key advantage to this system is that it potentially provides a huge cost savings over direct international filing with the national registries. Under the Madrid Protocol, an IR covering 70-plus countries costs well under $20,000, whereas comparable national filings could cost $100,000 or more. In addition, the procedural aspects of filing and maintaining an IR are greatly simplified as compared to national applications in that there is essentially only one application to file, one registration that issues, and one renewal that must be docketed and coordinated at the end of a single unified registration term. There also are no translation, power of attorney, or document legalization requirements, which represents a further time and cost savings.

But the system is not without its disadvantages. A key feature of the Madrid Protocol is the concept of dependency. The IR remains dependent upon the owner's underlying home country application or registration for a period of five years, which can result in several significant consequences, particularly for U.S. trademark owners. First, the Madrid filing cannot cover a broader range of goods and services than the underlying U.S. filing. Since the United States has very strict and narrow goods and services specification requirements, IRs based on U.S. applications or registrations generally cover a much narrower range of goods and services than comparable national filings would cover. Second, if the underlying home country application or registration becomes invalid for any reason, or if the goods and services are restricted during the dependency period, the same invalidation or restriction will apply to the IR. So, for a U.S.-based trademark owner, if there is any concern that the home country application will not register, either because of failure to bring the mark to use within the allowance

term or because of prior marks that could cause a risk of objection in examination or opposition, then the Madrid Protocol may not be the best way to secure international protection for the mark. If any of these problems come to fruition, it could significantly impact the international portfolio, not just the U.S. rights. Third, a Madrid registration must be used in each designated country in order to insure against cancellation actions and other invalidation actions based on "non-use" being brought against it. As a result, careful evaluation of this filing technique is required before a decision is made to use it.

B. The Community Trademark System

A second important and relatively recent development is the establishment in 1997 of the Community Trademark (CTM) registration, which protects a trademark in all member states of the European Union (EU)—currently twenty-seven states.[6] Unlike the Madrid Protocol system, which extends protection to designated countries in a hub-and-spoke type mechanism, the CTM application serves as a single, unified filing covering all EU member states. The CTM system is available to all members of the Paris Convention, which includes almost all countries in the world. Because of this, the CTM system affords a unique filing opportunity to companies and individual citizens of most countries, including the United States.

Key advantages of the CTM system include the significant cost savings obtained by not having to file twenty-seven individual national applications and the unified right extending to all twenty-seven countries provided by virtue of a single CTM registration. The CTM registration process also is relatively quick and easy to administer, with applications maturing to registration well within a nine-month window, barring any extraordinary circumstances or oppositions. In addition, use of the trademark in any single member country protects the entire registration from cancellation or invalidation based on "non-use" of the trademark, meaning in practical terms that use in one country extends protection to an additional twenty-six countries.[7] Finally, filing a CTM application can be a good way to get a quick assessment of the availability of a proposed trademark in Europe, since the CTM Office gives applicants the option of ordering copies of national trademark search reports for an additional fee.[8]

Not surprisingly, the CTM system also has disadvantages. One huge disadvantage is that an objection lodged on the basis of a single national trademark registration, such as a German national trademark registration, can hold up the entire CTM registration process. If this happens, the applicant has the option of converting its CTM application into various national applications in lieu of allowing the entire CTM to lapse. However, the costs involved with such conversion would eliminate any cost savings gained by filing the CTM in the first place. In addition, given the number of countries covered by the CTM and limitations of national search reports, it can be difficult to assess whether a CTM application will draw third-party objections.[9] Finally, a trademark owner may desire protection in European countries that do not belong to the European Union, such as Norway or Switzerland. In that case, the trademark owner must supplement its CTM filing by also filing national applications in the non-EU countries of interest.

C. Regional Filing Options in Africa

In addition to the Madrid Protocol and Community Trademark systems, trademark owners also may take advantage of other consolidated trademark filing mechanisms, including regional filing arrangements. In Africa, for instance, trademark applicants may pursue consolidated protection through either the African Intellectual Property Organization (OAPI) or the African Regional Industrial Property Organization (ARIPO). The first option, OAPI, serves as a consolidated office for applications covering the following Francophone African countries: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Mali, Mauritania, Niger, Senegal, and Togo.

Like the CTM unified right, OAPI registrations also provide a unified right, and use in one country constitutes use for all countries. The OAPI system is well recognized and well administered. The second option, ARIPO, covers the following English-speaking African countries: Botswana, Lesotho, Malawi, Namibia, Swaziland, Tanzania, Uganda, and Zimbabwe. It functions as a collection of national rights, and it is not well-recognized or administered. Because certain ARIPO member countries have not yet passed implementing legislation, the ARIPO system may not be a viable option for trademark protection. National trademark applications still offer the soundest mechanism for protection in ARIPO member countries.

V. Trademark Enforcement

Consistency is one of the most important features of an effective global IP enforcement strategy. One way to ensure consistency is to very carefully define a circle of protection around the client's mark and develop a clear set of criteria for deciding what falls within the circle and therefore should be challenged and what falls outside the circle and should not be challenged. The stronger the trademark (i.e., the more distinctive and well-known) and the greater the resources the client is willing to commit to the mark, the wider the circle can be. On the other hand, for a marginally distinctive mark for which the client does not wish to expend a great deal of time and money on enforcement, the circle should be smaller.

There is a virtually limitless supply of infringement, counterfeiting, and objectionable trademark filing out

there. Deciding when it makes sense to take action, and when not to do so, is a key area on which trademark counsel should advise their clients. The more clearly defined the criteria are for this decision, the better outside counsel can ensure they are in step with the client's needs. An additional benefit is that counsel can avoid taking inconsistent positions in different cases, such as arguing that two marks are confusingly similar only to find such arguments used against you in a different case involving an analogous mark that has priority over the client's mark.

Conducting regular IP audits, as discussed above, is also a key part of a global enforcement strategy. This ensures that the client has the tools it needs to enforce its rights in its countries of interest. The costs of trademark registration are comparatively far lower than the costs of trying to enforce an unregistered mark in an important country against an infringer. Most costly of all, of course, is being shut out of a potential market because another party has registered the client's mark first. The bottom line is that the costs incurred in securing trademark rights are usually money well spent when it comes time to enforce the rights.

Effective global IP enforcement requires vigilant monitoring of trademark registers, marketplaces, and domain name registries. There are many commercial vendors that enable trademark counsel to monitor each of these areas for potentially objectionable trademark usage. In terms of trademark applications, one can employ trademark-watching services, which provide notices to the trademark owner of any applications that arguably are close to a watched mark. These services can generate a huge number of watch notices. It is important to vigilantly review these notices on a timely basis, since the deadlines are sometimes immediate. For domain names, there are similar monitoring services. And for general brand surveillance, there are services that monitor usage of trademarks on the Internet.

Again, particularly in jurisdictions that are rife with counterfeiting, there is a virtual limitless supply of objectionable uses of well-known trademarks. Deciding which of these infringements to proceed against and which do not warrant such an investment can involve a difficult line-drawing process. To the extent you can develop clear criteria for such decisions, it can greatly assist in cutting through the vast number of such reports efficiently. Finally, the client's business people on the ground in overseas jurisdictions can be one of the best sources of information concerning counterfeit and infringing products. Consequently, it is always a good idea to counsel clients to maintain open lines of communication with their local business people in key jurisdictions and to educate them to look for infringing activity, to report such activity as soon as possible, and to keep detailed records and evidence, including most particularly any evidence of actual confusion.

A final important strategy in global enforcement is to work with Customs offices in key jurisdictions to assist them in identifying and seizing infringing articles crossing the borders. Many jurisdictions, including the United States and the European Union, have Customs recordal procedures for registered trademarks. Taking advantage of these recordal systems is usually a highly effective strategy for catching infringing products before they make it into the marketplace. Moreover, in many countries it may be possible to have training sessions with Customs officers to educate them on your key trademarks and to help them identify genuine and infringing articles. Cooperation with Customs officials is always a good idea, since it can significantly increase their effectiveness and interest in assisting your company police its brands at the borders.

VI. Conclusion

For any trademark owner, navigating the complexities of various foreign trademarks laws and practices can be a daunting experience. Regardless of the stage, whether it is trademark portfolio audit, selection and clearance, filing and registration, or enforcement, a trademark owner can benefit greatly from the expert assistance of experienced trademark counsel.

Endnotes

1. "Common law" trademarks are use-based trademark rights recognized in jurisdictions which trace their legal heritage to Britain. Examples of countries that recognize "common law" trademark rights include the United Kingdom, the United States, Australia, Canada, India, and other former colonies of the British Empire.
2. The Saegis database currently covers United States (federal), United States (state), Canada, Mexico, Brazil, Austria, Benelux, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Monaco, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, United Kingdom, CTM, Australia, China, Japan, South Korea, and the International Register.
3. Many trademark offices have Web sites through which trademark records can be searched. The following is a sampling of some of those sites:
   - European Community: www.oami.europa.eu;
   - Australia: www.ipaustralia.gov.au;
   - New Zealand: www.iponz.govt.nz;
   - United Kingdom: www.patent.gov.uk;
   - Canada: www.cipo.gc.ca;
   - Hong Kong: http://ipsearch.ipd.gov.hk/trademark/jsp/main.jsp;
   - Singapore: www.ipos.gov.sg;
   - International Register: www.wipo.int/ipdl/en/search/madrid/search-struct.jsp.
4. Examples of consolidated commercial screenings searches include the KISS (Country Identical Screening Search, searches for identical marks in any jurisdiction); the RISS (Regional Identical Screening Search, searches for identical marks in one of the following geographic regions or a "custom" region: Asia and Australasia; Europe; European Union; Madrid Agreement

and Madrid Protocol; Middle East and Africa; Americas—South America, Central America, U.S. and Canada; Eastern Europe and Former Soviet Republics); and the WISS (Worldwide Identical Screening Search, searches for identical marks in all jurisdictions and registers).

5. It is advisable if not critical to file as soon as possible. In most jurisdictions, priority of trademark rights is determined by the filing date. Thus, the first party to file an application to register a mark has priority, regardless of use in that country or elsewhere. Even if priority is determined by use, not filing, as in the United States, it still is advisable to file as soon as practical, as the filing date establishes a "constructive use" date throughout the country. Under the Paris Convention, it is possible to file applications in jurisdictions that are parties to the Paris Convention up to six months after the filing date of a first-filed application for the mark and still claim as an effective filing date the filing date of the home country application. As priority in most countries is based on filing date, this enables the applicant to secure a filing date by applying to register its mark in one principal country, and then determining the other countries of most importance in which to seek protection.
6. The current members of the European Union are Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.
7. However, this role is not explicitly set forth in the CTM Regulation and there have been efforts in the European Commission to change the rule so that use would be required in a substantial portion of the European Union to sustain a CTM that is subject to use requirements.
8. This is particularly true when an initial preliminary screening search for the CTM database and/or EU member countries does not disclose any serious obstacles to adoption of a mark in Europe. Ordering and reviewing comprehensive searches in the EU member states can be extremely expensive, and often the cost of filing a CTM application and requesting copies of national search reports comes in well below this. And, because all member states, except France, Italy, Germany, Cyprus, Estonia, Latvia, Malta and Slovenia, undertake national searches for CTM applications, the national search reports offer a fairly decent geographic coverage of the EU member states. Of course, national search reports often will provide only very basic information about cited marks and therefore ultimately may be minimally helpful in identifying serious conflicts. Nevertheless, they can provide a decent point of reference for evaluating the presence of third-party marks in the member states.
9. Because the CTM office, called the Office of Harmonization for the Internal Market (OHIM), will not refuse to register a mark on the ground that it is confusingly similar to another mark, it is incumbent on prior applicants or registrants themselves to object to later-filed applications. Theoretically, the search reports permit CTM applicants to identify marks that may pose problems for their applications, thus providing an opportunity for applicants to address issues preemptively by withdrawing their applications or attempting to negotiate with prior mark owners. More often than not, however, applicants must simply "wait and see" whether their applications draw any third-party objections.

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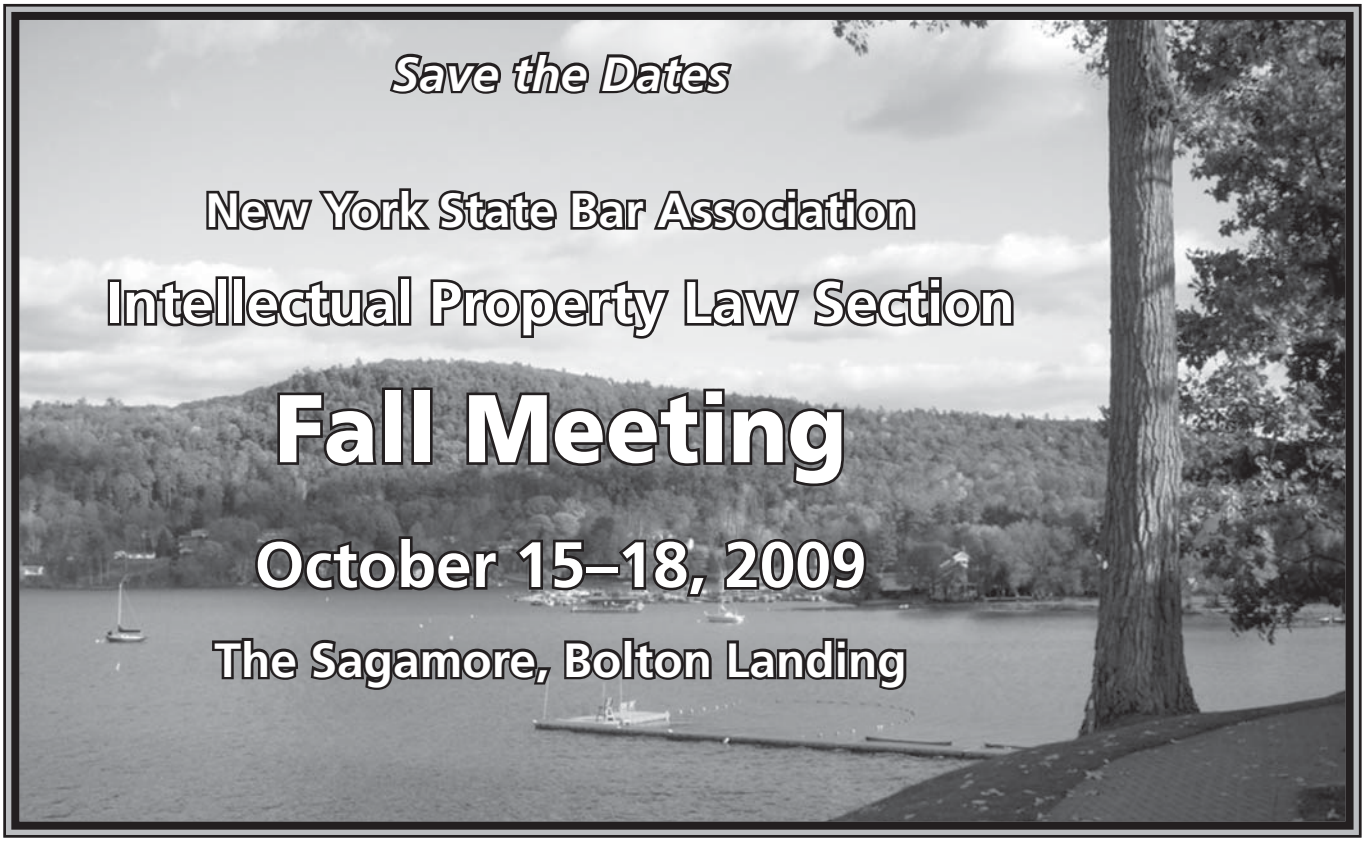

Dissonant Paradigms and Unintended Consequences: Can (and Should) the Law Save Us from Technology?

By Donald J. Labriola

I. Introduction

Technologies like digital audio, the Internet, and broadband communications spur economic growth and foster new patterns of commerce and social interaction. But they also spawn disruptive innovations that force established industries to forge novel responses or risk falling by the wayside.[1] The horse-and-buggy industry,[2] vaudeville,[3] and video-rental stores[4] are but a few examples of thriving markets that found themselves on the scrap heap of obsolescence because they failed to react quickly to the effects of new technology.[5]

Industries faced with such challenges often look to the law for help (as do new-technology upstarts that feel bullied by their entrenched competition).[6] But rarely have legislatures and the courts done more than delay the inevitable.[7]

One reason for this has been the all-too-common failure of conventional legal analysis to address the irreconcilable differences between warring factions' basic assumptions, beliefs, and norms of behavior.[8] This article argues that such incommensurabilities are functionally similar to the "cognitive dissonances" that social psychologists observe in conflicted individuals,[9] and it synthesizes a dissonance-based analytical model suited to such controversies.[10] It concludes that lawmakers and courts seeking to remedy the social ills caused by technological disruption should consider classical dissonance-reduction strategies used successfully in the social sciences.[11]

The article assembles this thesis in three steps. In Part II, it synthesizes Thomas Kuhn's theory of paradigm shifts with modern economic and business-management theories to create a general model of the large-scale social and economic disruption that accompanies technological innovation. It draws upon principles of social psychology to find parallels between internal conflicts (or "cognitive dissonances") experienced by individuals and those that arise within communities on either side of a paradigm shift, and it posits that lawmakers, regulators, and the courts must consider the effect of such dissonances when devising legal remedies to controversies created by disruptive innovation.

Part III lays the groundwork for this argument by introducing the concept of shared paradigms and describing how a technology-driven shift to a new paradigm advances scientific and social progress even as it devastates established markets. Part IV calls upon evolutionary economic theory to describe the Darwinian process that links these shifts to disruptive technological innovation. Part V surveys cognitive dissonance theory, which has long been used by psychologists to predict and explain the ways individuals respond to conflicts among their personal beliefs, assumptions, and behavioral norms.

Part VI articulates a unified theory of *paradigmatic dissonance* that extends cognitive dissonance doctrine to the thorny controversies that arise when disruptive technology spawns a community whose members share an unprecedented paradigm or business model. Part VII applies paradigmatic dissonance theory to the Supreme Court's *Sony v. Universal* decision, and Part VIII integrates this model into modern jurisprudential thought. Part IX applies the theory to our legal system, comparing it to conventional rationalist thought and using it to suggest more effective ways to analyze and remedy legal disputes rooted in disruptive technological innovation.

II. Setting the Stage

Markets come and markets go. History is littered with the cadavers of once-healthy industries that failed to react quickly enough to new technology.[12] Consider, for example, the way markets rose and fell as waves of innovation drove consumers from live burlesque to radio to free over-the-air television and then to various forms of subscription TV. Again and again, industries and the cultures they feed have been unseated by newer technologies that better met the needs of consumers. The survivors are those nimble enough to devise business models that successfully exploit new technologies.[13]

Despite the painful ramifications for established industries, this quasi-evolutionary process of stability, disruption, adaptation, and renewal ultimately benefits society.[14] Technology that fosters more efficient and flexible ways of working, playing, communicating, or transacting business serves the public interest and is likely essential for survival in a global economy.[15] Like a fire that clears deadwood, periodic exfoliation is an efficient way to revitalize stagnating markets.[16]

The situation is less clear-cut when a business is inundated by a technological tsunami it failed to predict. Laws that do no more than prop up inundated businesses paddle against an inexorable current.[17] There were certainly good reasons, for example, to give the record industry legal tools to defend itself against the unauthorized online distribution of its product.[18] But lawmakers and the courts might have better served the major labels by considering the bigger picture.[19] As important as it is to protect intellectual property rights, statutes enacted or applied in response to technological disruption also must

consider the overarching natural-selection process that ensures our economy's continued vitality.[20] The laws of the wild are harsh, but established industries sometimes benefit when forced to fend for themselves against new business models.[21] The challenge for lawmakers and judges is to balance the legal rights of traditional businesses against the survival of pioneers who leverage new technology into more efficient (and often unforeseeable) markets— a task akin to playing chess blindfolded.[22]

III. Shifting Paradigms

A. The Elusive Paradigm

Hand-waving marketeers and pop-culture theorists have long used the word "paradigm" as a linguistic spittoon, plugging it with any meaning that happened to need a receptacle.[23] If defined with precision, however, the concept of shared paradigms can be an effective way to characterize and understand cultural and economic transitions.

The current meaning of the word "paradigm" emerged in the natural sciences with the publication of epistemologist[24] and science historian Thomas Kuhn's influential 1962 essay "The Structure of Scientific Revolutions." Kuhn described a prototypical shared paradigm that he conceptualized as a "disciplinary matrix" of beliefs and practices that define a scientific discipline.[25] Kuhn's "disciplinary matrix" concept remains useful today in the natural sciences and does not differ fundamentally from the modern understanding of a scientific "paradigm" as a "set of assumptions, models[,] and methods that serves as common, almost canonic knowledge in a discipline."[26]

Kuhn confined his work to scientific communities, but he was quick to note that it could be extended legitimately to other fields,[27] a prediction long since fulfilled in disciplines ranging from sociology[28] to management science[29] and information technology.[30] The concept, however, has not always survived translation, often undergoing arbitrary redefinition.[31] I use the term "paradigm" conservatively to describe a collection of assumptions, beliefs, and norms of behavior that (i) are specific to an industry, customer base, or other clearly demarcated community and (ii) shape the way that that community conducts itself and perceives the world. This approach is faithful both to Kuhn's original concept and to current usage[32] yet broad enough to be applied with precision to non-scientific communities and to markets associated with specific technologies.[33]

B. Paradigm Shifts

Kuhn likened a paradigm to a scientific community's blueprint for solving problems, calling experimental work done within an established paradigm "normal science."[34] Unlike traditional notions of scientific progress as a linear, incremental process that occurs within a static universe, Kuhn observed that the most important leaps take place when normalcy is interrupted by anomalies[35] that cannot be accommodated by the prevailing paradigm.[36] He dubbed such an event a "crisis."[37] In extreme cases, which he later called "paradigm shifts,"[38] a community in crisis undergoes a scientific revolution that compels it to adopt an entirely new paradigm that better fits the troublesome data.[39] When that happens, it is impossible for the old and new paradigms to coexist.[40] Kuhn called this phenomenon "incommensurability," stating that profound differences in the ways such overlapping worldviews interpret basic definitions and standards make it impossible even to compare, much less reconcile, them.[41]

Kuhn nonetheless considered paradigm shifts to be an essential catalyst of scientific progress[42] that "invariably" result in the advancement of science.[43] He described them as part of an evolutionary process that naturally selects the worldview that best explains both anomalous observations and the greatest number of phenomena that fall within the traditional model.[44] Such a mechanism, he argued, may not foster a model that is objectively "closer to the truth,"[45] but it cannot possibly result in anything but progress.[46]

Kuhn also observed that the mere discovery of an anomaly does not always trigger a paradigm shift.[47] If a troubling observation does not inescapably conflict with a fundamental component of a traditional paradigm, a community may find some way to accommodate the anomaly by applying traditional paradigms in new ways or by redefining the troublesome observation to fall within some other discipline.[48] The community may even completely sidestep the problem by declaring it beyond the current state of the art and setting it aside for consideration by future researchers armed with next-generation clinical tools.[49]

IV. Creative Destruction and Disruptive Innovation

Despite their disparate vantage points, Kuhn's analysis of paradigm dynamics has much in common with the evolutionary school of economics. Both view technological innovation and its effects as an inevitable, adaptive, and even quasi-organic process akin to natural selection.[50] And like Kuhn, evolutionary economists believe that despite the havoc a paradigm shift wreaks upon a traditional community, such transitions are a prerequisite for progress.[51] This school has become an integral part of modern macroeconomic theory.[52]

A. Schumpeter and Self-Destructing Capitalism

Joseph Schumpeter's analysis of the role of entrepreneurship profoundly influenced twentieth-century economic thought.[53] In his posthumous 1954 book *The History of Economic Analysis*, he described a cyclical model

of "creative destruction" that ties closed-universe economic development to endlessly recurring sequences of equilibrium, disruption, transition/adaptation, and renewed stability.[54] He portrayed capitalism as a self-devouring process of monopoly and breakup where technology-driven entrepreneurship continually and inexorably interrupts the "steady-state" economic equilibrium that normally exists in the absence of entrepreneurial perturbation.[55]

In Schumpeter's view, this "creative destruction" was an essential component of capitalism that was responsible for economic growth.[56] Like Kuhn, his observations lead to the conclusion that governments should avoid unduly hampering technological progress by seeking too zealously to shield traditional industries from its disruptive effects.[57]

B. Technological Innovation and the Solow-Swan Neoclassical Model

Schumpeter's work was refined and quantified by Robert Solow and Trevor Swan, who developed the Solow-Swan Neoclassical Model of economic growth.[58] This theory states that overall economic progress within a Schumpeterian closed system is driven by (i) increases in "inputs" (primarily labor and capital) and (ii) exogenous technical progress.[59] It concludes that economies naturally converge toward a steady-state growth rate that depends solely on the pace of technological progress and changes in the size of the labor force.[60] If the workforce increases at a steady, predictable rate, overall economic growth (adjusting for factors like depreciation and inflation) becomes a function of the pace of technological innovation.[61] This model has since been applied to determine that 80 percent of post-World War II growth in domestic productivity was due primarily to global research and development.[62]

C. Christensen and Disruptive Innovation

These theories burst into mainstream consciousness when Harvard Business School professor Clayton Christensen's best-selling 1997 book *The Innovator's Dilemma* introduced a theory of business management that addressed the destabilizing market effects of "disruptive technologies."[63] Unlike "sustaining technologies," which generally are incorporated into existing business models, Christensen's disruptive technologies spawn new markets that small, innovative companies can hijack under the noses of established businesses.[64] He stated that such technologies, so long as they are sufficiently different from traditional models, will displace even clearly superior alternatives if they better fit the needs of some emerging (and overlooked) user community.[65] The new markets often are initially too small to attract the attention of established interests, but they can grow rapidly enough to displace entire industries[66] through a natural-selection process much like a Kuhnian paradigm shift or Schumpeter's creative destruction.

Christensen ultimately revised his theory to identify "disruptive innovation" as the true catalyst, arguing that novel application of technology within a new business model, not the technology itself, is the cause of market disruption.[67]

V. Dissonance and Cognition

A. Festinger and Cognitive Dissonance

Business and economic theories that describe the mechanics and implications of paradigm shifts do not explain *why* the appearance of even a single anomaly would drive a community to desert long-held beliefs and norms. Is there some fundamental aspect of human nature that compels groups to abandon a worldview *en masse* whenever an ostensibly fitter one comes along? Are lawmakers' efforts to shield traditional business models from new technology invariably doomed to failure? More to the point, given the historical consensus that paradigm shifts are a *sine qua non* of economic progress, is such a goal even desirable? One set of answers can be found in cognitive dissonance theory, a branch of social psychology that describes the ways conflicted individuals respond to internal contradictions.[68]

Dissonance theory may be virgin territory to the legal profession, but it is well-tread ground in the social sciences. Current thinking dates back to psychologist Leon Festinger's seminal 1957 text *A Theory of Cognitive Dissonance*, which revealed the surprising findings of his clinical research into the motivations of behavior.[69]

Festinger defined "cognitions" as "any type of human knowledge, opinion, or belief about the environment, about oneself, or about one's behavior,"[70] a kitchen-sink classification that accommodates everything from religious and political ideologies to Internet file-sharers' beliefs about the morality of their downloading practices. Within this model, a shared paradigm (which, you will recall, is a collection set of assumptions, beliefs, and behavioral norms) is merely a set of cognitions held by all members of a community.[71]

Festinger found "cognitive dissonance" when an individual is faced with two cognitions that lead to obverse results.[72] A record buyer, for example, might believe that shoplifting a CD would be an act of theft—a cognition that leads to the conclusion that acquiring a commercial recording without payment is immoral. But if that same person falls into the habit of comfortably downloading copyrighted music from unauthorized Internet services, that behavior leads to a second cognition and the obverse conclusion that he is allowed to take commercially produced music for free. The paradox between those two conclusions is a classic example of cognitive dissonance between a belief and a norm of behavior.[73]

Festinger frequently saw his subjects struggling to avoid the obverse implications of their dissonant cognitions, an observation that led him to conclude that dis-

sonance is profoundly aversive.[74] He also discovered that cognitive dissonances could be assigned magnitudes and that a dissonance's aversive effect increases monotonically with its magnitude[75]—a key finding that has helped psychologists predict responses to dissonance-altering stimuli.[76]

Festinger's basic premises remain valid today, but fifty years of analysis and observation have produced refinements.[77] Joel Cooper's "New Look" model[78] asserts that dissonance produces aversion only when a subject deliberately takes steps to produce obverse conclusions and is fully aware of the consequences of that decision. The extent of this volition and commitment is now considered a key factor in determining the magnitude of a dissonance and its resulting aversive effect.[79]

B. Dissonance Reduction

Festinger's observation that aversion increases with dissonance magnitude implies that individuals, regardless of whether they act alone or as part of a community, are compelled to find ways to reduce the magnitude of any cognitive dissonance they experience.[80] Festinger and his followers have documented many ways humans try to reduce cognitive dissonance,[81] the majority of which fall into four general categories:[82]

(i) pretending the dissonance does not exist;

(ii) reducing the dissonance's perceived importance by rationalizing or discounting its effect or by fabricating counterbeliefs that are consonant with both cognitions;

(iii) changing one's behavioral norms to reduce dissonance with another cognition; and

(iv) taking steps to prevent dissonant cognitions from arising in the first place, including avoiding possible sources of dissonance-producing cognitions.[83]

These responses can produce unexpected and seemingly irrational results that, without an appreciation of dissonance effects, appear to defy logic.[84]

VI. Tying It All Together: The Dissonant Paradigm Model

Cognitive dissonance pervades our lives. Academic literature is filled with efforts to extend its precepts and observations to group behavior.[85] This article applies the theory to dissonances between cognitions held by communities that straddle a paradigm shift.[86]

It should not be surprising that the laws of cognitive psychology would apply to mass phenomena such as paradigm shifts. Communities consist of individuals, and paradigms are by definition clusters of beliefs, assumptions, and behavioral norms (that is, *cognitions*) shared by community members.[87] If a disruptive event gives rise to cognitions dissonant with those of a communal paradigm, similar cognitive dissonance potentially will confront every individual in the group. Such a stimulus can, in aggregate, produce macroeconomic effects if it elicits common dissonance-reduction responses from a significant proportion of the community.[88]

Kuhn, Schumpeter, Christensen, and their followers all use local terminology to describe aspects of this process. An anomaly—be it an inexplicable experimental observation (that is, a Kuhnian "crisis"), an economy-shattering social or technological innovation, or an entrepreneurial business model that renders established industries obsolete—destabilizes a traditional paradigm by creating cognitive dissonance in the minds of individuals who share that paradigm.[89]

Community members seek to reduce such dissonance with an urgency that increases with the magnitude of the dissonance.[90] These efforts produce combinations of the standard dissonance-reduction strategies discussed above.[91] Minor dissonances can be accommodated without drastic steps, but anomalies that strike at the heart of a paradigm drive a community to more extreme action.[92]

A paradigm shift occurs when high-magnitude dissonance makes it impossible to place anomaly-generated cognitions in consonance with the traditional paradigm.[93] Kuhn notes that in such cases, old and new paradigms are not merely different—they are generally "incommensurable."[94] That is, they incorporate assumptions and basic definitions so irreconcilable that one cannot even find common benchmarks with which to compare them.[95] Once that happens, community members generally are left with dissonance-reduction options that permit only the adoption of a better-fitting worldview—and the migration to a new paradigm.[96]

These are the general conditions, long studied and well-understood from a variety of perspectives, to which the arguments in this article apply. Social psychologists and economists, like most scientists, raise an eyebrow at theories that are contrived *post hoc* and not founded on empirical data derived from blind, peer-reviewed studies.[97] But the liberties taken here in synthesizing the dissonant-paradigm model are hardly unprecedented. Researchers have long sought and found parallels between dissonance and macroeconomic phenomena,[98] and Kuhn's observations about paradigm shifts have been applied routinely to extra-scientific communities.[99] Although new to the legal world, the rationale and methodology that underlie this analysis should be familiar to readers grounded in fields such as psychology and economics.

VII. The Jurisprudence of Paradigmatic Dissonance: *Sony v. Universal*

Despite its apparent novelty, the dissonant paradigm model is hardly disconnected from mainstream jurisprudential thought. There is little reason a theory rooted in

Neoclassical economics and cognitive dissonance—doctrines that have been extended successfully to so many of the social sciences[100]—would not be relevant to an area of the law that clearly intersects with macroeconomics and group psychology.[101]

Consider, for example, a dissonance-informed analysis of the Supreme Court's 1984 decision *Sony Corp. of America v. Universal City Studios*.[102] In that case, Universal Studios and Disney Productions, which owned copyrights on television shows and feature films broadcast by television networks, claimed that Sony contributed to large-scale infringement by selling videocassette recorders (VCRs) that let viewers "time-shift" (that is, record and store for later viewing) their copyrighted content.[103]

Commercial-supported over-the-air television was still the industry's dominant business model when the case reached the Supreme Court.[104] But this paradigm had already been disrupted[105] by consumer videotape technology that allowed millions of viewers to consume TV programming more efficiently by choosing viewing times convenient to them.[106]

Cast in terms of paradigmatic dissonance, this controversy becomes a straightforward contest between shared worldviews on opposite sides of a paradigm shift. As is generally the case, the local legal system at the time held the perspective of the industry's traditional real-time broadcast paradigm.[107] The plaintiffs thus urged the Court to apply strict statutory construction to copyright law.[108] Within that paradigm, non-infringing "fair use" of copyrighted content was limited to a small number of enumerated examples subject to a statutory four-part test.[109] This short list did not include time-shifting entire programs for personal use.[110]

Time-shifting disrupted the traditional paradigm by transferring temporal control over content consumption from the networks to consumers. This threatened a business model that relied upon carefully constructed programming schedules to maximize ratings and advertising revenue.[111] More alarming to the plaintiffs, the VCR made it easy for consumers to share and distribute recorded programs without copyright owners' consent, strip out or fast-forward past commercials, view recorded shows multiple times, and otherwise control and manipulate content in ways that previously had not been possible.[112]

These capabilities spawned cognitions alien to the traditional paradigm and led to widespread adoption[113] of behavioral norms (that is, time-shifting) that did not fall within the plaintiffs' definition of fair use. The home-taping community's commonality of experience ensured that these cognitions and dissonances were experienced as group phenomena.[114]

Cognitive dissonance theory teaches that viewers faced with such disruptive technology and its aversive consequences would likely try to reduce their dissonance by denying to themselves the existence of any conflict; by fabricating consonance-restoring cognitions (such as the belief that time-shifting is a valid new type of fair use); or by taking steps to prevent the creation of cognitions potentially dissonant with the traditional paradigm (by, for example, refusing to make unauthorized recordings or even to own a VCR).[115]

Among viewers who could not resist the allure of the VCR, the most probable strategy would be to devise some rationale for deeming time-shifting morally or legally legitimate. Furthermore, because the VCR threatened to disrupt a traditional worldview at a fundamental level, these cognitions likely would have been only one component of a comprehensive, internally consistent set of behavioral norms, beliefs, and assumptions—in other words, an entire paradigm—that better accommodated anomalies created by VCR technology.[116]

Kuhn, Christensen, and the evolutionary economists agree that it is generally futile—and even undesirable—to obstruct a new paradigm that more efficiently addresses a disruptive anomaly.[117] Here, it was too late to simply ban the VCR after millions of users had adopted the new time-shifting paradigm. But it would have been equally difficult for a mere plurality to endorse unrestricted mass copying of protected content in a way that might be interpreted as subverting centuries of copyright history and tradition.

The Court ultimately resolved the conflict by adopting the standard dissonance-reduction strategy of fabricating a new cognition that reconciles disparate paradigms.[118] Refusing to hold home taping infringement *per se*, it devised a rationale for extending the "fair use" defense to the practice of time-shifting an entire program for non-commercial use.[119] Without an underlying act of direct infringement, the traditional legal system could not deem the defendant's act of selling VCRs to be contributory infringement.[120]

The *Sony* Court found support for this position by noting that the plaintiffs had been unable to show non-trivial harm and that other content providers were uninterested in protecting their content from time-shifting.[121] VCR technology thus offered substantial non-infringing uses that would be lost to the public should video recorders be banned—justification in the Court's eyes for declaring time-shifting to be a new type of fair use.[122]

Notwithstanding its inconsistency with precedent, this holding upheld the studios' contention that existing copyright law should be strictly enforced, but it did so through a process of extrapolation. The Court effectively created a third paradigm that reduced the dissonance between the Copyright Act's infringement rules and the new-paradigm cognition that time-shifting is neither morally nor legally wrong. It allowed the paradigm shift to generally run its course, but only so long as time-shifters adhered to fair-use limits set by the Copyright Act.[123]

In true Kuhnian fashion, unfettered VCR technology eventually inspired new, more efficient business models and time-shifting technologies that ultimately benefited all parties.[124] Not only did the VCR help create the enormously profitable movie-rental market, it also benefited the public by paving the way for methods of content delivery that would more efficiently and effectively satisfy consumer needs than traditional over-the-air television.[125]

Most significantly, the Court arrived at its holding through conventional judicial reasoning (albeit, perhaps, with paradigmatic dissonance lurking as a Holmesian "inarticulate major premise"[126]), demonstrating that established jurisprudential standards and methodologies can be fully compatible with the dissonant-paradigm model.

VIII. Dissonance and Modern Jurisprudential Thought

It is one thing to use court decisions to illustrate a novel legal theory, but *ex post facto* analyses neither demonstrate a model's predictive value nor integrate it into an established legal framework. Here, however, there is no need to shoehorn paradigmatic dissonance into the jurisprudential mainstream. The model clearly claims common provenance with several prominent schools of legal thought and, in particular, shares with the influential Chicago School of the Law and Economics movement[127] deep roots in Neoclassical economics and belief in the primacy of transactional efficiency and unfettered market forces.[128] One might even argue that paradigmatic dissonance merely enhances Law and Economics with a set of dissonance-cognizant analytical tools.[129]

Both acknowledge that economic forces set the stage for paradigm shifts and that, despite any concomitant disruption, such forces are essential components of a healthy, growing economy. But paradigmatic dissonance more completely explains less obvious motivations of adversaries entangled in such shifts and better predicts the counterintuitive ways parties may react to economically rational remedies. Paradigmatic dissonance, in other words, fits snugly within the larger framework of the Law and Economics model but introduces additional factors necessary to accurately compare relative efficiencies and transaction costs and to predict the conduct of communities interacting within a transitioning market.

The Chicago School has been criticized for mercilessly applying economic criteria to even equitable disputes, a perspective that opponents claim ignores the importance of distributive justice.[130] Paradigmatic dissonance addresses this concern by softening the Neoclassical Model's stark reliance on market infallibility with humanist qualifications drawn from cognitive psychology.

Consider again the *Sony* decision. There, the plurality, although concerned with preserving the plaintiffs' copyrights, was unwilling to criminalize millions of Americans merely because they chose a more efficient consumption method. The Court intrinsically understood the futility of trying to suppress a paradigm that had been endorsed by the mass market—a tactic that, even if successful, risked opening niches for less efficient and even more disruptive innovations.[131] In giving relatively free rein to economic natural selection, the *Sony* decision could not help but facilitate efficient business models that would better serve the public interest.

Paradigmatic dissonance and the Chicago School share ground in other ways. Richard Posner,[132] for example, reveals a Kuhnian perspective to Law and Economics theory when he describes how evolutionary market forces, not the whims of government or some objectively knowable benchmarks, ultimately determine the "truth" of new ideas.[133] Like the theorists from whose work the dissonant-paradigm model is derived, he explains that communities select cognitions (and, by analogy to the work of H. L. A. Hart,[134] ascribe power to the corresponding legal system) when those cognitions better explain observations and phenomena that are anomalous to a traditional paradigm:

> [W]hen we say that an idea (the earth revolves around the sun) is correct[,] we mean that all or most of the knowledgeable consumers have accepted ("bought") it. Even in science—the traditional domain of objective validity—ideas are discarded not because they are demonstrated to be false but because competing ideas give better answers to the questions with which the scientists of the day are most concerned.[135]

Posner's statements also echo another tenet of paradigmatic dissonance: the impossibility of protecting an established business model by suppressing a more efficient paradigm.[136] By corollary, Law and Economics, like the dissonant-paradigm model, acknowledges that government should, whenever possible, resist the urge to shield vested interests in heavy-handed ways that interfere with technological progress or judge innovations solely by standards rooted in traditional paradigms and legal systems.

> If competition among ideas is the method by which truth is established, the suppression of an idea on the ground that it is false is irrational. An idea is false only if rejected in the marketplace, and if rejected there is no occasion to suppress it. For the government to declare an idea to be "true" when it has suppressed the competing ideas would be comparable to its declaring a brand of beer to be the "most popular" brand when

the sale of the other brands had been suppressed."[137]

Posner further notes that even the venerable "Hand rule" of tort law,[138] familiar to almost every first-year law student, fits within this framework by requiring lawmakers and adjudicators to consider the relative effects of their actions on both parties to a dispute.[139] A remedy that enacts great penalties upon time-shifters without demonstrating equivalent benefits to content owners would be based upon a biased analysis that ignores one side of the economic equation. This is the lesson of *Sony v. Universal* and one that is still being relearned to this day.

One can find connections to paradigmatic dissonance in other schools of jurisprudential thought. H. L. A. Hart,[140] for example, tempered the austere Austinian view of positivism[141] by identifying "secondary rules" that legitimize legal power and define how it is allocated and applied in society. The most basic of these rules is the Rule of Recognition, which holds that law gains validity not from intrinsic authority of the sovereign but from the recognition and acceptance of those subject to its power.[142] This concept foreshadows the fundamental principle of paradigmatic dissonance that it is a community's market-driven choices, regardless of the efforts of government, that legitimize a local legal system and its accompanying paradigm.

From another perspective, the dissonant-paradigm model may be viewed as a straightforward extension of the Sociological School of legal thought, which considers differences between social groups on either side of a legal controversy.[143] Instead of defining law as what the courts or a government say it is, both doctrines assume a pragmatic stance that strives to balance competing values of adversarial groups that belong to different demographic and social classes.[144]

These parallels are evidence that legal models do not develop in a vacuum. The same broadly applicable doctrines that inform paradigmatic dissonance could not have helped but influence other major schools of jurisprudential thought. Paradigmatic dissonance is a multidisciplinary synthesis of widely accepted theories, not an unprecedented leap. And its unique vantage point is an extension of, not an alternative to, mainstream legal thought.

IX. The Role of Lawmakers and Adjudicators

A. The Illusion of Rationalism

Paradigmatic dissonance need not be the only modality used to analyze controversies that arise during paradigm shifts, but failing to consider it can result in an imperfect analysis and unintended consequences.[145] One problem is that mainstream Rationalist analysis may not reveal the underlying motivations of parties on either side of a transition.[146] Rationalism, for example, generally assumes that individuals' responses to external events follow logically from their beliefs—not the other way around—a presumption that produces an incomplete picture of paradigm-shift dynamics.[147]

Rationalist legal analysis also fails to acknowledge fundamental characteristics of the shift itself. In his exhaustive examination of the conflicts between the recording industry and the online file-sharing community, economist Aernout Schmidt noted that rather than treating the emergence of disruptive entrepreneurial markets as migrations to new paradigms, mainstream legal analysis assumes the viewpoint of the "local legal system."[148] Such an approach determines legality but fails to address the questions of *why* one community irrationally violates the law in an otherwise-stable legal system and why another clings to economically inefficient business models within that established system.[149] Because existing laws are likely wedded to traditional paradigms, Schmidt argued, Rationalist analysis encourages a one-sided perspective that casts disruptive technology and new-paradigm communities as villains.[150] Furthermore, although mainstream legal analysis frequently assumes that single-mindedly applying current law during a paradigm shift will foster more efficient business models, this rarely happens.[151]

Another example of Rationalism's failings is its assumption that more severe penalties have greater deterrent effect upon premeditated actions.[152] This may make sense when perpetrators share values and behavioral norms with the local legal system.[153] But when disputes arise between communities defined by incommensurable paradigms, simply increasing penalties that favor one worldview over the other can produce counterintuitive results.[154] Dissonance theory teaches that the most effective way to use punishment to discourage behavior is to inflict the mildest possible penalty capable of influencing underlying beliefs.[155] Anything stronger will strengthen those beliefs and make the proscribed behavior *more* attractive.[156] Worse, the principle of *vicarious dissonance*, which states that individuals can experience the aversive effect of other people's dissonant cognitions,[157] makes it likely that applying an overly harsh remedy to even one community member can have undesired effects on the entire group.[158]

B. What the Law Can Learn from Paradigmatic Dissonance

1. Legal Remedies

It is beyond the scope of this article to propose solutions to specific social problems.[159] But it is certainly possible to suggest general points of departure from which theorists, lawmakers, and adjudicators can develop fact-specific analyses and remedies.

In an unpublished 2003 dissertation, economists Jason Withrow and Mark Geljon applied Kuhn's and Festinger's models to business and management problems, analyzing them as dissonances between contrasting

worldviews. [160] The authors defined three general classes of remedies:

- strategic approaches that foster the development of a third paradigm that is consonant with the worldviews of both parties;[161]
- tactical solutions that reduce dissonance by facilitating the parties' understanding of each other's worldviews and by encouraging them to accept the fact that their conduct is rooted in different assumptions and beliefs;[162] and
- operational cures that work to build bridges between worldviews when creating a new paradigm is not possible.[163]

Any combination of these three approaches may give rise to effective remedies, but cures must be fashioned with an understanding of underlying cognitive dissonances and the specific factors that control their magnitude.[164] This perspective may help explain why regulators have traditionally favored certain types of solutions to the problems that attend disruptive innovation:[165]

- **Throw Technology at Technology.** Regulate the pace of the shift with incentives that favor technological controls or innovations that reduce dissonance or make old paradigms more economically feasible.[166]
- **Alternative Dispute Resolution.** Rather than taking one side, force parties to submit to mediation or arbitration. This approach can reduce aversion to compromise by coercing adversaries to adopt otherwise-dissonant cognitions[167] and can be especially effective during an impasse, when one or both parties cannot afford to lose face through concession.[168]
- **Tax the Poor and Give to the Rich.** When disruptive innovation threatens a traditional industry with undue hardship, it may be possible to ease the pain by using fees and taxes to shift capital. This solution changes the relative efficiency of the two paradigms, giving the besieged industry time to catch its breath without unduly suppressing innovation. It also may reduce both sides' dissonances by creating a bridging mechanism through which each acknowledges, supports, and profits from the other's efforts.[169]
- **Give the Market Free Rein.** In some cases, the government has simply refused to step in, allowing survival-of-the-fittest market forces to exert *de facto* regulation. This may seem harsh, but it was just such a ruling in *Sony* that, despite fears that home videotaping would devastate the film and television industries, instead gave Hollywood an enormous new revenue stream by facilitating the creation of the prerecorded videotape aftermarket.[170]

C. Unintended Consequences

The surprising outcomes often predicted by cognitive dissonance theory help explain why many seemingly rational, straightforward legal remedies produce counterintuitive results. Dissonance theory can thus help governmental and private entities better comprehend and more reliably influence individuals' behavior by more accurately identifying and characterizing the components of the paradigm they share.[171]

The recording industry, for example, periodically tries to discourage unauthorized online file-sharing activity by launching media campaigns that stress the inequity of enjoying other people's creative work without compensation.[172] Dissonance theory would characterize such messages as attempts to reinforce consumers' presumed belief in fair play and thus increase the magnitude of that cognition's dissonance with—and consumers' aversion to—unlawful file-sharing behavior. This tactic, however, ignores the fact that file-sharing communities live within a different paradigm than do record labels. It is thus a mistake to assume that young Internet music consumers observe any belief, assumption, or norm of behavior merely because such a cognition falls within the record industry's traditional paradigm.

Music file-sharers, for example, do not equate the interests of faceless record labels with those of recording artists. Many believe that money paid to major record labels never finds its way into musicians' pockets and, if anything, assume that record companies routinely and shamelessly exploit both musicians and consumers.[173] The cognition that unlawful downloading deprives labels of income thus does not easily lead the file-sharing community to the conclusion that the practice is immoral or harmful to innocent parties. Therefore, pleas to consider the welfare of musicians are less likely within the file-sharing community's paradigm to increase the magnitude of the dissonance between downloaders' online behavioral norms and their belief in fair play.

A better understanding of dissonance and paradigm shifts might suggest more effective ways to discourage file-sharing behavior. One strategy would be to cultivate dissonance with the cognition that recording companies engage in practices so unfair that the labels themselves do not deserve equitable treatment. The labels, however, have done exactly the opposite, reinforcing their schoolyard-bully image with high-profile lawsuits that threaten small-time music downloaders with extraordinary fines.[174] As mentioned earlier, dissonance theory teaches that unnecessarily harsh penalties have less deterrent effect and can actually strengthen cognitions that reinforce undesired behavior.[175] Taking steps that increase resentment of the music industry promotes the belief that the

labels do not deserve fair treatment and further reduces cognitive dissonance with illicit downloading norms, making the practice even more acceptable within the file-sharer community.[176]

Apple, Inc., on the other hand, took a radically different approach with its iTunes legal music download service, the first such offering that could be considered a success.[177] Despite the fact that Apple's copy-protection technology was cracked soon after iTunes went live,[178] there is little evidence that the site has suffered from wholesale piracy—at least any that might cause the devastating sales declines that have crippled the major labels. One difference is that young, hip music consumers do not view Apple with the contempt they reserve for old-paradigm record companies. Apple CEO Steve Jobs has made it clear that Apple is one of them, openly challenging the labels' hardline anti-piracy stance[179] and furnishing iTunes with a slick interface and savvy business model that clearly evinces an understanding of its user community's shared paradigm.[180] Where music consumers overwhelmingly prefer illicit download sites to the labels' proprietary offerings, a significant minority willingly pays Apple for content available elsewhere for free. In other words, Apple's business decisions, informed by its intrinsic understanding of the online-music community's shared paradigm, give rise to cognitions and cognitive dissonances critically different from those produced by the labels' old-paradigm tactics.

This example hints at the power of dissonance theory to provide an analytical framework within which one can conceptualize interactions between communities that share different paradigms. But it is not intended to be definitive proof of the superiority of the dissonant-paradigm model. Many of the same conclusions could have been reached through other paths and, more to the point, using paradigmatic dissonance theory to forge a comprehensive analysis of a complex real-world controversy would require a deeper understanding of Festinger's and Kuhn's work and its linkage to modern jurisprudential thought than can be imparted here. The point is to convey a taste of how the dissonant-paradigm model might be applied and to demonstrate that such analyses are possible, have predictive value, and can produce insights into why seemingly logical actions have unanticipated outcomes.

X. Final Thoughts: "We've Only Just Begun"

The dissonant-paradigm model may seem novel within the context of legal analysis, but extrapolations of psychological and economic theories to foreign disciplines are far from unique. As noted earlier, the work of Kuhn, Christensen, and the evolutionary economists has been successfully extended to a broad range of disciplines. And legal theorists have strayed into the social sciences—sometimes with results that seem deceptively similar to the work presented here.[181]

Applying Festinger's theory of cognitive dissonance to the law may seem formidable to legal professionals who lack training in psychology, but similar efforts have already borne fruit in business management, economics, finance, and many other fields of endeavor.[182] There is no reason why the legal profession, with its centuries-long academic legacy and huge number of peer-reviewed journals,[183] cannot develop a useful body of theory and case law in this area.

This article has attempted to give an aerial overview of the dissonant-paradigm model's logical flow and overarching concepts. Numerous opportunities exist for interested readers to flesh out this skeletal work and delve more deeply and subtly into the topic from both legal and extra-legal perspectives.

Paradigmatic dissonance does not take sides in paradigm-shift controversies and, despite some of the examples cited here, it should not be condemned out of hand as a backhanded effort to justify copyright infringement. To the contrary, it proposes a broader perspective that accommodates the viewpoints of both parties to a controversy and acknowledges that new-paradigm business models and communities, despite the havoc they play on established industries, cultures, and legal systems, serve a vital economic function. In other words, it holds that such pioneers should not be reflexively dismissed as criminals merely because their activities defy traditional standards.

Paradigmatic dissonance brings to the table a new way for the law to conceptualize the processes that drive paradigm shifts, a framework within which lawmakers and adjudicators can better evaluate responses to complex and subtle social problems. It is the author's hope that this first modest effort will be cultivated by many hands into a robust model that can help relieve the often devastating business, social, and economic problems that accompany increasingly frequent technological revolutions.

Endnotes

1. *See generally infra* Parts II–III (describing how technological innovation can give rise to economic upheavals).
2. *See* Thomas A. Kinney, From Shop to Factory in the Industrial Heartland: The Industrialization of Horse-Drawn Vehicle Manufacture in the City of Cleveland (unpublished Ph.D dissertation, Case Western Reserve University), The Encyclopedia of Cleveland History, http://ech.case.edu/ech-cgi/article.pl?id=WACI (describing how none of Cleveland's "enormous wagon and carriage factories" survived the introduction of the automobile).
3. *See, e.g.*, *West Virginia State University Capitol Theater*, http://capcenter.wvstateu.edu/history.html (last visited Mar. 24, 2008) ("With the advent of 'talkies' in the late '20s, . . . live stage shows were suddenly things of the past.").
4. *See, e.g.*, *We Have a Winner: Blockbuster Essentially Concedes to Netflix*, Gizmodo, Nov. 2, 2007, http://gizmodo.com/gadgets/we-have-a-winner/blockbuster-essentially-concedes-to-netflix-318076.php (noting that Blockbuster is the only video-store chain to remain profitable, that its only hope of survival is to "[move] into new distribution channels," and that "things are looking grim for the corner rental store").

5. All three industries were displaced with startling speed by new markets created by the automobile, the motion picture soundtrack, and Internet movie distribution. *See supra* notes 2-4 and accompanying text.

6. *See, e.g.*, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 417 (1984) (where content owners unsuccessfully petitioned the Court to outlaw home video recording); *Deep v. Recording Industry Ass'n of America, Inc.*, 540 U.S. 1107 (2004); *see also* Declan McCullagh, *High court turns deaf ear to Aimster*, CNET News, Jan. 13, 2004, http://www.news.com/2100-1028-5139938.html (discussing the Supreme Court's refusal in *Deep v. RIAA* to hear Aimster's argument that the online file-sharing service had legitimate non-infringing uses).

7. Regardless of how the cases listed *supra* at note 6 were decided, none were able to halt the disruptive effect of new technology. Sony could not stop the inexorable growth of home video-recording and none of the recording industry's many legal victories could save it from decimation by online file-sharing. *See generally* James Lardner, Fast Forward: Hollywood, the Japanese, & the VCR Wars (paperback ed. rev., New American Library 1988) (describing the content industry's efforts to suppress personal video-recording technologies); Aernout Schmidt, Wilfred Dolfsma, & Wim Keuvelaar, Fighting the War on File Sharing (Information Technology & Law Series V. 14) 85-86, 90 (T·M·C Asser Press 2007) (noting that the record industry's successful effort to shut down the centralized Napster network merely encouraged file-sharing entrepreneurs to develop more resilient decentralized topologies such as LimeWire and Gnutella).

8. *See infra* Part IX.A.

9. *See generally* Leon Festinger, A theory of cognitive dissonance (Stanford University Press 1957) (deriving the basic precepts of cognitive dissonance theory).

10. *See infra* Parts VI–VII.

11. *See infra* Part IX.B.

12. *See, e.g., supra* notes 2–5 and accompanying text.

13. Consider the motion picture industry, which has survived for nearly a century by maintaining the flexibility to extract revenue from potentially disruptive innovation that ranged from sound recording through broadcast television, the VCR, cable TV, and the Internet. *See generally* A Concise History of Movie Industry Economics, (Charles Moul ed., Cambridge University Press 2005); The American Movie Industry: The Business of Motion Pictures, (Gorham Kindem ed., Southern Illinois University 1982).

14. *See* Thomas Kuhn, The Structure of Scientific Revolutions 66, 97–98 (The University of Chicago Press, 2d Ed., Enlarged 1970); Joseph Schumpeter, Capitalism, Socialism, and Democracy 83-84 (Harper & Row 1942); Aron S. Spencer & Bruce A. Kirchhoff, *Schumpeter and new technology based firms: Towards a framework for how NTBFs cause creative destruction*, 2 Int'l Entrep. Mgmt. J. 145, 146 (2006).

15. *See* Spencer & Kirchhoff, *supra* note 14, at 146.

16. Contrast this to the case where industries have survived by anticipating and riding each new wave of innovation as it breaks. In such cases, businesses are able to prevent paradigm shifts by incorporating non-disruptive *sustaining* technologies into their business models. *See* Clayton M. Christensen, The Innovator's Dilemma xviii-xix (HarperBusiness Essentials paperback ed. 2000) (1997) (describing the differences between disruptive and sustaining technologies). *See, e.g.*, Don Labriola, *Discs After DVD: Blue-Light Specials*, PC Magazine, May 18, 2005, *available at* http://www.pcmag.com/article2/0,2704,1820927,00.asp (describing how, in the rewritable-DVD industry, Tier One manufacturers survived for years by exploiting every technological advance in the medium with a new product line. Each generation commanded higher margins long enough to subsidize R&D costs, and by the time offshore vendors could drive down prices with reverse-engineered knockoffs, the next launch was ready to go. This cyclical model kept the industry healthy until it finally hit the physical limits of the medium. Similar business models are common in the computer and consumer electronics industries.).

17. The theorists discussed in Parts III–V are unanimous in their contention that these types of technology-driven mass migrations, once begun, cannot be stopped for long. *See, e.g., infra* notes 40, 55.

18. *See, e.g.*, Brief of Association for Independent Music as Amicus Curiae in Support of Appellees Urging Affirmance at 3-6, *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, No. 00-16401 (9th Cir. Sep. 19, 2000), 2000 WL 33979744.

19. *See, e.g.*, Brian Hiatt & Evan Serpick, *The Record Industry's Decline: Record sales are tanking, and there's no hope in sight: How it all went wrong*, Rolling Stone.com, Jun 28, 2007, *available at* http://www.rollingstone.com/news/story/15137581/the_record_industrys_decline/print (stating that, like many industry insiders, talent mgt. company CEO Jeff Kwatinetz now believes that suing Napster "was the moment that the labels killed themselves").

20. This process is described from several perspectives in Parts III–VI, and its application to legal controversies is discussed in Parts VII and IX.C.

21. The classic example of such an outcome is *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984), where the Court's refusal to outlaw videocassette recorders forced the movie industry to figure out how to instead use the technology to create a profitable aftermarket. The blow-by-blow of this complex melodrama is told compellingly in James Lardner, Fast Forward: Hollywood, the Japanese, & the VCR Wars (paperback ed. rev., New American Library 1988).

22. The reason for this is that new business models are intrinsically unpredictable.

23. *See* Robert "Larry" Trask, Mind the Gaffe! A Troubleshooter's Guide to English Style and Usage 200 (HarperCollins 2006) ("*[P]aradigm* has become a vogue word, and today it is used far too freely, and often pretentiously, when a simpler word would be preferable. . . . Moreover, be very wary of the expression *paradigm shift* [, which has been] applied with wearisome frequency to almost any change in policy or fashion.").

24. Epistemology is a branch of philosophy that studies the nature of knowledge, its means of production, and the way that it relates to concepts like truth, belief, and skepticism. *See* Encyclopædia Britannica Online, 2007, http://www.britannica.com/eb/article-9106052/epistemology.

25. Kuhn, *supra* note 14, at 182. Kuhn initially defined the term: "the entire constellation of beliefs, values, techniques, and so on shared by the members of a given community." *Id.* at 175. But he later described a narrower type of "paradigm" that was a subset of the disciplinary matrix: "the concrete puzzle-solutions which, employed as models or examples, can replace explicit rules as a basis for the solution of the remaining puzzles of normal science." *Id.* This article uses only the original "disciplinary matrix" definition when referring to Kuhnian paradigms.

26. Schmidt *et al.*, *supra* note 7, at 147.

27. Kuhn, *supra* note 14, at 208–09 (explicitly calling for "comparative study of the corresponding communities in other fields" and observing that his theses "are undoubtedly of wide applicability" because Kuhn himself had borrowed many assumptions from the social sciences, literature, music, the arts, politics, and other disciplines).

28. *See, e.g.*, http://en.wikipedia.org/wiki/Paradigm (crediting the late University of Toronto Sociology Professor Madan Handa as having "introduced the idea of 'social paradigm' in the context of social sciences" in his unpublished paper "Peace Paradigm: Transcending Liberal and Marxian Paradigms," presented at the International Symposium on Science, Technology and Development, New Delhi, India (Mar. 20–25, 1987) (mimeographed transcript available at O.I.S.E. Library, Univ. of Toronto)) (last visited Mar. 24, 2008).

29. *See*, *e.g.*, Jason Withrow and Mark Geljon, *Paradigm Dissonance: A Significant Factor in Design and Business Problems*, Dec. 11, 2003, http://www.boxesandarrows.com/view/paradigm_dissonance_a_significant_factor_in_design_and_business_problems.

30. *See*, *e.g.*, PCMag.com Encyclopedia, http://www.pcmag.com/encyclopedia_term/0,,t=paradigm+shift&i=57310,00.asp (last visited Mar. 24, 2008) (claiming that one example of a "paradigm shift" is "accessing applications and data from the Web instead of from local servers").

31. The computer industry, for example, defines "paradigm" broadly as any "model, example or pattern," PCMag.com Encyclopedia, http://www.pcmag.com/encyclopedia_term/0,2542,t=paradigm&i=48811,00.asp (last visited Mar. 24, 2008), a characterization that has encouraged pundits to apply it to everything from user-interface styles (Jan Ozer, *Pinnacle Edition DV*, Sep. 17, 2002, *available at* http://www.pcmag.com/article2/0,2704,480532,00.asp), to the way that Microsoft Word structures documents (Edward Mendelson, *The Best Office Alternatives*, Nov. 26, 2007, *available at* http://www.pcmag.com/print_article2/0,1217,a=220175,00.asp).

32. The American Heritage Dictionary defines "paradigm" as: "A set of assumptions, concepts, values, and practices that constitutes a way of viewing reality for the community that shares them, especially in an intellectual discipline." Dictionary.com, The American Heritage Dictionary of the English Language (4th Ed. Houghton Mifflin Co., 2004), http://dictionary.reference.com/browse/paradigm (last visited Mar. 24, 2008).

33. *See*, *e.g.*, *infra* Part IX.C.

34. Kuhn, *supra* note 14, at 10, 24.

35. An anomaly in this context is a discovery with implications that contradict the assumptions and beliefs of the current paradigm, or that render that paradigm's norms of behavior ineffective or inadequate. *Id.* at 52.

36. Kuhn gave an example of such a crisis in nineteenth-century optical physics, when mounting evidence that a beam of light could act like a stream of particles could not be explained by assumptions intrinsic to the prevailing paradigm of the wave theory of light. This crisis was resolved only when the scientific community shifted over the next half-century to a relativistic paradigm that could account for this evidence. *Id.* at 11–13, 107–08. This example also illustrates Kuhn's observation that paradigm shifts can take decades to complete and often require the death or retirement of most of the community members who had vested emotionally in the earlier paradigm. *Id.* at 150–52.

37. Kuhn, *supra* note 14, at 66–73 (repeatedly referring to several such incidents as "crises").

38. *Id.* at 103–06 (first using the term "paradigm shift" several times in the Postscript to the Enlarged Second Edition).

39. *Id.* at 84–85.

40. *Id.* at 98 (declaring it an "historical implausibility" that a new scientific theory or paradigm could arise without discrediting and displacing its predecessor).

41. *See id.* at 149 (observing that a new paradigm, although likely to borrow vocabulary, concepts, and procedures from the traditional worldview it replaces, "seldom employ[s them in] the traditional way"); *id.* at 150 (stating that "the proponents of the competing paradigms practice their trades in different worlds," meaning that differences in basic assumptions change the way that old- and new-paradigm communities perceive common aspects of reality); *id.* at 101–02 (citing as an example the incommensurability of Newtonian and Einsteinian mechanics, where even seemingly equivalent terms like "mass" have fundamentally different meanings).

42. Kuhn, *supra* note 14, at 77 (summarizing the prior chapter with the assumption that scientific crises "are a necessary precondition for the emergence of novel theories").

43. *Id.* at 173 ("[P]aradigm change invariably produce[s] an instrument more perfect . . . than those known before.").

44. *Id.* at 109–10 (presenting paradigm shifts as a natural-selection process that fosters competition among worldviews to best explain anomalies that thwarted the old paradigm); *id.* at 172 (drawing explicit parallels between scientific progress and Darwin's theory of "biological evolution"). Kuhn also noted that, at least in the field of mathematics, new paradigms often represent a step forward because they are likely to provide "neater" or "simpler" solutions than the paradigms they replace. *Id.* at 155–56.

45. Kuhn, *supra* note 14, at 148–51 (arguing that the principle of incommensurability made such a claim impossible to measure).

46. *Id.* at 172–73.

47. *Id.* at 84 (explaining that a paradigm shift becomes inevitable only when a traditional paradigm is totally unable to explain a fundamentally troubling anomaly; and asserting that a scientific community may approach the problem by (i) devising creative ways to explain the anomaly within the current paradigm; (ii) declaring the anomaly inexplicable at the current state-of-the-art and reserving it for analysis by future generations; or (iii) migrating to a new paradigm that can explain the anomaly).

48. *Id.*

49. *Id.*

50. *Economics A-Z*, Economist.Com, http://www.economist.com/research/Economics/alphabetic.cfm?letter=E#evolutionaryeconomics (last visited Mar. 24, 2008) (defining "evolutionary economics" as a "Darwinian approach to [economics]. . . . Following the tradition of [Schumpeter], it views the economy as an evolving system and places a strong emphasis on dynamics, changing structures (including technologies, institutions, beliefs and behaviour) and [disequilibrium] processes (such as [innovation], selection and imitation)."). *See also* Richard R. Nelson, *Recent Evolutionary Theorizing About Economic Change*, 33 J. Econ. Literature 48, 49 (1995) (noting that Darwinian analogies come naturally to economists, who often "make use of 'biological conceptions' or metaphors" when speaking colloquially about their work).

51. *See* Joseph A. Schumpeter, Capitalism, Socialism, and Democracy 83–34 (3d ed., Harper & Row, 1942); Richard Swedberg, Entrepreneurship: The social science view 14 (Oxford Univ. Press 2000).

52. The pioneering work of the evolutionary economists discussed here has been acknowledged by numerous authorities and has earned them several Nobel Prizes. *See*, *e.g.*, The Bernard Schwartz Center for Economic Policy Analysis, www.cepa.newschool.edu (last visited Mar. 24, 2008) ("Robert Solow is one of the major figures of the Neo-Keynesian macroeconomics."); All Laureates in Economics, http://nobelprize.org/nobel_prizes/economics/laureates (last visited Mar. 24, 2008) (listing evolutionary economist Paul Samuelson's 1970 Nobel Prize "for the scientific work through which he has developed static and dynamic economic theory and actively contributed to raising the level of analysis in economic science" and Solow's 1987 Nobel Prize "for his contributions to the theory of economic growth").

53. Interested readers can find a compelling biography of Schumpeter, who is often named one of the founding fathers of evolutionary economic theory, in Thomas McCraw, Prophet of Innovation: Joseph Schumpeter and Creative Destruction (Belknap Press 2007).

54. *See* Schumpeter, *supra* note 51, at 83.

55. *Id. See also* Joseph A. Schumpeter, The theory of economic development: An inquiry into profits, capital, credit, interest, and the business cycle 66–67 (Transaction Books 1934) (describing capitalism's "competitive destruction of the old" and enumerating the five classes of disruptive innovations that entrepreneurs introduce into steady-state systems).

56. Schumpeter, *supra* note 51, at 84.

57. The assertions that paradigm shifts are a vital component of scientific or economic progress and that blindly interfering with them can lead to unintended consequences are common threads that span the breadth of this Article. *See generally* Parts III–VII.

58. *See* Warren J. Samuels *et al.*, A Companion to the History of Economic Thought (Blackwell Companions to Contemporary Economics) 413–14, (Wiley-Blackwell 2003). *See generally* Robert Solow, *A Contribution to the Theory of Economic Growth*, 70 Q. J. Econs. 65 (1956) (introducing the author's theory in full quantification); Trevor W. Swan, *Economic Growth and Capital Accumulation*, 32 The Economic Record 334 (1956) (presenting an elaboration of Swan's initial presentation of what would become his Neoclassical growth theory).

59. Samuels, *supra* note 58, at 413–14 (citing the Neoclassical Model's "Golden Rule" for economic growth, which holds that rate of return on capital investments depends solely on "the rate of growth of the labor force, the rate of technical progress, and the rate of depreciation").

60. *Id.*

61. *Id.*

62. Charles I. Jones, *Sources of U.S. Economic Growth in a World of Ideas*, 92 Am. Econ. R. 220, 252-53 (2002) (using the Solow model to determine that 80 percent of domestic economic growth from 1950 to 1993 was due to increases in educational attainment and world R&D levels).

63. *See* Clayton M. Christensen, The Innovator's Dilemma, xxii-xxviii (HarperBusiness Essentials paperback ed. 2000) (1997) (describing the general principles and characteristics of disruptive innovations); *id.* at 111–14 (summarizing the author's suggestions for managing disruptive change).

64. *Id.* at xviii-xx.

65. *Id.* at 219–21.

66. *Id.* at 265–66.

67. Christensen's The Innovator's Solution (the sequel to The Innovator's Dilemma) generally substitutes the phrase "disruptive innovation" for "disruptive technology." Clayton M. Christensen, The Innovator's Solution (Harvard Business School Press 2003). *See also* CD-ROM: The Opportunity and Threat of Disruptive Technologies (Faculty Lecture: HBSP Product Number 1482C) (Harvard Business School Publishing 2003) (presenting a 62-minute video lecture during which Christensen tells how Intel CEO Andy Grove suggested the terminology change just as The Innovator's Solution was going to press) (17-minute excerpt *available at* http://www.viddler.com/explore/sleibson/videos/3/#).

68. The Encyclopædia Britannica states that "cognitive dissonance" explains why "people seek to preserve their current understanding of the world by rejecting, explaining away, or avoiding the [challenging] information or by convincing themselves that no conflict really exists." Concise Encyclopedia Article, Encyclopædia Britannica Online, 2007, http://www.britannica.com/ebc/article-9361091.

69. Leon Festinger, A theory of cognitive dissonance (Stanford University Press 1957).

70. *Id.* at 3.

71. *See supra* notes 32–33 and accompanying text.

72. Joel Cooper, Cognitive Dissonance: fifty years of a classic theory 6 (Sage Publications, Ltd. 2007) ("The state of cognitive dissonance occurs when people believe that two of their psychological representations are inconsistent with each other. More formally, a pair of cognitions is inconsistent if one cognition follows from the obverse (opposite) of the other.").

73. *See* Festinger, *supra* note 69, at 5.

74. *See* Cooper, *supra* note 72, at 2–3 ("Festinger "made a very basic observation about . . . human beings: we do not like inconsistency. It upsets us and drives us to action to reduce our inconsistency. . . . People do not just prefer consistency over inconsistency. . . . [They] are *driven* to resolve that inconsistency. How we go about dealing with our inconsistency can be rather ingenious. But, in Festinger's view, there is little question that it *will* be done."). In layman's terms, this aversion is most often described as a nagging *discomfort* with the conflict that creates the dissonance. *Id.* at 57.

75. *Id.* at 7 (noting that one distinguishing characteristic of Festinger's theory was that it assigned magnitude to cognitive dissonance that was proportional to, among other things, the severity of contradiction between the conclusions that arise from the cognitive pair).

76. *See* Jack W. Brehm & Arthur R. Cohen, Explorations in Cognitive Dissonance 302–06 (John Wiley & Sons, Inc. 1962) (summarizing factors that contributed to clinically observed dissonance magnitudes and that indirectly determined how subjects responded to stimuli).

77. *See* Cooper, *supra* note 72, at 181–83 (summarizing advances in the field that have occurred since Festinger's initial publication).

78. *Id.* at 182 (formalizing the "New Look" definition of dissonance as "a state of arousal that occurs when a person *acts responsibly* to bring about an unwanted consequence) (emphasis added). Note that Cooper's model merely synthesizes concepts that have long been part of cognitive dissonance theory. Brehm and Cohen, for example, theorized in 1962 that a behavioral cognition gives rise to dissonance only when a subject acts with volition and commitment to the resulting obverse outcome. *See* Brehm & Cohen, *supra* note 76, at 300.

79. Cooper, *supra* note 72, at 63–64.

80. *Id.* at 7.

81. Recent research suggests that the compulsion to reduce cognitive dissonance extends even beyond the human race. Researchers at Yale observed capuchin monkeys subjected to a variation of Festinger's original 1956 experiments exhibiting what could be considered dissonance-reduction behavior. John Tierney, *Go Ahead, Rationalize. Monkeys Do It Too.*, The New York Times, Nov. 6, 2007, *available at* http://www.nytimes.com/2007/11/06/science/06tier.html?_r=2&8dpc&oref=slogin&oref=slogin.

82. Theorists have at times organized dissonance-reduction strategies in other ways. Brehm & Cohen, for example, found five modes:

- Attitude changes, which may include alterations of one's opinions (personal beliefs) and of one's evaluations (judgments);
- Selective exposure to information;
- Selective recall of information;
- Perceptual distortions; and
- Behavioral changes. Brehm & Cohen, *supra* note 76, at 306–08.

83. Eddie Harmon-Jones & J. Mills, Cognitive Dissonance: Progress on a Pivotal Theory in Social Psychology (Science Conference Series) (Eddie Harmon-Jones ed., American Psychological Association, 1999). *See also* Cooper, *supra* note 72, at 7-12 (including an example of how dissonance effects come into play when buying a car).

84. *See infra* Part IX.C for an example of how unexpected consequences can occur when seemingly straightforward attempts to change behavior run afoul of cognitive dissonance effects.

85. Brehm & Cohen, *supra* note 76, at vii (noting that from the outset, Festinger's theory was used to study "a broad range of phenomena, [including] social interaction and mass behavior"). *See, e.g.*, Sendhil Mullainathan & Ebonya L. Washington, Sticking With Your Vote: Cognitive Dissonance and Voting (Yale Economic Applications and Policy Discussion Paper (Working Paper) No. 14, June 2007), *available at* http://ssrn.com/abstract=904000) (last visited Mar. 21, 2007) ("[T]heories of cognitive dissonance suggest [that] the very act of voting may influence political attitudes."); Alafair S. Burke, *Improving Prosecutorial Decision*

Making: Some Lessons of Cognitive Science, 47 WM. & MARY L. REV. 1587, (2006) (using cognitive psychology to analyze the decision-making behavior of prosecutors); Withrow & Geljon, *supra* note 29 (applying cognitive dissonance to business-management controversies); Victor Ricciardi & Helen K. Simon, *What Is Behavioral Finance?*, 2 BUS. EDUC. & FIN. J. 1 (2000) (surveying the field of Behavioral Finance, which applies dissonance theory to the behavior of investors and financial markets); William H. Cummings & M. Venkatesan, *Cognitive Dissonance and Consumer Behavior: A Review of the Evidence*, 13 J. MARKET RES. 303 (1976) (reviewing and summarizing research relating consumer behaviors like brand loyalty to cognitive dissonance theory); BREHM & COHEN, *supra* note 76, at 270–285 (using cognitive dissonance theory to interpret the results of 1960s-era desegregation efforts); *id.* at 286-297 (applying dissonance theory to analyze brainwashing techniques used on Korean War POWs); Desmond Ng, *Cognitive Dissonance in the Swine Value Chain* (text of presentation made at the Banff Pork Seminar January), 12 Procs. of the Advances in Pork Production 1 (2000), www.banffpork.ca/proc/2001pdf/Chap15-Ng.pdf (using cognitive dissonance to explain differences in perceptions among competitors and end-users in the U.S. and Canadian markets for swine genetic products).

86. The scope of the model described here is limited to controversies that occur within a paradigm shift, but the author contends that it is applicable to any controversy where adversaries, whether individuals or groups, hail from communities within different paradigms, and he plans to explore this proposition in future articles.

87. KUHN, *supra* note 14, at 176 ("A paradigm is what members of a community share, *and*, conversely, a scientific community consists of men who share a paradigm.").

88. *Id.*

89. The parallels among these theories run deeper than this, but addressing them as comprehensively as they deserve is beyond the scope of this introductory article. Kuhn, for example, described community responses to scientific crises that mimic classic cognitive dissonance reduction behavior. KUHN, *supra* note 14, at 78–79 (stating that when scientists encounter an anomaly that leads to results obverse to those predicted by a traditional paradigm, "they will devise numerous articulations and *ad hoc* modifications of their theory to eliminate any apparent conflict"). Kuhn's work also mirrors Festinger's observations about dissonance magnitude when it acknowledges that the greater degree of "tension" between more dissimilar paradigms can drive community members to more extreme responses, even including willingness "to desert science because of their inability to tolerate crisis." *Id.* Aversion to dissonance was so central to Kuhn's thesis that it spawned the analogous concept of "the essential tension," which arises when a community member must work, at least occasionally, within an established paradigm despite the discomforting conflict between that paradigm and an anomaly that it cannot explain. *Id.* Even more significantly, Kuhn acknowledged that non-scientists also experienced this aversive tension, mentioning specific examples culled from the arts community. *Id.* at 79, note 2 (citing Frank Barron, *The Psychology of Imagination*, SCIENTIFIC AMERICAN, Sept. 1958, at 151, 160).

90. *See supra* notes 75–76.

91. Kuhn, for example, observed that minor dissonances may be accommodated by extending a traditional paradigm, by casting the dissonance-causing anomaly in a different light, or by simply ignoring the dissonance in the hope that some future community will find a way to resolve it. These responses fit into standard categories of dissonance-reduction strategies. *See supra* note 47; HARMON-JONES & MILLS, *supra* note 83; COOPER, *supra* note 72.

92. KUHN, *supra* note 14; HARMON-JONES & MILLS, *supra* note 83. In a full-blown paradigm shift, some community members typically adopt long-term dissonance-reduction strategies like total denial, and the community as a whole may not shift to a new paradigm until a large portion of the original community retires or dies out. KUHN, *supra* note 36 and accompanying text.

93. KUHN, *supra* note 38. This article describes such conflicting worldviews as "dissonant paradigms."

94. KUHN, *supra* note 41.

95. *Id.*

96. One fact agreed upon by all the theorists discussed in this article is that once a disruption has spawned a new (and incommensurable) paradigm, the paradigm shift cannot—and should not—be stopped. *See* KUHN, *supra* notes 42–46; SAMUELS, *supra* note 59; Jones, *supra* note 62. *See also* CHRISTENSEN, *supra* note 16, at 266 (asserting that companies that try to use traditional management techniques to halt the progress of disruptive technologies cannot succeed).

97. *Brehm & Cohen* at 312–13 (noting that a theory can be confirmed by its ability to predict experimental outcomes, but merely showing that it is consistent with prior observed phenomena is at best persuasive evidence of its validity, and specifically stating that after an "experiment is over, anything that occurred can be interpreted as dissonance reduction, whether or not it was seen as a possible mode beforehand"). Festinger brings up related concerns before gingerly extending his theoretical framework to communities that consist of individuals that experience identical dissonances. But his reservations are not daunting enough to stop him from proceeding. *See* FESTINGER, *supra* note 69, at 234.

98. *See supra* notes 29 and 85 for a sampling of such studies.

99. *See*, *e.g.*, CHRISTENSEN, *supra* note 16, at xxix (supplementing the book's detailed analyses of several business-community paradigm shifts with a table listing two dozen more); Tim O'Reilly, Open Source Paradigm Shift, June 2004, http://www.oreillynet.com/pub/a/oreilly/tim/articles/paradigmshift_0504.html (extending the concept of paradigm shifts to the computer industry, specifically citing the introduction of the IBM PC as an example and predicting a shift to open-source software); John C. Harrison, Program Director, National Stuttering Project, Do You Suffer From Paradigm Paralysis? (text of presentation made at the First World Congress on Fluency Disorders) (Aug. 1–5, 1994), http://www.mnsu.edu/comdis/kuster/Infostuttering/Paradigmparalysis.html (describing a new paradigm within which the medical community may better understand the phenomenon of stuttering).

100. *See*, *e.g.*, *supra* note 85 and *infra* Part VIII.

101. Macroeconomics is the branch of economics that studies the overall working of a national economy. The Free Dictionary, http://www.thefreedictionary.com/macroeconomics (last visited Nov. 24, 2008). Group psychology is the branch of human psychology that deals with the behavior of groups and the influence of social factors on the individual. The Free Dictionary, http://medical-dictionary.thefreedictionary.com/Group+psychology (last visited Nov. 24, 2008).

102. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

103. *Id.* at 417.

104. *History of Cable Television*, National Cable & Telecommunications Ass'n, http://www.ncta.com/About/About/HistoryofCableTelevision.aspx (noting that cable and satellite television did not become popular until after passage of the 1984 Cable Act) (last visited Nov. 22, 2008).

105. *VCRs achieve 30% market penetration*, DISCOUNT STORE NEWS, Feb. 17, 1986, *available at* http://findarticles.com/p/articles/mi_m3092/is_/ai_4138144 (citing a report by the Electronic Industries Association's Consumer Electronics Group that 7.6 million units were sold in 1984 alone).

106. *Sony*, 464 U.S. at 421.

107. *See* SCHMIDT *ET AL.*, *supra* note 7, at 143; *see generally* The 1976 Copyright Act, 17 U.S.C. §§ 101 *et al.* (1976).

108. Justice Blackmun affirmed the plaintiffs' interpretation in a strongly worded dissent. *Sony*, 464 U.S. at 460. His opinion is a straightforward illustration of Schmidt's "material law is king" scenario, wherein adjudicators determine legality without considering a new-paradigm community's motivations and probable responses to strict-constructionist remedies. SCHMIDT *ET AL.*, *supra* note 7, at 143.

109. 17 U.S.C. § 107 (1976).

110. *See* the "Fair Use" section of The 1976 Copyright Act, 17 U.S.C. § 107 (1976) ("[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . ., scholarship, or research, is not an infringement of copyright.").

111. *Sony*, 464 U.S. at 452.

112. *Id.* at 421, 452–53 (describing reasons why most of these fears should be found groundless).

113. *Supra* note 105.

114. *See supra* notes 86–92.

115. These responses fall into the general categories of dissonance-reduction strategies predicted by Festinger and his followers. *See supra* notes 82–83 and accompanying text.

116. *See* KUHN, *supra* note 14.

117. *See* KUHN, *supra* note 14; *supra* Parts V.A-B.

118. *See* HARMON-JONES & MILLS, *supra* note 83 and accompanying text.

119. *Sony*, 464 U.S. at 417.

120. Contributory copyright infringement requires actively inducing, causing, or materially contributing to, or providing goods or means necessary to help another party directly infringe. Without direct infringement, there can be no contributory infringement. *See* "contributory infringement," BLACK'S LAW DICTIONARY (8th ed. 2004).

121. The Court observed that, because the plaintiffs owned only a minority of copyrighted broadcast content, their competitors had "created a substantial market for a paradigmatic non-infringing use of [time-shifting VCRs]." *Sony*, 464 U.S. at 447.

122. *Id.*

123. Even the Sony holding would not save time-shifting technologies that, for example, caused material economic harm to content owners and had no other non-infringing uses. *Sony*, 464 U.S. at 447.

124. Examples include the videotape and disc rental industries, personal video recorders (such as TiVo products), networked media-streaming appliances, video-on-demand applications, and online information-delivery services.

125. These included settop and computer-based video-recording, video-on-demand services, and DVD and Blu-ray discs. And while the Sony decision did not, strictly speaking, address the legality of videotape rental, it certainly did facilitate the growth of the VCR market, without which video rentals might never have become viable.

126. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897) ("Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding."); *see also* Anne C. Dailey, *Holmes and the Romantic Mind*, 48 DUKE L.J. 429, 447-56 (1999) (describing Holmes's view of the relationship between "unconscious ideas and legal rules").

127. Black's Law Dictionary defines "Law and Economics" as: "A discipline advocating the economic analysis of the law, whereby legal rules are subjected to a cost-benefit analysis to determine whether a change from one legal rule to another will increase or decrease allocative efficiency and social wealth." BLACK'S LAW DICTIONARY (8th ed., 2004). Although beyond the scope of this introductory paper, the author suggests that the complex relationship between paradigmatic dissonance and the Law and Economics school is a topic worthy of further exploration.

128. This connection should hardly be surprising since the Law and Economics movement generally builds upon the same Neoclassical model of economics that underlies paradigmatic dissonance. *See supra* Part IV.B.

129. That is, by finding linkage between the principles of Neoclassical economics and of cognitive dissonance theory.

130. *See, e.g.*, Duncan Kennedy, *Law-and-Economics from the Perspective of Critical Legal Studies*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 465 (Palgrave Macmillan 1998) ("[The] proposal that courts adopt [efficiency] as the criterion of decision between different possible legal rules is a bad idea, practically unworkable, incoherent on its own terms, and [open to] ideological manipulation.").

131. This is exactly what happened when the Ninth Circuit shut down the Napster peer-to-peer music file-sharing service. Rather than save the record industry by eliminating unauthorized online file-sharing, terminating Napster gave rise to decentralized file-sharing services that have proven nearly impossible to control. *See A&M Records, Inc. v. Napster, Inc.*, 239 F. 3d 1004 (9th Cir. 2001); *see also* Jeffrey R. Armstrong, *Sony, Napster, and Aimster: An Analysis of Dissimilar Application of the Copyright Law to Similar Technologies*, 13 DPLJAEL 1, 13, (2003); SCHMIDT *ET AL.*, *supra* note 7, at 85–86, 90.

132. Posner, who sits on the Seventh Circuit and is Senior Lecturer at the University of Chicago Law School, has been described as "the most influential and significant theorist and advocate of the law and economics approach." Richard E. Levy, *The Tie That Binds: Some Thoughts About the Rule of Law, Law and Economics, Collective Action Theory, Reciprocity, and Heisenberg's Uncertainty Principle*, 56 UKSLR 901 (2008).

133. Excepting, of course, "purely deductive propositions such as the Pythagorean theorem." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 541 (2d ed., Little, Brown, and Co. 1977).

134. *See* MACCORMICK, *infra* note 142.

135. POSNER, *supra* note 133, at 541–42.

136. *See, e.g.*, CHRISTENSEN, *supra* note 16, at 266 (claiming that companies that use traditional management techniques to halt the progress of disruptive technologies cannot succeed because such practices work only with sustaining technologies. The "more productive route . . . is to understand the natural laws that apply to disruptive technologies and to use them to create new markets and new products.").

137. POSNER, *supra* note 133, at 541–42.

138. *Id.* at 542 ("The courts, [Judge Learned Hand] wrote, must in each case 'ask whether the gravity of the 'evil' (i.e., if the instigation succeeds), discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'").

139. *Id.* at 545–46 ("Hand's rule argues that lawmakers must consider the cost of a law to both sides of a controversy. He uses the example of pornography, where restricting the public display of pornography on billboards would have a relatively low cost for pornography consumers, but failing to enact such a law would have a much higher cost to the public at large. The reverse is true for a law that completely bans pornography.").

140. Herbert Lionel Adolphus Hart (1907-92) was a British philosopher and professor of jurisprudence at the University of Oxford, where he held the esteemed Regius Chair for Jurisprudence from 1952 through 1969. *See Legal Philosophy in Oxford*, http://www.law.ox.ac.uk/jurisprudence/hart.shtml (last visited Nov. 21, 2008).

141. Austinian Positivism teaches that legal rules are valid because they are enacted by an existing political authority or accepted as binding in a given society, not because they are grounded in morality or in natural law. *See* "legal positivism," BLACK'S LAW DICTIONARY (8th ed. 2004).

142. Neil MacCormick, H.L.A. Hart 33 (Stanford Univ. Press 2008) (stating that a legal system is valid in a particular community only if "the bulk of the inhabitants of [that community agree to] comply with the primary rules requiring them to do certain things and omit others").

143. *See generally* Mathieu Deflem, Sociology of Law: Visions of a Scholarly Tradition (Cambridge University Press 2008) (describing and tracing the history of the Law and Sociology movement).

144. S*ee, e.g., Brown v. Board of Education*, 347 U.S. 483, 494 n.11 (1954) (supporting desegregation by citing numerous studies that show detrimental psychological and sociological effects on segregated black children).

145. *See supra* note 84 and accompanying text; *infra* Part IX.C (presenting a brief example of the often-unexpected ways that individuals respond to cognitive dissonance).

146. Rationalism assumes that pure reason and logic are the ultimate source of truth. Encyclopædia Britannica Online, http://www.britannica.com/dictionary?va=srationalism (last visited Mar. 24, 2008). Legal analyses that blindly embrace this philosophy do not always anticipate counterintuitive dissonance effects that arise during paradigm-shift controversies. *See*, *e.g.*, *infra* Part IX.

147. *See* Mullainathan & Washington, *supra* note 85 ("[C]ognitive dissonance suggest[s] that behavior may shape preferences.").

148. *See* Schmidt *et al.*, *supra* note 107.

149. *Id.* at 144. These issues are also a primary focus of Christensen's "disruptive innovation" thesis. *See generally* Christensen, *supra* note 16, Part I (describing how established businesses and innovators interact from a market perspective).

150. *Id.* at 143–44 (observing that this rule applies generally, with disruptive technologies and new-paradigm businesses often declared responsible for "major legal and economic problems [arising in areas like] intellectual property law enforcement[, and] contract, liability, competition[,] and privacy law"). *See also* Withrow & Geljon, *supra* note 29 (defining the dissonance effect "Fundamental Attribution Error" as occurring when one party blames "the other's perceived mistakes on some intrinsic aspect of that person (e.g., their personality or personal abilities").

151. *Id.* at 144.

152. Rationalists presume that behavior is a logical response to stimuli, and thus, in general, deterrents deter, incentives entice, and people act in a rational manner. *See* Rationalism, Encyclopædia Britannica Online, http://www.britannica.com/EBchecked/topic/492034/rationalism (last visited Nov. 20, 2008).

153. *See*, *e.g.*, Joshua Dressler, Criminal Law 230–233 (4th ed., Thomson/West 2007) (describing modern homicide law, which is generally considered logical and effective when applied to perpetrators who hold a paradigm similar to the one upon which the law is founded. This paradigm includes beliefs that killing a person is a punishable act; that premeditated killings are worse than those committed in the heat of passion; and that both are more deserving of punishment than causing an accidental death; and that capital punishment or life imprisonment have greater deterrent effect than would a few years in prison.).

154. *See*, *e.g.*, Cooper, *supra* note 72, at 19–21 (discussing clinical evidence that increasing punishment for proscribed behavior can create dissonance effects that make those activities more attractive); *id.* at 24-25 (describing a classic experiment where more severe punishment inflicted upon children ordered not to play with attractive toys had lesser effect upon the children's cognition that the toys were desirable).

155. Cooper, *supra* note 72, at 24.

156. *Id. Cf.* Cooper, *supra* note 72, at 18–19 (citing Brehm & Cohen, *supra* note 76, at 73-78 (presenting an inverse corollary based on a 1961 experiment where Yale students were paid varying amounts of money to write favorable essays about unpopular local police. Students paid the least experienced the greatest changes in attitude toward the police, thereby confirming an inverse relationship between the intensity of the external stimulus and its effect on dissonance.)).

157. *See* Cooper, *supra* note 72, at 119–23.

158. *Id.* This principle is illustrated *infra* in the music-industry example of Part IX.C and is extrapolated to the concept of "vicarious hypocrisy" in Cooper, *supra* note 72, at 178–80.

159. In fact, it is inadvisable to even consider such a task without undertaking an exhaustive analysis of the facts in each case.

160. *See* Withrow & Geljon, *supra* note 29.

161. *Id*. This is type of approach taken in *Sony*, where the Court's refusal to regulate home-recording devices facilitated the creation of the video-rental industry.

162. *Id.* One such remedy is the record labels' recent decision to sell freely reproducible music online. Even if the music industry's paradigm does not include its customers' cognition that they have the right to port purchased music to multiple devices at will, this new business model acknowledges that such a cognition exists and recognizes that it must be incorporated into its business model. Likewise, even if music consumers do not hold a cognition that they have the duty to pay for online music, the labels' good-faith offering of unprotected downloads may reduce dissonance enough to make these services palatable. *See BMG Goes DRM-Free*, Rock & Roll Daily, Rolling Stone.com (Jan. 4, 2008), http://www.rollingstone.com/rockdaily/index.php/2008/01/04/ti-illegal-seizure-ruling-postponed-sonybmg-goes-drm-free-led-zeppelin-roo-rumors-inaccurate-and-more (reporting that holdout Sony/BMG will join the other major labels, Amazon.com, and iTunes Plus in licensing unprotected MP3 music files through the Internet).

163. *See* Withrow & Geljon, *supra* note 29 ("Accept differences in paradigms and implement smart ways of dealing with them.").

164. *See* Brehm & Cohen, *supra* note 76, at 302–06 (summarizing the factors controlling dissonance magnitude that had been reported to date).

165. This list is by no means exhaustive. It describes several general classes of remedies that boast proven track records, but there are innumerable ways to deal with technology-based disruption, and each solution must be crafted specifically to serve the facts at hand. Readers are encouraged to glean ideas from the scores of examples, observations, and findings described in the sources cited here. *See*, *e.g.*, Festinger, *supra* note 69; Brehm & Cohen, *supra* note 76, Cooper, *supra* note 72.

166. The Ninth Circuit ostensibly attempted such a remedy when it ordered the Napster online file-sharing service to implement a content-filtering mechanism that would allow it to survive so long as it could guarantee its ability to pay the music industry royalties for all copyrighted content downloaded from its servers. This appeared on its face to be an incentive to create technology that would allow old- and new-paradigm business models to coexist. But many would argue that it was merely a cynical way to side against Napster, which had little chance of developing the perfect technology required by the court. *See Napster, Inc.*, 239 F.3d at 1027 (holding that Napster "bears the burden of policing the system within the limits of the system"); *Record industry attacks Napster filter*, BBC News, Mar. 28, 2001, http://news.bbc.co.uk/2/hi/business/1246924.stm.

167. *See* Cooper, *supra* note 72, at 63–64 (describing how dissonance occurs only when a subject undertakes dissonance-causing behavior of her own volition).

168. Consider how much healthier the music industry might be today had the *Napster* court ordered it to negotiate joint ownership of Napster and work together in good faith to transform the site into a legal and profitable downloading service. Napster's founders were clearly amenable to a merger but the labels could not risk alienating their old-paradigm business partners, such as CD

retailers and distributors, by voluntarily undertaking such an effort. Had they been forced to do so under court order, however, they might have been relieved of much of that pressure. *See A&M v. Napster*, *supra* note 18; *Napster's CEO Splits on a Sour Note*, BUSINESSWEEK.COM, (May 14, 2002), http://www.businessweek.com/technology/content/may2002/tc20020514_1069.htm (reporting that co-founder Shawn Fanning and Napster CEO Konrad Hilbers resigned in anger with the collapse of a deal to sell the service to media giant Bertelsmann).

169. Congress adopted this approach when refereeing the anti-piracy debate between the music and consumer-electronics industries created by the advent of personal digital recording devices. Its solution was to enact the Audio Home Recording Act, 17 U.S.C. §§ 1001–10 (1992), which imposed taxes on digital recorders and media that funded compensatory royalties to content publishers. 17 U.S.C. §§ 1001–10 (1992).

170. *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (refusing to acquiesce to the MPAA's demands that videocassette recorders be banned). *See also* Dave Owen, *The Betamax vs. VHS Format War*, MEDIACOLLEGE.COM, http://www.mediacollege.com/video/format/compare/betamax-vhs.html (last visited Mar. 24, 2008).

171. *See*, *e.g.*, COOPER, *supra* note 72, at 174 (citing public health policy as an example of how cognitive dissonance may be "an effective means of inducing changes in both behavior and attitudes toward greater compliance with positive health messages" and calling it "one of the more effective . . . techniques that health professionals can use to trigger healthier behaviors").

172. The Record Industry Association of America (RIAA), Motion Picture Association of America (MPAA), and the business-software industry's Business Software Alliance (BSA) have all launched such advertising campaigns over the last few decades.

173. A representative sampling of Stanford Law Professor and celebrity file-sharing advocate Lawrence Lessig's blog entries clearly express the disdain that the file-sharing community feels toward the music industry. *See*, *e.g.*, Lawrence Lessig, *Copyright Thugs*, THE INDUSTRY STANDARD, May 7, 2001, *available at* http://www.lessig.org/content/standard/0,1902,24208,00.html ("preventing piracy doesn't mean you can punish researchers"); Lawrence Lessig, *Just Compensation*, THE INDUSTRY STANDARD, Apr. 9, 2001, *available at* http://www.lessig.org/content/standard/0,1902,23401,00.html ("Congress should help artists get paid without delivering the Internet into the hands of the big labels."); Lawrence Lessig, *Copyrights Rule*, THE INDUSTRY STANDARD, Oct. 2, 2000, *available at* http://www.lessig.org/content/standard/0,1902,18964,00.html ("Courts are racing to enjoin alleged violators of copyright law, taking no account of the effects on the development of the Internet.") (reprinted from The Industry Standard, Oct. 2, 2000); Lawrence Lessig, *The Limits of Copyright*, THE INDUSTRY STANDARD, Jun. 19, 2000, *available at* http://www.lessig.org/content/standard/0,1902,16071,00.html ("You don't have to be a pirate to be concerned about this trend.").

174. *See* Hiatt & Serpick, *supra* note 19.

175. *See supra* note 156 and accompanying text.

176. One might argue that the incommensurability of the paradigms in conflict here and record executives' ignorance of the characteristics of paradigm shifts both conspired to prevent decision-makers from understanding the futility of attempting to change beliefs and norms of behavior with a message rooted in the cognitions of the wrong paradigm. Nonetheless, it is hard to argue that the record companies lawsuits against music consumers helped in any significant way; music sales have taken a precipitous fall since the suits began in late 2003. *See* Hiatt & Serpick, *supra* note 19 (including a Nielsen SoundScan album sales chart that shows the rate of decline increasing sharply in 2004 and subsequent years).

177. *Apple's iTunes Grows to No. 2 U.S. Music Retailer*, PC MAGAZINE, Feb. 26, 2005, *available at* http://www.pcmag.com/article2/0,1759,2270240,00.asp (reporting that only Wal-Mart sold more music than iTunes in 2007).

178. Norwegian hacker cracks iTunes code, CNN.COM, Nov. 27, 2003, http://www.cnn.com/2003/TECH/internet/11/27/itunes.code.ap/index.html.

179. Steve Jobs, *Thoughts on Music*, Feb. 6, 2007, http://www.apple.com/hotnews/thoughtsonmusic (last visited Mar. 24, 2008).

180. Troy Dreier, *Apple iTunes Music Store*, (capsule review), PC MAGAZINE.COM, Aug 5, 2003, *available at* http://www.pcmag.com/article2/0,1759,1194956,00.asp (receiving five-star highest rating from online readers).

181. One must be careful to distinguish the dissonant-paradigm model from the superficially similar Behavioral Law and Economics school, which seeks to replace the Law and Economics school's assumption of perfect rationality with the assertion that "all people systematically fall prey to biases and errors in their judgment and decisionmaking [that] lead to predictably irrational behavior." Although the two theories may seem to start from the same gate—with the assumption that legal analysis must account for behavior motivated by psychological factors—the conclusions and applications are dissimilar. This article makes no judgments about the rationality of the choices made by individuals faced with cognitive dissonance, and that issue is irrelevant to the thesis presented here. At most, cognitive dissonance identifies rules with which seemingly irrational conduct can be seen to be logical and consistent. *See* Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded For Behavioral Law And Economics' Equal Incompetence*, 91 GEO. L.J. 67, 67 (2002).

182. *See, e.g.*, Jason Withrow & Geljon, *supra* note 29 (adapting cognitive dissonance techniques to business-management problems); Ricciardi & Simon, *supra* note 85 (describing principles of Behavioral Finance, which apply cognitive psychology, including dissonance theory, to the behavior of financial markets). *See also* the many other examples cited *supra* in note 85.

183. In 2007, there were, for example, over 1,100 active law journals in existence in the United States. Karen Dybis, *100 Best Law Reviews*, NATIONAL JURIST, Feb., 2008, at 22.

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When Are Ideas Protectible?

By Marc Jonas Block

I. Introduction

Original ideas such as advertising pitches, television show proposals, and business models are commonly submitted by their creators to others with the expectation of receiving valuable consideration. What recourse creators have against those who refuse or fail to compensate them is an important question. Under federal intellectual property law, protection (under copyright, patent, or trademark law)[1] is granted only to the *expression* of artistic, scientific, and commercial ideas and concepts.[2] Ideas are protected only under state law. As demonstrated by a string of recent federal and state court decisions,[3] the protection of ideas is an area of increasing litigation. This article provides an overview of the protection of ideas under New York law and discusses the differing protection under California law.

In general, the use of a disclosed idea[4] does not in and of itself create a legal obligation to compensate the creator under New York law. After all, an idea is

> impalpable, intangible, incorporeal, yet it may be a stolen gem of great value, or merely dross of no value at all, depending on it novelty and uniqueness. Its utility is not the test. An idea may be regarded as useful, and worth putting into execution, even though the imparting of it gives no claim for recovery to its originator.[5]

However, since 1922 New York courts have recognized the value in some ideas and the importance of protecting them from being stolen. At the same time, they have recognized that "[n]ot every 'good idea' is a legally protectible idea."[6]

In an effort to protect only ideas of value, New York courts have required that an idea be both original and novel to give rise to a claim for compensation. The central question is: To whom must the idea be novel? The creator, the person to whom it is disclosed, a segment of the public, or the world?

For claims brought under contracts entered into prior to disclosure of the idea, courts have held that the idea must have been novel to the buyer in order to constitute valid consideration.[7] Disputes arising from contracts entered into after the idea has been disclosed are treated as simple contract actions, with courts deeming the idea to have value to the contracting parties with no proof of novelty or originality required. New York also recognizes a property right in an original and novel idea. A misappropriation of idea claim requires a legal relationship between the parties and proof that the idea is original and novel in an absolute sense.

II. New York Courts Recognize Protection of Ideas Under Contract and Misappropriation Law

The first case to find protection for the disclosure of ideas in New York was *Soule v. Bon Ami Co.*,[8] a 1922 Appellate Division decision. Plaintiff Louis Soule and defendant Bon Ami Company entered into an agreement whereby Soule agreed to disclose allegedly valuable information that would increase the Bon Ami Company's profits, and Bon Ami Company promised to pay Soule one-half of the increased profits arising from the yet-to-be-disclosed information. Soule then disclosed his business model, which was that an increase in the gross price of a product would increase the profit margin. Bon Ami Company refused to comply with the agreement, and Soule sued.[9]

The First Department overturned a directed verdict for Soule, holding that an idea or a piece of information might in fact be valuable consideration for a contract, but "the information must be new."[10] The court stated that although an original idea may be considered valuable consideration for a contract, "[n]o person can by contract monopolize an idea that is common and general to the whole world."[11] The Court of Appeals affirmed without comment.[12] Thus, under *Soule*, an idea could be consideration for a contract provided it is new and original and not a fact already known.[13]

Applying *Soule*, courts in New York have found that the "lack of novelty in an idea is fatal to any cause of action for its unlawful use."[14] After all, there exists an inherent inequity in any disclosure agreement:

> An agreement premised on the disclosure of a secret is a blind deal. When the purveyor of that secret exacts a promise of confidentiality, he knows what he is dealing with, but the recipient is in the dark. The enforceability of such a threshold agreement—a promise in exchange for a revelation—turns on the value of the disclosure. . . . If the idea is of such a nature that it cannot be appropriated by a party, it cannot be misappropriated by another.[15]

Although *Soule* recognized that an idea may be consideration for a contract, subsequent decisions broadened the holding, recognizing original and novel ideas as property. In 1972, in *Downey v. General Foods Corp.*,[16] the Court of Appeals held:

> An idea may be a property right. But, when one submits an idea to another,

> no promise to pay for its use may be implied, and no asserted agreement enforced, if the elements of novelty and originality are absent, since the property right in an idea is based upon these two elements.[17]

Plaintiff John Downey was an airline pilot who submitted a proposal for increasing the sale of defendant General Foods Corporation's gelatin product "Jell-O" by targeting the children's market and renaming the product "Wiggly," or a variation thereof, including "Mr. Wiggle."[18] Downey's wife allegedly called General Foods' Jell-O product "Mr. Wiggle" to their children. Downey sent an unsolicited suggestion to General Foods that it adopt the trademark "Mr. Wiggle" throughout the United States. At about the same time plaintiff made this unsolicited proposal to General Foods, General Foods' advertising firm, Young & Rubicam, on its own initiative, independently developed the trademark "Mr. Wiggle" for use in the children's market.[19] In March 1965, General Foods informed Downey that it had no interest in his proposal,[20] but in July General Foods began offering its Jell-O product under the trademark "Mr. Wiggle."[21] Downey sued for misappropriation of the idea to use the trademark "Mr. Wiggle" for the marketing of General Foods' Jell-O product. The Appellate Division affirmed the denial of summary judgment motions brought by both sides.[22]

The Court of Appeals reversed the denial of General Foods' summary judgment motion and dismissed the action.[23] The Court held that original ideas are the property of their creators, and the theft or unauthorized use of them is actionable as misappropriation.[24] Ideas are not subject to protection, however, if they are not novel and original.[25] In concluding that Downey was not entitled to compensation for his idea, the Court of Appeals held that the use of the word "wiggly" or "wiggle" was descriptive of the most obvious characteristic of plaintiff's gelatin product and thus was lacking in novelty and originality.[26] Although the Court did not define novelty and originality, it relied on General Foods' evidence of previous knowledge and prior usage of the word "wiggles" to rule out the existence of novelty and originality in Downey's idea.[27]

Downey did not base his claim on a contract with the defendant; there was none. Instead, he sued for misappropriation, and the Court examined the claim under a property theory. In treating the idea as property, *Downey* expanded the rights afforded to a creator of an idea. Indeed, whereas under *Soule* creators were limited to the enforcement of contracts, now creators of original and novel ideas also could seek redress under a tort theory.

Based on the theory that an original and novel idea is property, courts recognized a cause of action for the misappropriation of ideas distinct from claims arising under contract or quasi-contract theories:

> In order for an idea to be susceptible to a claim of misappropriation, two essential elements must be established: the requisite legal relationship must exist between the parties, and the idea must be novel and concrete. The legal relationship between the plaintiff and defendant may be either a fiduciary relationship, or based on an express contract, an implied-in-fact contract, or a quasi-contract.[28]

The concept of novelty was examined by the Second Circuit, applying New York law, in *Murray v. National Broadcasting Co*.[29] Plaintiff Hwesu Murray claimed NBC's production and broadcast of the television series "The Cosby Show," about everyday life in an upper middle-class African-American family in New York City, was derived from an idea he had presented to NBC in 1980, years before the show premiered.[30]

The Second Circuit confined itself to the question of whether Murray's proposal of a non-stereotypical portrayal of African-Americans on television was novel and thus protectible. The court held that

> ideas that reflect 'genuine novelty and invention' are fully protected against unauthorized use. *Educational Sales Program*, 317 N.Y.S.2d at 844. But those ideas that are not novel "are in the public domain and may freely be used by anyone with impunity." *Ed Graham Productions*, 347 N.Y.S.2d at 769. Since non-novel ideas are not protectible as property, they cannot be stolen. In assessing whether an idea is in the public domain, the central issue is the uniqueness of the creation.[31]

Although "The Cosby Show" was recognized unquestionably as innovative, the mere fact that such a program had not been made before did not necessarily mean the idea for the program was novel. Cosby himself had outlined his "dream" project years earlier in a 1965 interview quoted by the Second Circuit:

> There'll be the usual humorous exchanges between husband and wife. . . . Warmth and domestic cheerfulness will pervade the entire program. Everything on the screen will be familiar to TV viewers. But this series will be radically different. Everyone in it will be a Negro. . . . I'm interested in proving there's no difference between people, [explained Cosby]. My series would take place in a middle-income Negro neighborhood. People who really don't know Negroes would find on this show that they're just like everyone else.[32]

The court noted that "not every good idea is a legally protectible idea" and that an idea is not novel if it merely represents an "adaptation of existing knowledge and of 'known ingredients' and therefore lack[s] 'genuine novelty and invention'."[33] The court concluded that the plaintiff's idea, although innovative, was not novel, as ideas for presenting African-American actors in non-stereotypical roles and family situation comedies had been circulating in the television industry for years.[34] Finding that the idea was not novel, the court affirmed the dismissal of the breach of implied contract, misappropriation, conversion, and unjust enrichment claims.[35]

In dissent, Judge Pratt argued that the novelty standard employed by the majority was too high:

> To say, as a matter of law, that an idea is not novel because it already exists in general form, would be to deny governmental protection to any idea previously mentioned anywhere, at anytime, by anyone. I do not believe New York law defines "novelty" so strictly. . . .
>
> Novelty, by its very definition, is highly subjective. As fashion, advertising, and television and radio production can attest, what is novel today may not have been novel 15 years ago, and what is commonplace today may well be novel 15 years hence.[36]

Judge Pratt's dissent highlights the extremely high standard of novelty the courts have adopted in New York. Although the courts continued to recognize and develop the law of idea protection under both contract and misappropriation law, few, if any, plaintiffs have been able to meet the burden of demonstrating novelty and originality.

III. The Court of Appeals Defines "Novelty"

In the seminal 1993 decision *Apfel v. Prudential-Bache Securities Inc.*,[37] the New York Court of Appeals finally addressed the degree of originality and novelty required for the protection of ideas under pre- and post-disclosure contracts. The plaintiffs, an investment banker and a lawyer, submitted a detailed written proposal to Prudential for issuing municipal securities through a system that allowed bonds to be sold, traded, and held exclusively by means of a computerized "book entry only" format, which Prudential accepted and implemented.[38] Initially, Prudential signed a confidentiality agreement that it would review the proposal detailed in a 99-page summary.[39] After nearly a month of negotiations, all parties entered into a sale agreement "under which plaintiffs conveyed their rights to the techniques and certain trade names and defendant agreed to pay a stipulated rate based on its use of the techniques for a term from October 1982 to January 1988."[40] The post-disclosure agreement provided that Prudential was obligated "to pay even if the techniques became public knowledge or standard practice in the industry and applications for patents and trademarks were denied."[41]

The Court of Appeals stated that the real issue was not whether the idea was novel but whether it had value. Novelty, the Court held, is an element of plaintiff's proof of either a proprietary interest in an idea or of the validity of the consideration under a contract theory:

> While our cases have discussed novelty as an element of an idea seller's claim, it is not a discrete supplemental requirement, but simply part of plaintiff's proof of either a proprietary interest in a claim based on a property theory or the validity of the consideration in a claim based on a contract theory.[42]

Thus, novelty is not a prerequisite in all cases involving idea disclosure.[43] The Court held that novelty is not required to validate a contract. The decisive question is whether the idea has value, not whether it is novel.[44]

The Court found no real question that the idea disclosed to Prudential had value to the defendant:

> It decided to enter into the sale agreement and aggressively market the system to potential bond issuers. For at least a year, it was the only underwriter to use plaintiffs' "book entry" system for municipal bonds, and it handled millions of such bond transactions during that time. Having obtained full disclosure of the system, used it in advance of competitors, and received the associated benefits of precluding its disclosure to others, defendant can hardly claim now the idea had no value to its municipal securities business. Indeed, defendant acknowledges it made payments to plaintiffs under the sale agreement for more than two years, conduct that would belie any claim it might make that the idea was lacking in value or that it had actually been obtained from some other source before plaintiffs' disclosure.[45]

The Court distinguished *Downey*, *Soule*, and other cases in which there were no further contractual negotiations or payment post-disclosure:

> Such transactions pose two problems for the courts. On the one hand, how can sellers prove that the buyer obtained the idea from them, and nowhere else, and that the buyer's use of it thus constitutes misappropriation of property? Unlike

> tangible property, an idea lacks title and boundaries and cannot be rendered exclusive by the acts of the one who first thinks it. On the other hand, there is no equity in enforcing a seemingly valid contract when, in fact, it turns out upon disclosure that the buyer already possessed the idea. In such instances, the disclosure, though freely bargained for, is manifestly without value. A showing of novelty, at least novelty as to the buyer, addresses these two concerns. Novelty can then serve to establish both the attributes of ownership necessary for a property-based claim and the value of the consideration—the disclosure—necessary for contract-based claims.
>
> There are no such concerns in a transaction such as the one before us. Defendant does not claim that it was aware of the idea before plaintiffs disclosed it but, rather, concedes that the idea came from them. When a seller's claim arises from a contract to use an idea entered into after the disclosure of the idea, the question is not whether the buyer misappropriated property from the seller, but whether the idea had value to the buyer and thus constitutes valid consideration. In such a case, the buyer knows what he or she is buying and has agreed that the idea has value, and the Court will not ordinarily go behind that determination. The lack of novelty, in and of itself, does not demonstrate a lack of value.[46]

The Court thus identified value to the defendant as the determining factor. That the plaintiff may not have a property right in the idea does not, by itself, render the contract void for lack of consideration.

Under *Apfel*, two distinct standards exist for contract-based claims arising out of idea disclosure. First, a showing of novelty as to the buyer is required for claims based on the unauthorized use of an idea disclosed after the parties enter into a contract.[47] In this respect, *Apfel* marked a significant change in the legal standard for idea submission cases. Whereas under *Downey*, *Soule*, and *Murray* an idea could be property and valid consideration for a contract only if it were novel to the entire world, under *Apfel*, an idea can be valid consideration so long as it is original to the defendant.[48] Second, with respect to contracts entered into after the disclosure of the idea, *Apfel* held that novelty is not required.[49] *Apfel* did not directly address the novelty and originality required for a misappropriation of idea claim.

IV. Application of *Apfel*

Apfel serves as the benchmark on the law of idea protection in New York. Its holding has been applied to both contract-based and misappropriation-based claims in idea-submission cases. In *Oasis Music, Inc. v. 900 U.S.A.*,[50] a computer game developer sued the distributor of video games over cell phones. After a joint venture between the developer and distributor for the creation, marketing, and commercial exploitation of an interactive telephone game fell through, the developer created and released a different game. The developer claimed the distributor had misappropriated its ideas by incorporating them into the game ultimately developed. The trial court granted summary judgment for the defendant.

The trial court in *Oasis* examined a situation in which the parties had entered into a confidentiality agreement with payment based on use, but, unlike in *Apfel*, there was no post-disclosure contract for use of the idea. The court stated that the *Apfel* Court

> did not repudiate the long line of cases requiring novelty in certain situations. Rather, the *Apfel* Court merely clarified that novelty is not required in *all* cases. *Apfel* held that when a seller and buyer enter into both a confidentiality agreement and a post-disclosure contract, the post-disclosure contract for the sale of an idea may be supported by adequate consideration even if the idea is not novel. However, if "the buyer and seller contract for *disclosure* of the idea with payment based on use, but no separate post-disclosure contract for *use* of the idea has been made" there is a problem in establishing "whether the idea the buyer was using was, in fact, the seller's. Thus, in this latter category of cases, the New York courts require '[a] showing of novelty, at least novelty as to the buyer'."[51]

Since there was no post-disclosure contract in *Oasis*, the court examined the idea under a property-based theory and stated:

> For an idea to be susceptible to a claim of misappropriation, two elements must be established. First, a requisite legal relationship must exist between the parties and second, the idea must be novel and concrete. . . . The legal relationship between the plaintiff and defendant may be either a fiduciary relationship, or based on an express contract, an implied-in-fact contract, or a quasi-contract. . . .[52]

The court held that a confidentiality agreement satisfied the requirement of legal relationship between the parties.[53]

In 2000 in *Nadel v. Play-By-Play Toys & Novelties, Inc.*,[54] the Second Circuit revisited *Apfel* in an effort to clarify the principles enunciated there. Plaintiff Craig Nadel was a toy developer who regularly submitted toy ideas to manufacturers to develop and market new toy concepts as quickly as possible.[55] "To facilitate the exchange of ideas, the standard custom and practice in the toy industry calls for companies to treat the submission of an idea as confidential. If the company subsequently uses the disclosed idea, industry custom provides that the company shall compensate the inventor, unless, of course, the disclosed idea was already known to the company."[56] Nadel submitted to Play-By-Play, a toy developer, a proposal for a dancing table-top plush monkey. Play-By-Play did not pay Nadel for his proposal and thereafter developed a similar toy. Nadel sued Play-By-Play, alleging that it had violated the parties' alleged agreement. Play-By-Play claimed that it independently developed the toy and that Nadel's proposal was not original.[57] The district court dismissed all claims on summary judgment, and both sides appealed. The Second Circuit reversed the dismissal of Nadel's claims and remanded for a determination of "whether Nadel's product concept was inherently original or whether it was novel to the industry prior to October 1996."[58]

In reviewing some of the post-*Apfel* cases, the *Nadel* court stated that it found New York case law in this area to be "relatively clear when viewed through the prism of *Apfel*," but it nevertheless recognized some post-*Apfel* confusion among the courts."[59] The court observed:

> In *Apfel*, the Court of Appeals discussed the type of novelty an idea must have in order to sustain a contract-based or property-based claim for its uncompensated use. Specifically, *Apfel* clarified an important distinction between the requirement of "novelty to the buyer" for contract claims, on the one hand, and "originality" (or novelty generally) for misappropriation claims, on the other hand.[60]

The *Nadel* court noted that *Apfel* made clear that the "novelty to the buyer" standard is not limited to cases involving an express post-disclosure contract for payment based on an idea's use. Where there is only a pre-disclosure contract, a seller might bring an action against a buyer who allegedly used his ideas without payment, claiming both misappropriation and breach of an *express* or *implied-in-fact contract*.[61]

The *Nadel* court also clarified the factors that determine novelty:

> The determination of whether an idea is original or novel depends upon several factors, including, *inter alia*, the idea's specificity or generality (is it a generic concept or one of specific application?), its commonality (how many people know of this idea?), its uniqueness (how different is this idea from generally known ideas?) and its commercial availability (how widespread is the idea's use in the industry?).[62]

In sum, under *Apfel* and its progeny, there are three different standards governing idea submission cases. Contract claims arising from pre-disclosure contracts require a showing that the disclosed idea was novel to the buyer in order to constitute valid consideration.[63] Contract claims arising from a post-disclosure contract require no proof of novelty or originality. And property-based misappropriation claims require a legal relationship between the parties and that the idea in question be original and novel in an absolute sense.[64] Finally, for both contract and misappropriation claims, an idea may be so unoriginal or lacking in novelty that, as a matter of law, the buyer is deemed to have knowledge of the idea. In such cases, neither a property- nor a contract-based claim for uncompensated use of the idea will lie.[65]

This review of the law of idea protection in New York points to the importance of being able to document when and how the idea was disclosed to the other side, the nature of the relationship between the parties, and, of course, any agreement between the parties. On the other hand, companies should maintain records of proposals received and trends in the relevant industry, which can be used to demonstrate that an idea was not novel as to it, in which case, absent a post-disclosure agreement, the plaintiff's claim will not survive. It also is advisable, of course, to maintain records of all proposals submitted by those with whom a business relationship exists.

V. New York v. California

Many states have adopted a legal framework for idea submission cases similar to that identified in *Soule* and *Apfel*, including New Jersey,[66] Illinois,[67] Georgia,[68] and Texas,[69] protecting ideas under contracts, both express and implied, and as property under misappropriation law. However, not all states recognize a property right in original ideas, thus precluding any protection outside of contracts.

California bases protection of ideas upon the relationship between the parties, without any analysis of the originality of the idea. The Ninth Circuit,[70] discussing the California Supreme Court's decision in *Desny v. Wilder*,[71] explained:

> To establish a *Desny* claim for breach of implied-in-fact contract, the plaintiff must show that the plaintiff prepared the work, disclosed the work to the offeree for sale, and did so under circumstances from which it could be concluded that the

> offeree voluntarily accepted the disclosure knowing the conditions on which it was tendered and the reasonable value of the work.[72]

Under California law the disclosure itself is the consideration; novelty is not part of the analysis.[73] In other words, California does not recognize a property right in novel and original ideas.

Thus, whereas in New York a creator can seek protection for the unauthorized use of his/her original idea whether or not a contract exists, in California only a creator who discloses an idea pursuant to a contract has any legal protection.

VI. Conclusion

New York protects the submission of ideas under both contract and misappropriation law upon a demonstration of value to the disclosed party, generally through proof of novelty and originality. Ideas are protected under a pre-disclosure contract if the idea was novel to the buyer.[74] Disputes arising from a post-disclosure contract are treated as simple contract actions; no proof of novelty or originality is required.[75] Finally, property-based misappropriation claims require a legal relationship between the parties (not necessarily contractual) and that the idea in question be original and novel in an absolute sense.[76]

Unlike New York, which recognizes a property right in original and novel ideas, California protects only those ideas disclosed pursuant to an agreement, express or implied. Thus, although the threshold is high, greater protection is available under New York law for creators of original and novel ideas.

Endnotes

1. *Irizarry y Puente v. President & Fellows of Harvard College*, 248 F.2d 799, 802 (1st Cir. 1957) ("An idea, as distinguished from the copyrighted contents of a book or a patented device or process, is accorded no protection in the law unless it is acquired and used under such circumstances that the law will imply a contractual or fiduciary relationship between the parties.").
2. The Copyright Act does not extend its protections to ideas or concepts. 17 U.S.C. § 102(b).
3. *American Bus. Training, Inc. v. American Mgt. Assn.*, 50 A.D.3d 219, 851 N.Y.S.2d 491 (1st Dep't 2008); *Alliance Sec. Prods. v. Fleming & Co., Pharms.*, 290 Fed. Appx. 380, 2008 U.S. App. LEXIS 16098 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 739 (2008); *Hudson v. Universal Studios, Inc.*, 2008 U.S. Dist. LEXIS 86146, 89 U.S.P.Q.2d (BNA) 1132 (S.D.N.Y. 2008); *sit-up Ltd. v. IAC/Interactive Corp.*, 2008 U.S. Dist. LEXIS 12017 (S.D.N.Y. 2008).
4. The term "idea" is defined as: "A rational conception; the complete conception of an object when thought of in all its essential elements or constituents; the necessary metaphysical or constituent attributes and relations, when conceived in the abstract." Webster's Revised Unabridged Dictionary, *available at* dictionary.com http://dictionary.reference.com/browse/idea.
5. *Educational Sales Program Inc. v. Dreyfus Corp.*, 65 Misc.2d 412, 415, 317 N.Y.S.2d 840 (Sup. Ct. N.Y. Co. 1970).
6. *Id.*
7. *See Alliance Sec. Prods., Inc.*, 290 Fed. Appx. at 382.
8. 201 A.D. 794, 195 N.Y.S. 574 (2d Dep't 1922), *aff'd*, 235 N.Y. 609 (N.Y. 1923).
9. *Id.* at 795.
10. *Id.* at 796.
11. *Id.* at 797.
12. *Soule v. Bon Ami Co.*, 235 N.Y. 609, 139 N.E. 754 (N.Y. 1923).
13. *Soule*, 201 A.D. at 797.
14. *Bram v. Dannon Milk Products, Inc.*, 33 A.D.2d 1010, 307 N.Y.S.2d 571 (1st Dep't 1970).
15. *Educational Sales Program Inc.*, 65 Misc.2d at 416.
16. 31 N.Y.2d 56, 286 N.E.2d 257, 334 N.Y.S.2d 874 (N.Y. 1972).
17. *Id.* at 61.
18. *Id.* at 58–59.
19. *Id.* at 60.
20. *Id.* at 59.
21. *Id.*
22. *Id.* at 58.
23. *Id.* at 63.
24. *Id.* at 61.
25. *Id.*
26. *Id.* at 61–62.
27. *Id.*
28. *McGhan v. Ebersol*, 608 F. Supp. 277, 284 (S.D.N.Y. 1985) (*citing Vantage Point, Inc. v. Parker Brother, Inc.*, 529 F. Supp. 1204, 1216-7 (E.D.N.Y. 1981), *aff'd without op. sub. nom. Vantage Point, Inc. v. Milton Bradley*, 697 F.2d 301 (2d Cir. 1982)).
29. 844 F.2d 988 (2d Cir. 1988).
30. *Id.* at 992.
31. *Id.* at 993.
32. *Id.* at 989 (quoting Lardine, *Looking to the Future: Bill Cosby Has Dreams of an All-Negro TV Series*, New York Daily News Sunday Magazine, Sept. 19, 1965, at 6).
33. *Id.* at 992.
34. *Id.*
35. *Id.* at 994.
36. *Id.* at 997.
37. 81 N.Y.2d 470, 616 N.E.2d 1095, 600 N.Y.S.2d 433 (N.Y. 1993).
38. *Id.* at 474.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 477.
43. *Id.*
44. *Id.* at 473.
45. *Id.* at 476.
46. *Id.* at 478.
47. *Id.* ("A showing of novelty, at least novelty as to the buyer, addresses these two concerns. Novelty can then serve to establish both the attributes of ownership necessary for a property-based claim and the value of the consideration--the disclosure--necessary for contract-based claims.").

48. *Id.* at 478.
49. *Id.*
50. 161 Misc.2d 627, 614 N.Y.S.2d 878 (Sup. Ct. N.Y. Co. 1994).
51. *Id.* at 630–631.
52. *Id.* at 631.
53. *Id.*
54. 208 F.3d 368 (2d Cir. 2000).
55. *Id.* at 371.
56. *Id.* at 371–372.
57. *Id.*
58. *Id.* at 382.
59. *Id.* at 379.
60. *Id.* at 374.
61. *Id.* at 376.
62. *Id.* at 378.
63. *See Alliance Sec. Prods., Inc.*, 290 Fed. Appx. at 382 ("[U]nder a contract-based theory a plaintiff need only prove novelty to the defendant.").
64. *Id.* ("[U]nder a tort based misappropriation theory a plaintiff must prove novelty with respect to the world at large." 290 Fed. Appx. at 382); *See also sit-up Ltd.*, 2008 U.S. Dist. LEXIS 12017 at *63-*64 ("To succeed on [a misappropriation of idea] claim under New York law, a party must prove (1) the existence of a legal relationship between the parties in the form of a fiduciary relationship, an express or implied-in-fact contract, or quasi-contract; and (2) the idea must be novel and concrete.").
65. *Id.* at 378–379.
66. *Duffy v. Charles Schwab & Co.*, 2001 U.S. Dist. LEXIS 14070 (D.N.J. 2001).
67. *Phillips v. Avis, Inc.*, 1996 U.S. Dist. LEXIS 7342 (N.D. Ill. 1996).
68. *Burgess v. Coca-Cola Co.*, 245 Ga. App. 206, 536 S.E.2d 764 (G.A. 2000).
69. *Kleck v. Bausch & Lomb, Inc.*, 145 F. Supp. 2d 819 (W.D. 2000).
70. *Grosso v. Miramax Film Corp.*, 383 F.3d 965 (9th Cir. Cal. 2004).
71. 46 Cal. 2d 715, 299 P.2d 257 (Cal. 1956).
72. *Grosso*, 383 F.3d at 967.
73. Ronald Caswell, *Comment, A Comparison and Critique of Idea Protection in California, New York, and Great Britain*, 14 Loy. L.A. Int'l & Comp. L.J. 717, 735 (July 1992) ("California courts now protect idea disclosures under both express and implied-in-fact contract theories. Since the act of disclosure suffices as consideration for a contract, novelty is a non-issue.").
74. *See Alliance Sec. Prods., Inc.*, 290 Fed. Appx. at 382.
75. *Apfel*, 31 N.Y.2d at 478.
76. *See sit-up Ltd.*, 2008 U.S. Dist. LEXIS 12017, at *63-*64.

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