

Of Process and Product: *Kremen v. Cohen and the Consequences of Recognizing Property Rights in Domain Names*

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ABSTRACT

In *Kremen v. Cohen* the Ninth Circuit recognized a property right in domain names, defining property as any form of intangible benefit that is distinct and excludable. This reasoning is flawed for three reasons: (1) it is grounded in a faulty understanding of property law; (2) it is over-inclusive, capturing a variety of things and benefits that have been explicitly removed from the realm of property; (3) and it is under-inclusive, as it fails to consider a number of interests necessary for evaluating if something should be deemed property. This doctrine, broadly applied, would result in a massive expansion of legal interests classified as property.

The *Kremen* court also failed to contemplate the collateral impact of such an expansive view of property. In addition to providing a remedy for interference with the right to exclude, property also functions as an interface between the owner and the society at large, assigning a number of responsibilities and burdens to the owner. For example, the location of property assists in determining important questions of jurisdiction, venue and choice of law, and classifying an intangible benefit as property means transforming it into a taxable asset. When recognizing domain names, or any other form of intangible resource, as property, one must carefully consider how the change in rights will affect dependent social and legal rules—something *Kremen* failed to do. For these reasons, *Kremen* is an inappropriate source of authority to rely upon when considering novel questions of intangible property rights.

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I. INTRODUCTION

“When we say that a man owns a thing, we affirm directly that he has the benefit of the consequences attached to a certain group of facts, and, by implication, that the facts are true of him.”¹

Despite the growing importance of electronic resources to modern society, scant attention has been paid to how these technological advancements impact other structures within the American legal system. The focus of both courts and academics have been on how these new, intangible resources fit within the existing property-contract framework. The participants in this discourse have, unfortunately, applied a method of classifying intangible resources as property or contract developed in the pre-modern era. These persons have failed to question if the methodology is adequate for the task or to recognize the potential impact on the remainder of the legal system, which utilizes the law of property for a plethora of important purposes. But as electronic resources grow more complex and more vital to society, and thus subject to even greater amounts of litigation, it has become necessary to address this absence of critical scholarship before further unintended consequences arise.

The paradigmatic example of this failure can be found in *Kremen v. Cohen*, wherein Ninth Circuit Court of Appeals held that a domain name was the property of the registrant, and was subject to the tort of conversion.² In its decision, the court described

¹ OLIVER W. HOLMES, JR., *THE COMMON LAW* 215 (Dover Publ'n 1991) (1881).

² *Kremen v. Cohen*, 337 F.3d 1024, 1029–30, 1035 (9th Cir. 2003).

property as “a broad concept that includes every intangible benefit and prerogative susceptible of possession or disposition.”³ Due to its capability for exclusion, the court held that a domain name was a form of property like real property, comparing the process of registering a domain name to “staking a claim to a plot of land at the title office.”⁴ Many courts and academics have celebrated this decision as a sound advancement in the law of property.⁵ But under this framework what may be considered property is remarkably broader than just domain names. In fact, because the *Kremen* court held that property rights exist when there is a distinct interest capable of exclusive control by a legitimate owner,⁶ the putative class of currently non-proprietary intangible interests that would be re-classified as property is too broad to measure.

Kremen places a stake in the heart of property law. By using excludability as the sole determinant for recognizing something as property, the *Kremen* court has effectively called for an end to the division between property rights and personal obligation. This reasoning is fatally flawed because it is both over-inclusive and under-inclusive. The *Kremen* analysis is over-inclusive because the reliance upon exclusion would propertyize many resources and interests that society has specifically exempted from the classical scope of property, like those of intellectual property and discretionary benefits awarded by contract. The analysis is under-inclusive because the court’s uncritical theory of property fails to recognize and consider the substantive role of property in establishing the structures of social organization, including, but not limited to, those such as jurisdictional or choice of law rules.

Furthermore, *Kremen* rests upon a flawed understanding of the animating principles of law, which left the court ill-suited to develop coherent rules for the electronic world, impermissibly blurring the distinctions between property, intellectual property, and contract law. The court confused how a right is protected with the legal mechanism that is used to protect it within: (1) the classical theory of property, which protects individual dominion over discrete and scarce objects of utility; (2) intellectual property, which represents the limited control over ideas, concepts, symbols and other interests that are not intrinsically useful or scarce; and (3) personal obligation, which mediates the interactions between two individuals.⁷ Although the right to exclude may be

³ *Id.* at 1030.

⁴ *Id.*

⁵ See, e.g., Shmueli v. Corcoran Group, 802 N.Y.S.2d 871, 875–76 (N.Y. Sup. Ct. 2005) (relying upon *Kremen* as a justification for granting an individual full property rights in an electronic document created and stored on a third-party’s computer); Richard A. Epstein, *The Roman Law of Cyberconversion*, 2005 MICH. ST. L. REV. 103, 107-08, 120 (2005) (arguing that the older rules governing property rights carry over in *Kremen* “without a hitch” because recognizing domain names as actual property would encourage efficient socio-economic outcomes by defining the allocation of risk in these new forms of transactions); Xuan-Thao N. Nguyen, *Cyberproperty and Judicial Dissonance: The Trouble With Domain Name Classification*, 10 GEO. MASON L. REV. 183, 184–85, 194, 203–05 (2001) (hailing the decision in *Kremen* due to the fact that that domain names have economic value in e-commerce and that classifying domain names as intangible property only when they are also trademarks would fail to recognize the significant value that could otherwise be introduced into the marketplace).

⁶ *Kremen*, 337 F.3d at 1030.

⁷ See Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002) (comparing how property rights are defined and enforced between

the primary way of identifying resources as property,⁸ the potential for excludability does not serve as a per se justification to classify something as property conferring the traditional rights of dominion.⁹ Instead of asking *if* something is capable of exclusion, the correct question to ask is if something *should* be placed under exclusive control, and if so, by *whom*.¹⁰

Even though the capability for exclusion and exchange have been prominent themes in much of the recent discourse on property, it does not provide a sound basis for a theory of property because property law evaluates interests beyond facilitating what resources may be transferred by individuals.¹¹ The California Supreme Court acknowledged concerns about the broader social and legal costs of recognizing property based solely upon excludability in *Intel v. Hamidi*.¹² In *Hamidi*, the court declined to extend California law to recognize an email server as property subject to an absolute right of exclusion. Facing potentially significant and unexpected social costs, the court was concerned that an adversarial adjudication, with its significant informational limitations, would be an inappropriate mechanism to resolve such a complex controversy.¹³ In contrast, *Kremen*'s myopic approach ignored how property fundamentally shapes the organization of the society by assigning culturally relevant responsibilities and burdens such as usage restrictions, affirmative duties of care, and taxation.¹⁴

Recognizing the broad significance of property is vital because the classification of a resource as property has important consequences within our judicial system, which still relies on the physical presence of property for resolving many questions of jurisdiction and choice of law. Although *Kremen* established that domain names were property, consider the important consequential details, such as where the situs of domain name was located—a characteristic necessary when determining which jurisdiction has power over and what rules may apply to the property. And if a domain name is property just like a plot of land, then it also becomes a taxable asset. If the taxable value of a domain name is determined by its best use or its market exchange value, the tax consequences could be striking for people who run popular yet non-commercial websites. Finally, *Kremen*'s over-simplistic rule would call into question the legal status of other forms of intangible property, creating substantial legal instability regarding the ownership of distinct resources such as individual Facebook pages or online gaming characters. By failing to recognize these readily foreseeable consequences, *Kremen* has damaged the

exclusionary and governance rules and how these two different systems are utilized to optimize resource allocation).

⁸ See Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731, 754 (1998).

⁹ See, e.g., Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005) (criticizing the reliance on excludability as a justification for granting traditional property rights in the area of intellectual property).

¹⁰ See *Cleveland v. United States*, 531 U.S. 12, 23–24 (2000) (refusing to recognize state-issued licenses as property of the state licensor with respect to the mail fraud statute, despite acknowledging the fact that such licenses are valuable and transferable interests).

¹¹ Thomas W. Merrill and Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1866–88 (2007).

¹² *Intel v. Hamidi*, 71 P.3d 296 (Cal. 2003).

¹³ *Id.* at 311.

¹⁴ Merrill & Smith, *supra* note 11, at 1850.

utility of property as a meaningful legal guidepost.

Accordingly, this article argues that *Kremen* is an exceptionally flawed decision and that a broad application of its reasoning would have substantial socio-legal consequences. First, this article will briefly discuss the history of the development of intangible property at common law. Second, this Article will analyze the theoretical foundations of the decision in *Kremen* and critique its reasoning. Finally, this Article will examine the impact of the *Kremen* framework as applied within the context of modern instances of intangible property.

II. THE HISTORICAL STRUGGLE TO UNDERSTAND INTANGIBLE PROPERTY RIGHTS

A. The Evolution and Conceptual Foundations of Intangible Property

The current ambiguity concerning how the law should recognize intangible property rights is the result of a doctrinal misunderstanding that had been of little importance until the electronic era. The law of property has long divided the legal protections accorded to tangible property and intangible property rights.¹⁵ This division has traditionally rested in the fact that tangible property derives its value from being inherently exclusive and physically useful, whereas intangible property, i.e., intellectual property, is only worth the value of the information it represents.¹⁶ Within this division, only tangible property such as real property and chattels were given what is popularly known as “property rights.”¹⁷ The benefit afforded by contract were obligations owed from one individual to another and thus, not being property, considered unassignable to others.¹⁸ As the story goes, this division began to decline under the pressures of a rapidly growing commercial society, when courts of equity expanded the category of alienable “intangible property” to include personal obligations such as debts, shares of companies, and other future interests, in order to make these resources available for commercial exchange.¹⁹

Expanding intangible property to include ownership interests caused some to confuse a new way of dividing property ownership with the creation of a new form of property all together. Contrary to those who believe the re-classification in nomenclature was the start of a disappearing divide between property and obligation, the ability to assign the ownership of certain categories of obligations did no such thing. Despite the greater level of abstraction, these “intangible property” interests reflect a division of the rights to control and benefit from an underlying “thing,” created by the works of mankind and governed by the rules of property.²⁰ It did not create a new intangible resource. For

¹⁵ ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 2* (4th ed. 2007).

¹⁶ Sarah Worthington, *The Disappearing Divide Between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation*, 42 TEX. INT'L L.J. 917, 920 (2007).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See RESTATEMENT (SECOND) OF TORTS § 242 (1965). The examples given by the Restatement exemplify intangible property as a contractual duty, the interference with which is tortious. For instance,

example, stealing someone's shares in a corporation is not converting a distinct property right—it is a conversion of underlying property rights by dispossessing the owner of the mechanism necessary to utilize the underlying assets. There is no separate form of property because the “intangible property” right is not distinct and is not useful when unattached from the underlying physical resources. This is the same as when a landowner is deprived of the use of property by an encroaching neighbor. In both cases the interference with the “intangible property” right, i.e., the exercise of ownership rights, disrupts the dominion necessary for the functional use of scarce property.

Until the modern era, the synonymous use of intellectual and intangible property was of little consequence. Previously, intellectual property was the only form of intangible property, conferring an unconventional property right in the content of information—a non-scarce or useful good—contained within a patent or copyright. But technological change has upset the traditional method of classifying property interests between tangible and intangible: inherently scarce, useful and wealth generating assets are no longer confined to a physical existence. Consider these examples: Jason Ainsworth, a resident of Las Vegas, Nevada, ran a real estate company in the game *Second Life*, renting out parcels of “virtual land” to other players.²¹ Mr. Ainsworth obtained a profit of around \$1,800 per month by selling in-game currency to other players.²² In the Netherlands, a 17-year-old was arrested for stealing nearly \$6,000 worth of furniture from a hotel room in the online game *Habbo Hotel*.²³

Some courts and commentators have simply assumed that these new forms of intangible resources should be given the same favored status as “real” property in order to afford their full utilization in the marketplace as they are useful, valuable, and transferable like other resources traditionally deemed to be property. But it has been well documented that just because something can, or even should, be capable of economic exchange does not justify its classification as full-fledged property. For instance, even though human organs clearly fit the *Kremen* definition of property, and treating organs as commercial objects would be of substantial social benefit, concerns about morality have refused such a classification.²⁴ Accordingly, it cannot be said that domain names, or anything else, can be classified as “property” solely based on the fact that they may be useful and alienable: There must be something else involved.

In order to determine when something should be recognized as property, one must look outside of its marketability and instead examine the broader functions of property

the Restatement illustrates the conversion of intangible property as the unwillingness of a corporation to register a change in stock ownership, thereby interfering with the right of the new owner to exercise control over the company. But the right to control a company only exists because it was created by an individual who then entered into agreements with others to distribute control of its physical assets.

²¹ Mark Wallace, *The Game Is Virtual. The Profit Is Real.*, INT'L HERALD TRIB., May 30, 2005, at 9, available at <http://www.nytimes.com/2005/05/29/business/yourmoney/29game.html>.

²² *Id.*

²³ Victor Keegan, *Screen grabbers — crime hits the digital frontier*, THE GUARDIAN (London), Nov. 17, 2007, at 16, available at <http://www.guardian.co.uk/technology/2007/nov/17/internet.crime>.

²⁴ See, e.g., Julia D. Mahoney, *The Market for Human Tissue*, 86 VA. L. REV. 163 (2000) (arguing that the moralistic refusal to commodify human organs “exact[s] a heavy cost” on society).

within a society.²⁵ No legal systems exist in a cultural vacuum. For property to function as a mechanism of organization and coordination, property must be structured in a way that allows the population as a whole to understand and voluntarily comply with its rules.²⁶ People infuse their actions and organizations with moral significance in order to reconcile their social, economic, and legal behavior with their cultural values.²⁷ Within this discourse, it is not difficult to imagine a situation where a society may not desire to enact the most commercially efficient system of human relationships. As a form of social organization, the distribution, control of and access to property may reflect other social, cultural and moral concerns, such as a desire for a more equitable or just society, or utilizing property ownership as a means to confer and/or restrict the availability of social status and power.²⁸

Property rights are substantive rights that, as developed through the common law system, have incorporated centuries of collective judgments about the praxis of human organization in order to stabilize those well-settled social expectations. In contrast, if property is merely a procedural mechanism—a series of distinct and transferable interests that are “bundled” together in efficient packages—then the right of performance created by any contract, as a distinct and excludable interest, would be no different than an orthodox property right. But a contract is not a servitude. Thus, when faced with new questions of intangible property such as domain names, these macro-level interests suggest that a court must do more than match the superficial characteristics of a new resource to those traditionally considered property, but must also consider how that new property right would reconcile with the organization of society at large.²⁹

²⁵ Merrill and Smith, *supra* note 11, at 1856–57; Eduardo M. Penalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1938–39 (2005) (describing property as a means of binding the individual owner to the larger community).

²⁶ Merrill and Smith, at 1853; *see also* Eduardo M. Penalver and Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1099–1101 (2007) (describing the influence of non-compliance with property law as a force for re-adjusting legal entitlements).

²⁷ Eugenie Samier, *Toward a Weberian Public Administration: The Infinite Web of History, Values, and Authority in Administrative Mentalities*, 50 HALDUSKULTUUR J. 60, 64–65 (2005).

²⁸ This stands in direct contrast with the economically-orthodox views of scholars such as Milton Friedman, who famously stated that the “one social responsibility of business . . . is to increase its profits” Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, (Magazine) at 32, 126. *See generally* WILLIAM A. KLEIN ET AL., BUSINESS ASSOCIATIONS 286–87 (6th ed. 2006) (discussing the various positions in regard to the public role of corporations by contrasting the Delaware General Corporation Law, which only authorizes charitable donations that serve the basic purpose of the corporation, with the California Corporations Code and the New York Business Corporations Law, both of which allow corporations to make charitable donations without regard to corporate benefit).

²⁹ While it relates to tangible, as opposed to intangible, property, the decision in *Kelo v. New London*, 545 U.S. 469 (2005), strongly supports this concept of property. A massive public outcry followed the court’s decision to conflate general economic development with the concept of public use, rejecting its commodified understanding of property. *See* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo* 6–7, (George Mason Law & Economics Research Paper Series, Paper No. 07-14, 2007), available at <http://ssrn.com/abstract=976298> (describing the publish backlash to *Kelo*). The rejection of the Weberian “iron box” that was seen as the logical extension of *Kelo* demonstrates that property possesses a certain *je ne sais quoi* besides its commercial utility.

B. The Recent Judicial Struggle to Reconcile the Modern Forms of Intangible Property with the Common Law of Property

Many courts have recognized that technological change creates special problems for the law of property. These decisions have found that while the classical doctrines may be inapposite when applied to these new forms of intangible property, the principles animating the law of property remain quite pertinent. Among the earliest of these cases is *Mundy v. Decker*.³⁰ An uncontroversial case, the facts are as follows: Until August 19, 1994, Robert Mundy employed Melissa Decker as his secretary.³¹ On her last day of work, Decker deleted a directory of WordPerfect documents saved on Mundy's computer, including files she was unauthorized to delete.³² In response, Mundy brought a claim against Decker for conversion of personal property, which the trial court rejected. The court reasoned that Mundy had not been deprived of the information contained in the documents because he had retained paper copies of the deleted files.³³ The Nebraska Court of Appeals reversed the decision of the trial court, finding that the directory of files was a "unique item of person property" and the useful, electronic form of the documents were destroyed and were therefore converted from his dominion.³⁴

Mundy underscores the point that property is not just determined by the characteristics of a thing, but with why the thing is an object of such significance as to be called property. Although the trial court apparently considered the value of the intangible property be similar to intellectual property—the property was the value of the information contained within and Mundy had not been dispossessed of that information—the appellate court recognized that the intangible documents represented a distinct and intrinsically useful *thing*, which the law of property has always protected.³⁵ The court analogized the situation to that of a records box.³⁶ There was no question as to the nature of the creation, ownership, location, control, or form of the property, thus making Decker's deletion of the files just like "[throwing] the entire box in the dumpster," thereby depriving him of its use.³⁷ This reasoning reveals two points salient for understanding property: the nature of an object's utility and its association with the individual. The electronic documents were held to be property not because they were excludable, and thus capable of being efficiently distributed within society, but because the documents required individual dominion to effectuate its socially beneficial purpose.

The greatest intellectual inquiry into how the traditional rules of property should apply to intangible property occurred in *Intel v. Hamidi*.³⁸ At issue in *Hamidi* was the scope of the right to exclude others from personal property—more specifically, the right of Intel to prevent Hamidi, a former employee, from sending emails critical of Intel's

³⁰ *Mundy v. Decker*, 1999 WL 14479 (Neb. App. 1999).

³¹ *Id.* at *1.

³² *Id.* at *4.

³³ *Id.* at *5.

³⁴ *Id.* at *5-6.

³⁵ *Id.* at *5.

³⁶ *Id.* at *4.

³⁷ *Id.*

³⁸ *Intel v. Hamidi*, 71 P.3d 296 (Cal. 2003).

employment practices to current Intel employees.³⁹ Hamidi sent six emails to Intel employees over a 21-month period, overcoming Intel's attempt to block all of the communications without any illicit breach of Intel's computer security.⁴⁰ Frustrated at its inability to block Hamidi via private methods, Intel sued for injunctive relief arguing that the unwarranted communications constituted a trespass against Intel's property rights in its computer network and the time of its employees, as both were valuable and exclusive resources under Intel's control. The trial court agreed, holding that Hamidi was liable for trespass to chattels.⁴¹

The California Supreme Court reversed, holding that there could be no trespass because Intel's rights in personal property were not absolute property rights akin to real property. In its decision, the court distinguished the various forms of property, the interests that property law is concerned with, and the remedies used to protect those interests.

First, the court held that a viable remedy for trespass to chattels did not extend to Intel's claims under California law because the requirement of actual damages or actual or threatened impairment of usage of the property was not proven.⁴² The court noted that the law of property distinguishes between real property and personal property, and that there must be actual interference with ownership for an actionable trespass to personal property to occur.⁴³

The decision in *Hamidi* is useful in understanding modern intangible property because it demonstrates that the nature of the division between real and personal is concerned with the intended function of the property and not the inherent characteristics of the property. The court's reasoning indicates that real property and personal property serve two different purposes.⁴⁴ Real property is introverted in nature, acting not just to facilitate the exploitation of resources, but also to provide absolute privacy and security from the owner from the outside world—signaling to the world that this property is the sole and exclusive dominion of the world and because of its intimate connection with the personhood of the owner. In contrast, personal property is extroverted, as its intended purpose is to be held out to the world and utilized for a specific task. And since personal property must be exposed to the public in order for it to be a useful instrumentality, unlike the privacy and security interests attached to real property, the dignitary and social interests in personal property do not warrant the strict remedies in trespass afforded to real property.⁴⁵ For example, a “harmless” intrusion into a person's home is offensive in a way not comparable to accidentally touching into a person's car on the street.

Accordingly, the court held that Hamidi's messages did not constitute an actionable trespass because the messages did not actually interfere with the ability of

³⁹ *Id.* at 301.

⁴⁰ *Id.*

⁴¹ *Id.* at 302.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 302–03.

⁴⁵ *Id.* at 303.

Intel to operate its email system.⁴⁶ Furthermore, there was no reasonable risk of interference based upon the possibility that Hamidi could disrupt the system with unwanted emails: Receiving the infrequent, unwelcome communications posed no threat to dispossess Intel's ownership or impair the integrity of its email system—otherwise, it would trivialize the tort by turning ubiquitous, yet harmless unsolicited telephone calls, junk mail, radio waves or television signals into a fictive injury.⁴⁷ For similar reasons, the court also rejected Intel's assertion that it had a legally protected interest in its employees' time and productivity. Although the employer may have a valuable, economic interest in its employees, they cannot be considered the personal property of the employer: Trespass protects the right of possession and not an unadulterated exclusionary right against all forms of disruption.⁴⁸

Second, the court refused to extend California law to recognize computer networks as real property instead of personal property. In doing so, the court responded to an amicus curiae brief offered by Professor Epstein, arguing that the court should classify computer networks on both moral and utilitarian grounds. Professor Epstein argued that computer networks were morally akin to real property because, like land, they have fixed addresses that are capable of exclusion and thus may serve as an "inviolable castle" against unauthorized intrusions.⁴⁹ But while computer networks and homes may share some characteristics, the court recognized that the value of the property is in its function as a communications tool.⁵⁰ The court reasoned that, just like a telephone, the entire point of an Internet server is to be held out to the world. Extending trespass to chattels cover any unauthorized communication would defeat the entire purpose of the system, making Professor Epstein's analogy to real-world trespass inapposite.⁵¹

The court also took issue with Professor Epstein's utilitarian argument that conferring the real property exclusionary rights to servers would facilitate the growth of markets and an optimal social result.⁵² While ceding that strong property rights may help force spammers or other malicious users to internalize the costs of their own activities, thereby reducing one source of harm, the court recognized that such a rule might also impose other new and substantive costs on society.⁵³ Creating property protections in such a situation could lead to extensive burdens on individuals seeking to use the system and thereby destroy the significant value created by the network effects of open access to these intangible resources.⁵⁴ With those concerns in mind, the court gracefully declined to extend the law of property, instead leaving the complex questions of social costs and benefits for the legislature.⁵⁵

⁴⁶ *Id.* at 303–04.

⁴⁷ *Id.* at 308.

⁴⁸ *Id.*

⁴⁹ *Id.* at 309.

⁵⁰ *Id.* at 309–10. The court also noted that intangible intrusions on land are only actionable in nuisance, and thus further extension of the law would be unnecessary on that basis.

⁵¹ *Id.* at 310.

⁵² *Id.* at 310–11.

⁵³ *Id.* at 311.

⁵⁴ *Id.* at 310–11.

⁵⁵ *Id.* at 311.

The *Hamidi* court's concern regarding the scope and effect of property protections demonstrates the complex, socio-cultural questions that are inherent to understanding any system of property rights. The creation of new property rules is a reallocation of power within society, which should not be lightly done. Because a change in the forms of property has a substantial impact on social organization, courts need to be keenly aware of the logical implications and consequences of enacting a dramatic shift in property rights. It is telling that the *Hamidi* court emphasizes the inability of the academic debate to come to a common understanding on how these intangible rights should be structured, before reserving such a significant policy judgment for the legislature.⁵⁶

Similar concern for the social and functional purpose of property can be seen in *eBay v. MercExchange*.⁵⁷ The central issue in *eBay* was whether the Court should uphold the Federal Circuit's presumption for injunctive relief, rather than apply the equitable four-factor test, in patent cases.⁵⁸ While the majority opinion is rather terse, Justice Kennedy's concurring opinion highlights the importance of taking a more comprehensive view of the interests at stake when determining the appropriate remedy for a violation of property rights.⁵⁹ In his opinion, Justice Kennedy urges the lower courts to consider the broader social goals that patent law is intended to advance by "bear[ing] in mind that in many instances the nature of the patent being enforced and the economic function of the patent holder present considerations quite unlike earlier cases."⁶⁰ Because of the impact of technological change, trial courts were directed to carefully examine how or if past practices genuinely fit into the circumstances of the cases before them.⁶¹

III. *KREMEN V. COHEN'S* RECOGNITION OF PROPERTY RIGHTS: A CRITICAL ANALYSIS

A. The Flawed Underpinnings of *Kremen v. Cohen*

The *Kremen* court's fundamental failure is that it confused the necessary and sufficient conditions for something to be deemed property — just because all forms of property are exclusionary things does not mean that all exclusionary things are property. Because of this flawed premise the court adopts an improperly narrow and technical definition of property, in direct contrast to broad, functional interests explored in cases such as *Hamidi* or *eBay*. Accordingly, by incorporating such a misguided understanding of property, the *Kremen* court ran afoul in two critical ways. First, it adopted a test that defines property so broadly that it not only propertizes resources that were deliberately exempted from the realm of property, it also appears to enact a transfer of rights in existing forms of property from the providers of commercial services to their end-users. Second, the test is so narrow in its scope that it creates such rights without accounting for the social cost or consequences that the *Hamidi* court was concerned with.

⁵⁶ *Id.* at 311.

⁵⁷ *eBay v. MercExchange*, 547 U.S. 388 (2006).

⁵⁸ *Id.* at 390.

⁵⁹ *Id.* at 395 (Kennedy, J., concurring).

⁶⁰ *Id.* at 396.

⁶¹ *Id.* at 397.

In *Kremen*, sympathetic facts are partially responsible for the resulting bad case law. The plaintiff, Gary Kremen, registered the domain name sex.com from the registration company Network Solutions for his business, Online Classifieds.⁶² Enter fraudster Stephen Cohen, who also saw the value in such a domain name. Cohen drafted a specious letter to Network Solutions in order to gain control of the domain name, asserting that he was an agent of Online Classifieds, but since the company had no Internet connection, any official contact had to be via letter.⁶³ This overt paradox apparently raised no suspicion with Network Solutions, who promptly transferred the domain name to Cohen without even contacting Kremen, the original registrant.⁶⁴ When Network Solutions refused to transfer the domain name back, Kremen sued both Cohen and Network Solutions.⁶⁵

Although Kremen won his domain name back at trial, he had difficulties obtaining damages from Cohen, who had fled the country with his ill-gotten gains.⁶⁶ Kremen then turned his sights on Network Solutions, demanding compensation for his losses based on breach of contract and conversion. The trial court rejected both claims, finding that because he received the domain names for free, Kremen had no contract due to a lack of consideration, and, as intangible property, the domain name could not be converted or bailed.⁶⁷

On appeal, the Ninth Circuit affirmed the trial court on the questions of contract and bailment, but reversed on the issue of conversion.⁶⁸ The Ninth Circuit decided that rather than modify the substance of contract law, or develop a remedy in tort—the historical basis for enforcing “community standards of reasonable behavior in the circumstances in order to minimize injuries and losses, and to promote honesty and fairness in economic relationships”⁶⁹—instead expanded the scope of property rights in order to confer a desirable remedy.⁷⁰ By adopting a definition of property that includes any kind of intangible benefit that could possibly be excludable, the court held that domain names were property just like real estate with the title held by the registering party.⁷¹ Thus, because the domain name was Kremen’s property, it could be converted.⁷²

Although there may be social or moral justifications for a cause of action for conversion of domain names, the case law that the Kremen court used in support of that result is dangerous and mistaken. For example, the court looked to *Astroworks, Inc. v. Astroexhibit, Inc.*, a case from the Southern District of New York. In *Astroworks*, two investors in an astronomy website had a falling out. When one investor proceeded to set

⁶² *Kremen v. Cohen*, *supra* note 2, 337 F.3d at 1024, 1026.

⁶³ *Id.* at 1026–1027.

⁶⁴ *Id.* at 1027.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 1027–28.

⁶⁸ *Id.* at 1029, 1036.

⁶⁹ Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127, 1128 (1990).

⁷⁰ *Kremen*, 337 F.3d at 1033–35.

⁷¹ *Id.* at 1030.

⁷² *Id.* at 1030–34.

up a competing website, the investor maintaining the original website sued his former partner for converting the idea for the original website.⁷³ The district court ultimately found that the basic idea for the website could be converted because it was “excludable” intangible property, thereby circumventing the limited nature of copyright law, which only protects the expressions and not abstract ideas, by redefining the issue as one of intangible property and not intellectual property.⁷⁴

In transforming the idea for a business into convertible property, the *Astroworks* court effectively made intellectual property laws moot by disregarding the explicit divisions in both statute and case law and transforming intellectual property into a mechanism to provide protections that would otherwise be unviable under patent, trademark, copyright or trade secrets laws. The court asserted that only ideas reduced to practice, in the form of tangible expressions or implementations may be converted as property.⁷⁵ But this does not explain how the idea for a website—and not the website itself—could be converted. Intellectual property law explicitly draws the line of when and how ideas are “reduced to practice” and are only classified as personal property by statutory classification.⁷⁶ But a concept must either be an idea or an expression.⁷⁷ The act of abandoning the joint venture to implement a business idea by oneself can only be described as an act of unfair competition because, as an *idea*, it should not be subject to a claim for copyright infringement or conversion under New York law—this formulation of the rule would make almost anything property because it completely ignores the statutory limitations of the Copyright Act.⁷⁸

By following the *Astroworks* principle, that conversion remains a remedy for an otherwise unprotected property right,⁷⁹ the *Kremen* court appears to conflate the realm of intellectual property—concerning the control over ideas, concepts and symbols — with the realm of intangible property, which represents discrete interests in objects of discrete utility. This principle—that an idea not protected under copyright law can nevertheless be protected under traditional personal property law—is clearly inconsistent with the pre-emption provision of the Copyright Act.⁸⁰ Accordingly, the *Kremen* court injected instability into the law of property by grossly expanding the law of property to the point of obviating the limitations of intellectual property protection in order to shore up its desire to remedy tortious conduct without creating new tort duties.⁸¹ For example, it

⁷³ *Astroworks, Inc. v. Astroexhibit, Inc.*, 257 F. Supp. 2d 609 (S.D.N.Y. 2003).

⁷⁴ *Id.* at 618; see Copyright Act, 17 U.S.C. § 102(b) (2006) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work”).

⁷⁵ 257 F. Supp. 2d at 618.

⁷⁶ See Patent Act, 35 U.S.C. § 261 (2006) (stating that patents have the attributes of personal property); Copyright Act, 17 U.S.C. § 201(d) (2006) (conferring copyrights with the status of personal property in regard to the transfer of ownership).

⁷⁷ See *Nichols v. Universal Picture Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (describing the contours of the dichotomy between expressions, which may be subject to copyright, and ideas, which are not).

⁷⁸ *Matzan v. Eastman Kodak Co.*, 521 N.Y.S.2d 917, 918 (App. Div. 1987).

⁷⁹ *Kremen v. Cohen*, 337 F.3d 1024, 1031 (9th Cir. 2003).

⁸⁰ Copyright Act, 17 U.S.C. § 301 (2006).

⁸¹ *Kremen*, 337 F.3d at 1035.

would undermine the copyright fair use doctrine by simply allowing the owner of the intellectual property to instead claim a cause of action in conversion when copyright is unavailable. As a matter of law, this simply cannot be correct.

An example of the logical problems can be found in *Shmueli v. Corcoran Group*.⁸² In *Shmueli*, the plaintiff was immediately locked out of her files, including the documents kept on her employer's computer, upon being fired from her job as a real-estate agent by her employer, the Corcoran Group and sued for conversion of her personal property, both real and intangible.⁸³ The court almost exclusively relied on *Kremen* and *Astroworks* in summarily concluding that the computer files were intangible property.⁸⁴ By basing its decision primarily on the narrow reasoning of cases such as *Kremen* and *Astroworks*, the court effectively enacted a transfer of property rights that could logically be extended far beyond its limitations in dicta to "medium of recordation."⁸⁵ Because these courts are hearing unfair competition disputes, but are using a flawed theory of property instead of contract or tort to achieve a remedy, substantial uncertainty now exists as to the scope of property rights concerning situations where people interact with property belonging to another.

B. The *Kremen* Analysis is Over-Inclusive

The approach in *Kremen* is over-inclusive because it fails to recognize that physical excludability is not the useful characteristic that it was in the pre-electronic era; it would therefore transform almost any form of Internet service into the property of the user. The extensive nature of electronic services in the modern world has changed the interactions of society. But unlike any time before, society today is dependent upon the private property of others to successfully function, primarily in the form of computers and the Internet.

The *Kremen* framework simply fails to recognize the breadth and importance of "intangible benefits" that exist today. Possession of an item is no longer required to use it, thus undermining the viability of exclusion as a defining characteristic of property. Sending one packet of data from New York to London requires the transfer of data across private networks, known as the "backbone," via reciprocal sharing agreements.⁸⁶ Corporations and individuals alike rely on using third-party private property for hosting websites, online chatting, storing documents and information, remotely operating software, processing financial transactions, and a plethora of other vital business services.⁸⁷ In addition to being intrinsically useful, privately provided intangible services

⁸² *Shmueli v. Corcoran Group*, 802 N.Y.S.2d 871 (N.Y. Sup. Ct. 2005).

⁸³ *Id.* at 875.

⁸⁴ *Id.* at 875-76.

⁸⁵ *Id.*

⁸⁶ See James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 Fed. Comm. L.J. 225, 243-47 (2002) (discussing the technical development of the Internet and its interconnectivity protocols).

⁸⁷ See, e.g., Google Business Solutions, <http://bizsolutions.google.com/services/> (last visited Feb. 5, 2008) (offering a wide variety of communication tools, business services, and web-based applications for uses such as word processing, spreadsheet and database creation); Salesforce.com,

are now able to replace the forms of personal property that previously could only be utilized with exclusive ownership and control. For instance, your diary must be in your exclusive possession for you to write in it. But if you are writing your entries on Facebook or MySpace, your use is distinct from your possession of the medium of communication. This situation is not completely novel, as it existed with the telephone network; but now it exists on an unprecedented scale.

Granting individuals property rights in services where the characteristics of ownership are separable from their utilization is an extensive upheaval in how property law establishes the boundaries of modern social organization. Beyond simple questions of control, this also implicates other, more complex substantive legal issues such as bailments or privacy rights — issues that were sidestepped by the court in *Kremen*.⁸⁸ A quick spin on the facts of *Shmueli* makes these concerns clear. For example, imagine a situation where the licensed user of a computer has stored documents on the employer's computer. Now, what happens if the owner unknowingly downloaded a virus that destroyed the contents of the machine or if the machine is hacked by an outsider? Is the owner a bailor of the user's property? What if the user refuses to remove the documents from the computer? What options can the owner use to reclaim the space? How about if the owner of the computer upgrades the machine where the user's documents are stored? Does the owner have a right of contribution from the user? Does the user have privacy rights in the files, or can the owner sift through them at will? These are just a few of the questions that relate to the blurred distinction of individual property rights that may occur.

Kremen ignores the vital fact that, unlike real estate, domain names are managed by a third party and not by the purported owner. The reasoning behind the holding in *Kremen* could easily extend beyond domain names or other electronic resources, which creates the “denominator problem” that has plagued many other prominent property decisions.⁸⁹ If the capability of being distinct and excludable makes something property, than almost anything conceivable can be considered property depending on how the “property interest” is defined. Thus, if a legitimate interest and capability for exclusion are all that are necessary to grant the user of a domain name a property right, then almost anything can be “propertized”. Compare ownership in a domain name with advertising in a magazine. The individual who purchases an advertisement obtains an interest in a form of excludable property managed by a third-party — the advertising space. It seems unlikely that *Kremen* did not intend to transfer a property right to the company who purchases the rear-cover advertisement in *The Economist*, but that is exactly what it did by holding that a person owns property when one is able to purchase any definable intangible benefit.

<http://www.salesforce.com/> (last visited Feb. 5, 2008) (offering web-based customer relationship management software services).

⁸⁸ *Kremen*, 337 F.3d at 1036.

⁸⁹ *See, e.g.*, *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

C. The *Kremen* Analysis is Under-Inclusive

Kremen is underinclusive because it does not capture the substantive, social interests necessary for such a sweeping reconfiguration of property rights. Just as in prior eras of change, technological advances are now spurring socio-legal evolution.⁹⁰ *Kremen* also fails to recognize the inherent limitations of an adversarial proceeding. While significant legal change should occur incrementally in the common law tradition, the *Kremen* court repainted the landscape of property without being able to capture the broader interests involved. Furthermore, it did so in an area of law where there is a lack of public accord on the subject. Such a complex and contentious academic debate exists that the corresponding state supreme court, when confronting a similar issue in *Hamidi*, felt it best to abstain from commenting on the issue altogether.

Kremen's reliance on the capability for exchange as a justification for property is akin to the failure of the *Kelo* court for ignoring the non-economic value of property. Both courts considered the property as a procedural anachronism, a label that suggests the relative strength of a remedy instead of reflecting a substantive value—a trend that is common in modern legal literature.⁹¹ On the other hand, these interests are recognized by the *Hamidi* court's concern with the outcome of the propertization or network effects debate.⁹² However, the interests are broader than the indecision concerning the costs and incentives of one choice or another. Property must have a purpose other than one solely directed by instrumental demands—a deontological justification, as opposed to a purely consequential justification.⁹³ More than simply providing for an individual's rights regarding resources, the law of property reflects cultural judgments concerning the morally acceptable ways for a society to structure itself and reconcile the needs of the individual with the needs of the group.⁹⁴ A definition of property that is limited in scope to facilitating the transfer of ownership between individuals largely ignores the macro-scale and cultural concerns of society as a whole.⁹⁵

The limits of *Kremen*'s reliance upon a theory of excludability for advancing property rights become evident when contrasted against the backdrop of reality. Perhaps the clearest example of how this theory is misguided can be found in Professor Sarah Worthington's explicit commentary on the impact of commercial expectation on property rights.⁹⁶ Professor Worthington contends that, in light of society's sophisticated transactions, there is no distinguishing feature of personal obligations—of which intangible property is a mere subset—that warrants different treatment because both are assignable and excludable.⁹⁷ Property rights have best served to prevent common

⁹⁰ See G. Edward White, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 16 (Oxford Univ. Press 2003) (1980) (describing in brief how the industrial revolution disrupted the previous system of social organization and interaction thereby facilitating the development of modern day tort law).

⁹¹ Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 *Yale L.J.* 357, 358 (2001).

⁹² *Hamidi*, 71 P.3d at 311.

⁹³ See Merrill and Smith, *supra* note 11, at 1853.

⁹⁴ See *id.*

⁹⁵ See *id.* at 1856-57; see also Penalver, *supra* note 25, at 1900.

⁹⁶ Worthington, *supra* note 16, at 917-18.

⁹⁷ See *id.* at 922-23.

ownership,⁹⁸ and therefore traditional property characteristics, such as the fact that property rights are “good against the world”, “run with the asset”, or provide entitlements and protections attached to the property, all could be attached to personal obligations as well.⁹⁹ But the fact that they could is not that they should.

Professor Worthington never questions if society still needs to prevent common ownership as it has in the past. Professor Worthington errs because she mistakenly assumes that because certain attributes of resources correlate with what society has deemed to be property, those attributes are the reasons why society has classified those resources as property. This confuses the ends with the means; property is established for substantive, social goals — excludability is simply one instrumental means among many for achieving those ends.¹⁰⁰

This doctrinal anachronism becomes apparent during Professor Worthington’s discussion of security interests. Professor Worthington questions the distinctions made between different kinds of interests and remedies available to creditors, believing that it creates haphazard and unjust results.¹⁰¹ It makes “perfect sense” for all forms of property to be secured because it would help organize insolvency claims and promote commercial transactions by reducing the risk of loss, so why restrict the availability of forms of insolvency protection?¹⁰² Professor Worthington cites the example of the United Kingdom’s preferential status for employment contracts as an example of the “gnawing reluctance” to adopt an expanded proprietary system.¹⁰³ Distracted by arguments for fairness and the facilitation of exchange, Professor Worthington misses an alternative explanation: the public may care more about providing a benefit directly to individuals who are dependent on an organization for their livelihoods more than the banks and various other corporate shareholders and instead use the law to re-distribute wealth or provide greater income security for employees by shifting the risk of loss to the corporation’s creditors.

The significance of property that Professor Worthington does not consider, and that the *Kremen* court is unable to evaluate in an adversarial proceeding, is not whether property confers some kind of right, but how such a right would respond to the demands of society. As the array of these rights must ultimately reflect the collective judgment of society, any substantial modification should be the result of a diligent exercise of legislative power and not judicial fiat.¹⁰⁴ The California Supreme Court in *Hamidi* recognizes this institutional limitation, while the Ninth Circuit in *Kremen* does not.

⁹⁸ See generally. *id.* at 939.

⁹⁹ See *id.* at 927-39.

¹⁰⁰ See Merrill and Smith, *supra* note 11, at 1853.

¹⁰¹ Worthington, *supra* note 16, at 937.

¹⁰² *Id.* at 937-38.

¹⁰³ *Id.* at 938.

¹⁰⁴ The debate over network neutrality serves as a poignant example of this concern. See generally Richard E. Wiley and Martha E. Heller, *Communications Law 2007*, in 25TH ANNUAL INSTITUTE ON TELECOMMUNICATIONS POLICY & REGULATION 249, 260-62 (PLI Patents, Copyrights, Trademarks, and Literary Property, Course Handbook Series No. 10946, 2007) (describing the “vigorous debate” over network neutrality and the “intense interest” of Congress in investigating the issue).

IV. THE CONSEQUENCES OF APPLYING THE *KREMEN V. COHEN* ANALYSIS

Not only is the foundation of *Kremen* flawed and its reasoning ill-suited to the demands of society, it also presents a serious risk to the stability of the legal system. While the desire to promote exchange is undoubtedly important, it is not the only function of property law. It is often overlooked that property serves as a procedural guidepost for determining significant matters of law. For example, expanding the definition of property creates uncertainty as to the jurisdictional competency of the courts, such as with questions of in rem jurisdiction, personal jurisdiction, and venue. The status of property also implicates the substantive law applied by those courts in choice of law decisions, which often rely on physical presence as a significant factor resolving choice of law issues. In a world where these new forms of “real” property lack a physical form, where can they be found and how may a court exercise power over them?

A. Consequence: Jurisdiction and Venue

Territoriality is a concept of significance to the American judicial system.¹⁰⁵ The Due Process Clause, concerned with the fair and orderly administration of the laws of the United States, requires that a state have minimum contacts in order to exercise personal jurisdiction over a defendant.¹⁰⁶ States have sovereign authority over property and persons found within their territorial boundaries.¹⁰⁷ But when is intangible property considered to be within the geographic reach of a state? Federal venue provisions allow courts to locate an action in a judicial district where “a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated.”¹⁰⁸ But what happens when the property that is the subject of the action doesn’t clearly exist within any set of territorial borders?

It may be tempting to turn to the laws of intellectual property for answers. But the existing rules governing intellectual property are inapposite as applied to domain names because the nature of the “property” protected by intellectual property laws is fundamentally different from modern forms of intangible property. Patents and copyrights award exclusive, personal rights to a concept, whereas modern intangible property has a distinct physical existence. Although the rights accorded to inventors and authors may be labeled as “intangible property” rights, they protect an interest in something that is primarily intellectual — an abstract concept reduced to description. Intellectual property has no intrinsic utility or physical existence, but instead must be implemented in some manner in order to be applied. That title may be issued to something abstract does not change its basic nature. The title to a farm represents the person rights against the land described within the deed, not the actual farm itself. The possession of stock certificates represents personal rights against the underlying corporation described in the certificate, not the corporation itself. Intellectual property is

¹⁰⁵ See *World Wide Volkswagen v. Woodson*, 444 U.S. 286, 293-94 (1980).

¹⁰⁶ See *id.* at 291-294.

¹⁰⁷ See *id.* at 293.

¹⁰⁸ 28 U.S.C. § 1391(a)(2) (2000); 28 U.S.C. § 1391(b)(2) (2000).

different because the rights are being enforced against something that can never have a distinct physical existence and is only subject to territorial jurisdiction by the authorization of Congress.

In contrast, new forms of intangible property, such as domain names, present something hereto unforeseen in law: the situs of physical property has not just become geographically unfixed from its primary user, but may concurrently exist in multiple locations at the same time. The intangibility of a domain name or an electronic document refers the fact that a person cannot hold it or see it. These forms of intangible property do not lack an actual existence, as a patent or copyright does, but instead are merely electronic in nature. A person may use a domain name in a practical manner “right out of the box.” But unlike other forms of tangible property such as houses or cars, the electronic nature of intangible property means that its use may not be tied to physical possession and that it is a non-scare good.

Congress has defined the situs of a domain name as the location of the registrar within the context of an in rem action under the Anticybersquatting Consumer Protection Act (ACPA).¹⁰⁹ However, outside of the ACPA the issue of where the situs of a domain name, or any similar intangible property, rests remains unsettled. If domain names are real property, does the situs still reside with the registrar? If a domain name is personal property, does it reside with the owner, or does it remain with the registrar? Consider an example based upon the facts of *Mundy*: If an individual has personal documents stored with Google Documents that are wrongfully destroyed, where does the situs of those documents rest? Is it with the location of the owner, the location of Google, or perhaps the location of the servers upon which the documents were stored? What if pieces of a single document are divided across a number of servers in different locations? Does the latter open up an untold number of new venues for the suit? How these questions will be answered will have an enormous impact on where a case may be heard. This legal uncertainty undermines the ability of those who offer online services to know where they may be hauled into court.

B. Consequence: Choice of Law

Territorial presence is an issue of key concern within a choice of law analysis.¹¹⁰ Transforming services into property necessarily impacts state choice of law provisions and has the potential to seriously undermine the stability of legal expectations. If, for instance, the email service at stake in *Hamidi* was recognized as a chattel, what laws apply to it? Is it where the physical servers are located? What if they are located across different states? Or is it where the domain name is located — since the “address” to the property is where the trespass onto the property occurs, thus giving rise to the claim? But if the registrar for the domain name is in Virginia, does Virginia law apply instead?

¹⁰⁹ 15 U.S.C. § 1125(d)(2)(C) (2000).

¹¹⁰ See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307-11 (1981) (discussing choice of law methodology); Restatement (Second) of Conflict of Laws §§ 145, 188 (1971) (suggesting the application of law based upon the location where tortious conduct or injury occurred in matters of tort, or in the absence of a valid choice of law provision within a contract, the application of law based upon the place of contracting, negotiation, performance, subject-matter concerning the contract, or domicile of the parties).

The ad-hoc propertization of all forms of intangible interests would undermine the stability of expectations that territoriality provides—it would permit a “thing” to exist in multiple places at the same time. It is vital that individuals understand the potential exposure to liability as to appropriately shape behavior and uncritically expanding the definition of what is property that blurs the lines between property and service threatens to destabilize the legal expectations of individuals. This expansion may create a strong incentive for individuals to act in a counterproductive and wasteful manner by foregoing otherwise reasonable opportunities or by engaging in unnecessary redundancies and conservative mechanisms that create deadweight loss because of the inability to accurately measure the potential risk of an endeavor. Because the legal status of property is still interconnected with physical location, and intangible property does not currently have a clear situs, the old rules do not necessarily carry over without a hitch.

C. Consequence: Ownership Burdens

For property rights to be functional, they must be fair. Even once issues of procedural uncertainty are settled, questions about the actual impact on the owners of property remain. If the users of online services are now becoming full-fledged property owners and are not the recipients of discretionary benefits, like the lessee of the domain name in *Kremen*, what consequences will arise? Although these new property owners may celebrate their strengthened rights, it is also important to remember that property ownership carries burdens as well. In particular, there is one area of the law that has traditionally drawn heightened attention: tax.

A recent paper by Professor Leandra Lederman discusses the applicability of the tax code to a comparable form of intangible property: “virtual worlds.”¹¹¹ A virtual world is form of persistent entertainment where people pay user fees in real-world currency in order to participate either in a scripted game, such as World of Warcraft, or an unstructured social environment, such as Second Life.¹¹² Participants in these virtual worlds create characters with unique names and distinguishable characteristics that result in a definable intangible asset, much like the way individuals registering domain names with hosting companies. Additionally, these users also receive or create “intangible benefits” that distinguish each character. Does this make the character the personal property of the player instead of the administrator of the virtual world? Furthermore, characters and other game elements can sometimes have real-world value and are frequently sold to other players.¹¹³ The realized incomes derived from such transactions are subject to federal income tax; however, much like that of domain names, the taxable status of these intangible “assets” is unclear.¹¹⁴

If no legal entitlement, i.e., property right, has been exchanged, there is no basis for taxation under federal law.¹¹⁵ Due to uncertainty surrounding ownership of “virtual”

¹¹¹ Leandra Lederman, “*Stranger Than Fiction*”: *Taxing Virtual Worlds*, 82 N.Y.U. L. Rev. 1620 (2007).

¹¹² *Id.* at 1621.

¹¹³ *Id.* at 1622-23.

¹¹⁴ *Id.* at 1624-25.

¹¹⁵ *Cottage Sav. Ass’n v. Comm’r.*, 499 U.S. 554, 555 (1991).

property, and particularly because the products of these game worlds could also be considered intellectual property, what constitutes “property” for taxable purposes here is a daunting problem.¹¹⁶ Are discrete objects obtained or created by users in the world’s legally distinct property entitlements and thus taxable assets, or are they merely redistributed licenses, for possession of discretionary benefits among those with a common pool of usage rights?¹¹⁷ If they are considered property in the traditional sense, then they fall within current tax law.¹¹⁸

However, even if virtual assets are not property, Professor Lederman argues that, while assets in scripted game worlds solely created for entertainment, such as World of Warcraft, should not be taxed, assets in worlds constructed with an intention to facilitate alternative platforms of commerce, such as Second Life, should be taxed.¹¹⁹ This taxation is justifiable because of the later platforms’ capacity to facilitate non-taxable exchanges of virtual items for otherwise taxable goods and services — in other words, platforms like Second Life are modern day barter clubs, with participants swapping valuable virtual currencies for real-world rewards.¹²⁰

Professor Lederman’s reliance on the distinction between “game worlds” and “commerce platforms” as a distinguishing characteristic is misplaced. Despite Professor Lederman’s assertion that World of Warcraft is “consumption-oriented” whereas Second Life may be “profit-oriented,”¹²¹ there is no real difference between the two outside of the existence of a more limited set of “commercially viable” gameplay options and an alternative use in the form of a story-driven environment. Neither of these features prevents scripted “game worlds” from serving as an alternative commercial platform to avoid taxation. This false dilemma has obvious consequences such as failing to protect innocent consumption of a service from a burden imposed on a profitable activity i.e. distinguishing those who pay for fun from those who play to profit.¹²² If these worlds were so popular as to pose a threat to the tax system, and Second Life became unavailable, there is nothing inherent to stop users from engaging in the same kind of activities in World of Warcraft. The distinction, which essentially boils down to “good faith intent” not to profit, is without merit.

Therefore, Professor Lederman’s argument must necessarily require the transformation of the discretionary benefits offered by those providing virtual worlds into a form of property for it to become a taxable asset. Furthermore, and more dubiously, this rests on the presumption that these types of services are stable enough to, and in fact do, constitute a reliable basis for mediating economic exchange by forming an alternative currency that would undermine the real-world equitable objectives of tax policy.¹²³

¹¹⁶ Lederman, *supra* note 111, at 1632-33. (For the sake of simplicity, this argument assumes away complications such as licensing agreements that reserve all rights to the service provider or imputed income).

¹¹⁷ *Id.* at 1652-55.

¹¹⁸ *Id.* at 1671.

¹¹⁹ *Id.* at 1670-71.

¹²⁰ *Id.*

¹²¹ *Id.* at 1666.

¹²² *See id.*

¹²³ *Id.* at 1658.

As a form of property, either the creators of the game or its players must retain ownership the asset. If players own the property, then enjoying the game to its full extent becomes financially prohibitive — the teenager who has invested a significant amount of time in a game and is in possession of a famous or powerful character could face devastating tax liabilities. But if the players do not own the assets, then the service providers must own the assets, exposing them to a potentially hyper-disproportionate tax liability for the sum of the virtual goods in existence on their systems due to the sheer number of users, something that does not honestly reflect a realized gain on behalf of the company, and may impose a burden that threatens the vitality of the service. In this situation, the net effect is essentially a Hobson's choice: either punishing customers who spend the most time / purchase the most services from the online provider, or punishing online providers just for having a valuable service — first in the form of taxes on their realized income, and then again for the value of the intangible property that they or their users have brought into existence. This creates a distinct incentive for both parties to avoid a flourishing relationship due to the looming threat of taxation, and instead engage in a sub-optimal relationship, i.e. forego the ability to have virtual playgrounds.

And unlike the other hobbies that Professor Lederman mentions,¹²⁴ the fruits of this recreational activity are not squarely within the control of the creator nor are they inherently scarce. An individual may enjoy painting landscapes as a hobby and the product of that labor may be valuable, thereby triggering tax concerns. But outside of an act of god or unlawful interference, the products of that labor exclusively belong to the individual and can only be duplicated by an expenditure of scarce resources and the opportunity cost by another. However, in the case of virtual worlds, the service provides “property” to the users that cannot exist outside of each individual world and rely upon remaining trendy with computer users in order to maintain an existence. Recognizing privately provided, non-scarce services as taxable assets poses an enormous risk to financial stability. The fact remains that virtual assets, particularly those of characters within virtual worlds, may be instantly, lawfully and totally destroyed by a non-user, owner or creator. This instability makes virtual property nearly worthless as a standard unit of commercial exchange.

In contrast, non-virtual assets, like other property, will persist with the demise of the originator or administrator. Even if a painting or corporate stock loses its monetary value, the owner still retains possession and can appreciate its aesthetic content or exercise rights against the underlying property. There are no vested ownership rights that protect the discretionary benefits that constitute virtual property, and thus no viable moral basis to impose burdens on people for having access to them.

If a landowner only permits one neighborhood child to play in a playground, but leaves it up to the group of children to decide who may access the property in the future, as long as the number is limited to one, the first child in does not obtain a property right in the lot just because the child is capable of transferring access to the playground. And neither does the license to access the property constitute a property right distinct from the rights in the lot. Property taxes are not assessed based on every possible separate right in

¹²⁴ *Id.* at 1666.

the property, but against ownership as a whole in its most valuable use. The problem with virtual property arises because of the premise of a bundle-of-sticks notion of property that, once introduced, upsets the entire balance of the system by making each individual “stick” taxable as well as the “bundle.” Permitting these services to be taxed under current federal law would transform a voluntary service, providing access, offered by a company into an evasive and elusive property obligation owned by either the company or the end-user—one that has the potential to impose significant and unintended financial consequences upon its possessor and society as a whole.

The substantive implications of an expansive view of property can be illustrated by examples in other areas of law. If discretionary benefits in virtual worlds can be transformed into property rights, what will the impact be in other contexts? Are promises to give gifts now taxable as well? Must employees be given full property rights in their allotted paid time off? How would the change in status from service to property impact privacy rights in non-common carrier communications? What about Fourth Amendment protections against unreasonable search or seizure? Or Fifth Amendment rights to compensation for eminent domain? Looking at property only through the narrow lens of increasing the amount of property capable of and subject to exchange ignores these kinds of consequences.

D. Consequence: Doctrinal Inconsistency

Kremen’s rigid approach reflects the failure to understand how property reconciles with the common law as a whole. When attempting to define property, it is essential to recognize the full scope of the concerns that property law has been created to address, including, but not limited to, the following: facilitating the basis of socio-economic interactions by determining what may be commoditized for commercial exchange and what is restricted to gifting; allocating scarce resources by establishing limitations on the control and utilization of property; enabling effective social signaling and differentiation by communicating information about what power the property owner possesses and is subject to; protecting communities from disruption by conferring rights against third parties; and resolving cultural conflicts by unifying responsibility and reconciling the interests of the individual and the group. These are substantive issues, concerning the ultimate shape and features of a unified society. Strong, uniform property rules help unify a diverse set of competing social interests into a functional, singular whole.

In contrast, the law of personal obligation, i.e. contracts, is expressly procedural in nature. It is not the final objectives of the contract that matter to the law, but the mechanisms used to get there. The doctrines of contract law are intended to ensure reliability, security and fair dealing when interacting with others—issues that can all be reduced to problems of trust; about *knowing* that another person can be relied upon and thus being willing to expose oneself to risk. The primary means of doing so are reconciling disparities in information and providing security to the parties at stake, and the remedies are concerned with providing security against damage caused by the breach of trust — a procedural goal intended to encourage reliance on contracts and not to enforce the substantive aims of the contract. Applying positive rights to contracts is

sufficient to achieve the social goal of encouraging exchange between two unrelated individuals, whereas property requires negative rights in order establish collective rules for group interactions.

Having examined the nature of intangible property through the lens of *Kremen* and having revealed the flaws in its analysis, this Article will now consider an application of those lessons to discovering property rights by looking at the facts of *Bragg v. Linden Research*.¹²⁵ The case contested ownership interests in the virtual world of Second Life.¹²⁶ Second Life explicitly recognizes its participants' full intellectual property protections in their creations and allows its users to purchase "virtual land" with currency that may be traded for or obtained by U.S. dollars.¹²⁷ Owners of this virtual land may exclude, develop, rent, or sell it as they please.¹²⁸ The plaintiff, Marc Bragg, acquired a parcel of virtual land for \$300, but Linden then froze Bragg's account and confiscated the parcel of virtual property and all of his other virtual assets after determining that Bragg acquired the property via an illicit exploit that violated the terms of service.¹²⁹ Although the lawsuit was eventually settled,¹³⁰ consider how it might have been resolved had it advanced further.

Linden Labs expressly grants intellectual property rights to its users' creations, but can the interest in the virtual land really be considered property? The property may be specific and distinct, but any perceived scarcity is illusory. If property is wrongfully destroyed or stolen, it can be recreated or reassigned to the owner at a mere keystroke, i.e. without any cost. And it is under the actual dominion of Linden Labs: As a proprietary system, any potential malefactors have already submitted to the control of Linden Labs in return for access. It is not as if there is the potential for conflict between two sovereign owners who have not agreed to the terms of use. Bragg has a right to use it and transfer that license to other users of the system, but unlike other forms of property, he cannot exercise control over it to the full extent of the law—he is restrained by the parameters established by Linden Labs. Accordingly, there is no need to create private rights of action against third parties in order to protect its usage because Linden Labs is capable of administering all and any remedies necessary to enforce Bragg's usage rights against the world. Finally, property in Second Life does not appear to be of considerable interest to society at large at least in regard to (1) its status signaling ability, (2) social contributions beyond any user created copyrighted content, or (3) a need to preserve privacy, due to its inherently communicative function.

On the other hand, the alleged intangible property interest is something that is capable of exchange and does not appear to run against common morality like organ sales. Second Life does represent an activity that many people rely on to make their economic livelihoods. By holding itself out in the way that it does, Linden Labs certainly

¹²⁵ 487 F. Supp. 2d 593 (E.D. Pa. 2007).

¹²⁶ *Id.* at 595.

¹²⁷ *Id.* at 595-96.

¹²⁸ *Id.* at 596.

¹²⁹ *Id.* at 597.

¹³⁰ Adam Reuters, *Linden Lab settles Bragg lawsuit*, Reuters/Second Life, Oct. 4, 2007, <http://secondlife.reuters.com/stories/2007/10/04/linden-lab-settles-bragg-lawsuit/>.

intends to create a nascent form of social organization and not just a recreational activity. Perhaps one day it will become significant or ubiquitous enough that society will come to depend on the stability of its institutions for shaping economic or social interactions and thus require the disinterested resolution of disputes concerning its activities.¹³¹ But, given that Second Life only has about 320,000 active users, that day is not here yet.¹³²

Therefore, this dispute is one only concerning the security of commercial transactions and not mediating social organization. Bragg asserts that Linden Lab has failed to perform its contractual obligations, i.e. permitting his usage of defined system resources or returning his assets. Linden Lab asserts that Bragg fraudulently obtained those rights, thereby breaching the usage agreement and excusing non-performance. It is an issue of trust and reliability, not of conflicting dominion.

Consider the following analogy: A student pays to take an art class at community college and secures a spot in a popular art class. The student can release the spot to a friend or choose to attend class himself. The student chooses to take the course, misbehaves, and is expelled. Although the works of art created prior to expulsion may be the student's intellectual property, the student does not have a claim for the "property right" in his spot in the class. The same can be said of "virtual property" such as domain names; in an era where personal property may be used without the need for physical possession, the mere capability for exclusion no longer has the same social, economic, or legal significance as it may have in the pre-modern world.

V. CONCLUSION

Domain names are only the first of many challenges for courts that will be forced to consider the status of intangible property. *Kremen v. Cohen* should not be considered as a useful tool when thinking about property law because of its myopic fixation on excludability. Property is something more than providing the substance for commercial exchange. By adopting the bundle of rights theory of property, its proponents cannot see the forest for the trees: they ignore how the "assembly value" of a unified "bundle" of property rights facilitates important social goals. When considering what should be protected by property rights, courts must expand their reasoning beyond the capability of the purported property right to change possession and instead think carefully about the broader social, moral, and legal consequences of modifying the distribution of benefits and burdens within our society.

¹³¹ Some may argue that this day has already come for certain networking applications. The recent banishment of David Lat, author of the blog *Above the Law*, from Facebook raised concerns around the blogosphere about the right of absolute control granted to the operator of the site, given how it encourages its users to invest a significant amount of time and energy in developing user pages, and how Facebook pages confer significant benefits as to developing business opportunities and professional reputation. For more information, see, David Lat, *Facebook Banned Me! Worst. Week. Ever.*, N.Y. Observer, Mar. 4, 2008, available at <http://www.observer.com/2008/facebook-banned-me-worst-week-ever>; see generally, Posting of Daniel J. Solove to Concurring Opinions, Facebook Banishment and Due Process, to http://www.concurringopinions.com/archives/2008/03/facebook_banish.html (Mar. 3, 2008, 00:55 EST).

¹³² Posting of Mitch Wagner to Information Week, http://www.informationweek.com/blog/main/archives/2007/05/why_is_linden_1.html (May 4, 2007, 21:33 EST).