

Essay

Private-Law Attorneys General

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INTRODUCTION

The Constitution empowers Congress to “promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”¹ The founding-era Congress quickly exercised this power by enacting copyright and patent laws that track the constitutional authorization: they grant authors and inventors exclusive but limited rights that are designed to incentivize investments in the production of works of knowledge (“science”) and technology (“useful arts”) and thereby ultimately to benefit the public.

Copyright and patent owners can thus usefully be understood as “private attorneys general”²—a term that has been used

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1. U.S. CONST. art. I, § 8, cl. 8.

2. Although not a common framework for understanding intellectual property law, I am not the first to articulate the characterization. *See, e.g.*, Megan M. La Belle, *Patent Law as Public Law*, 20 GEO. MASON L. REV. 41, 51 (2012); John M. Golden, *Patent Privateers: Private Enforcement’s Historical Survivors*, 26 HARV. J.L. & TECH. 545 (2013); David W. Opderbeck, *Peer-to-Peer Networks, Technological Evolution, and Intellectual Property Reverse Private Attorney General Litigation*, 20 BERKELEY TECH. L.J. 1685 (2005).

since the mid-twentieth century to describe private parties who are authorized to bring lawsuits that serve not merely their own interests, but the broader public interest.³ These particular instances of the private attorney general mechanism are somewhat unusual in that the private parties are granted exclusive rights that take the form of property rights—which are otherwise considered paradigmatically private rights, not public rights.⁴ Nonetheless, in light of the Constitutional purpose of the rights, it is important not to lose sight of their public character. And it is therefore useful to recognize that their owners are acting as what I will call “private-law attorneys general.” This recognition helps us to see how the benefits and risks that have long been associated with the enlistment of private attorneys general to serve public ends apply to intellectual property law (IP). These include the risk that private parties will deploy their causes of action not to serve the public mission of the law but rather to extort settlements from defendants in ways that punish and deter desirable behavior. At the same time, it is meaningful that the Constitution authorizes, and Congress has deployed, the specific mechanism of private property protection to promote the public mission of IP. Instead of justifying an excessive focus on the rights of owners, however, this private law character should invite consideration of how IP, like other well-functioning private law systems, promotes the self-determination of *all* individuals—including authors, owners, and users of intellectual creations.⁵

3. The phrase is attributed to *Associated Indus. of N.Y. State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943) (“Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers . . . even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.”). See generally William B. Rubenstein, *On What a “Private Attorney General” Is—And Why It Matters*, 57 VAND. L. REV. 2129 (2004).

4. See generally Thomas W. Merrill, *Private and Public Law*, in OXFORD HANDBOOK OF THE NEW PRIVATE LAW (Andrew Gold et al., eds. 2020).

5. See generally Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395 (2016) (developing a theory of private law centered on “relational justice,” meaning reciprocal respect for self-determination and substantive equality); HANOCH DAGAN & AVIHAY DORFMAN, *RELATIONAL JUSTICE: A THEORY OF PRIVATE LAW* (forthcoming 2024) (further articulating relational justice theory of private law).

This Essay has two goals. One is simply to introduce the concept of the “private-law attorney general” in order to identify it as a useful analytical subset of private attorneys general. The second is to deploy some of that analytical utility by exploring the ways in which empowering private attorneys general with property rights—as opposed to other types of causes of action—produces distinctive versions of the benefits and risks that are associated with private attorney general schemes more generally. IP serves as my case study for this exploration.

This Essay proceeds in three parts. Part I describes the established concept of the private attorney general, makes the case that intellectual property rights should be understood as examples of this concept in action, and fleshes out the idea that there is a category usefully understood as *private-law attorneys general* that includes IP. Part II reviews the benefits and risks commonly associated with the private attorney general mechanism; it then argues that empowering private attorneys general with private property rights (IP rights in particular) poses unique variations on these benefits and risks. Part III suggests how my observations might be relevant to IP doctrine and reform; it includes, in particular, consideration of how developments in standing jurisprudence threaten to exacerbate the risks posed by private-law attorneys general to balanced IP law.

I. THE CONCEPTS OF THE PRIVATE ATTORNEY GENERAL AND THE PRIVATE-LAW ATTORNEY GENERAL APPLIED TO IP

The concept of the “private attorney general” is a familiar one in judicial opinions and legal scholarship.⁶ Although an exact definition is elusive, the basic idea is that legislatures sometimes augment the regulatory and enforcement power of public

6. Examples of the (extensive) literature discussing the concept include Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589 (2005); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93 (2005); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353 (1988); John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215 (1983).

officials by authorizing private parties to bring causes of action vindicating the public interest.⁷

Some private attorney general regimes invite private litigants to intervene in public law by policing the government itself. That is, they create causes of action that private citizens can use to sue government officials for taking unlawful actions or failing to perform their duties.⁸ These may be the most paradigmatic examples of the private attorney general.

Other private attorney general regimes invite private litigants to sue other private parties, but in service of a regulatory scheme that serves clearly recognizable public purposes. Causes of action that allow private litigants to enforce environmental regulations are a prominent example.⁹

I am most interested in a third category of regimes that grant private litigants causes of action that appear at first glance to be more in the nature of traditional private law causes of action. They are nonetheless properly considered private attorney general regimes because the primary purpose of those private rights is to serve the public good. Here, the litigants enlisted are what I call “private-law attorneys general.”

I should pause at this point to recognize that skeptics of the public/private distinction, and of a pre-political conception of private rights, might argue that all “private” rights are (or should be) enforced only in the ultimate service of the public good. On this view, all private law litigants (including, for example, tort plaintiffs whose suits encourage deployment of safety precautions) can be understood as private attorneys general. Some private law theorists insist, to the contrary, that the public/private distinction is meaningful and that private law vindicates values

7. See, e.g., *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (explaining that “meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC)”).

8. See generally, e.g., Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 857 (2007) (“Beginning in the 1960s and 1970s, private attorneys general increasingly sought structural reform of public entities by bringing lawsuits against government entities, including challenges to school segregation, conditions in mental hospitals and prisons, and housing discrimination.”).

9. See, e.g., 42 U.S.C. § 7604 (authorizing “citizen suits” under the Clean Air Act).

apart from aggregate welfare.¹⁰ Resolution of this debate about the nature of private law is not critical to my mission in this essay, although I will return to it briefly below. It suffices for my principal purposes to establish that there are some classes of legal rights that take the form of private rights but undeniably exist in large part to serve a public purpose.

Intellectual property owners are perhaps the clearest example of private-law attorneys general. They can sue to enforce the law based on infringement of exclusive rights that operate (and are commonly classified) as property rights.¹¹ But these are property rights that Congress has created for the public purpose of promoting the progress of knowledge and technology by encouraging authors and inventors to generate works and inventions that ultimately benefit the public. Indeed, creating these rights for any other purpose would exceed Congress's constitutional authorization.¹² As the Supreme Court has explained:

10. See, e.g., Dagan & Dorfman, *supra* note 5; JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* (2020); Benjamin C. Zipursky, *Palsgraf, Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757, 1759 (2012) (rejecting private attorney general conception of tort law and claiming that “[a]t common law, a private plaintiff—even if he was seeking punitive damages—was not playing a private attorney general role; he was redressing a wrong to himself or herself”); John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 918 (2010) (arguing that “[t]he law of torts is a law of wrongs and recourse—what Blackstone called ‘private wrongs,’” while acknowledging that “tort law is in many ways public”); John C.P. Goldberg, *Twentieth Century Tort Law*, 91 GEO. L.J. 513, 554 (2003) (“Economic accounts . . . fail to offer a compelling account of the deep structure of tort law—at best they offer the dubious hypothesis that a system empowering victims to act as private attorneys general will be more efficient than a scheme of regulatory fines.”). Cf. Guido Calabresi & Spencer Smith, *On Tort Law’s Dualisms*, 135 HARV. L. REV. F. 184 (2022) (“We think both ‘sides’—if you want to call them that—miss something. At one level, tort law is about wrongs and redress. That is the private side of torts. And it is what courts do much of the time. At another level, tort law is about preventing harms or, if you like, about the regulatory needs of society. That is the public side of torts. And it is what courts do on occasion, and what legislatures and administrative agencies do very often. If you fixate only on one side or the other, you fail to appreciate the whole of tort law.”).

11. See generally Molly Shaffer Van Houweling, *Intellectual Property as Property*, in *RESEARCH HANDBOOK ON THE LAW AND ECONOMICS OF INTELLECTUAL PROPERTY* (Ben Depoorter & Peter Menell eds., 2019).

12. On the question of whether Congress could create intellectual property rights on the basis of some other enumerated power, see, for example, Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The*

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.¹³

More recently, the Court explained in *Oil States Energy Services, LLC v. Green's Energy Group, LLC* that the validity of patents could be adjudicated by a non-Article III tribunal because a grant of a patent is a “matter involving public rights,” emphasizing that patents are creations of statutory law that take rights out of the public domain and bestow them on patent holders in order to promote progress as authorized by the Constitution.¹⁴

It is thus clear that U.S. patent and copyright law grant exclusive rights to private parties in order to serve an explicitly public purpose. Patent and copyright owners who sue to enforce

Intellectual Property Clause as an Absolute Constraint on Congress, 2000 U. ILL. L. REV. 1119 (2000).

13. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *see also, e.g., United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) (“The copyright law, like the patent statute, makes reward to the owner a secondary consideration. . . . It is said that reward to the author or artists serves to induce release to the public of the products of his creative genius.”); *Fox Film v. Doyal*, 286 U.S. 123, 127 (1932) (“The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The limited scope of the copyright holder’s statutory monopoly . . . reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”); *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349–50 (1991) (“The primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’ To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.”).

14. *Oil States Energy Services, LLC v. Green’s Energy Group, LLC*, 138 S. Ct. 1365, 1373–74 (2018). *But see* Adam Mossoff, *Statutes, Common Law Rights, and the Mistaken Classification of Patents As Public Rights*, 104 IOWA L. REV. 2591 (2019) (disputing *Oil States’* classification of patents as public rights); Adam Mossoff, *Institutional Design in Patent Law: Private Property Rights or Regulatory Entitlements*, 92 S. CAL. L. REV. 921 (2019) (arguing for the superiority of viewing patents as private property as opposed to regulatory entitlements).

those rights should therefore be understood to perform as private-law attorneys general. In this Essay I will focus on patent and copyright, but trademark law is perhaps an even clearer example of the private-law attorney general mechanism in action, with the law promoting the public interest in consumer welfare and well-functioning markets through the mechanism of private causes of action for trademark owners.¹⁵

IP owners are not the only litigants who help to promote the public purposes of the IP laws. Those purposes are served not only by the enforcement of IP rights, but also by the limitations on those rights that ensure that they operate to promote as opposed to inhibit progress—including limitations on eligibility and duration that ensure the existence of a public domain of un-owned intellectual resources. When litigants advocate to preserve the benefits of the public domain and of limitations like fair use, they are serving public purposes and can thus also usefully be considered private attorneys general—or, perhaps more aptly, “public-domain attorneys general.”¹⁶ Their participation can be critical to ensuring that IP owners do not abuse their private-law attorney general status. Judge Posner recognized this in awarding attorneys’ fees to anthology editor Leslie Klinger after he prevailed in a declaratory judgment action establishing that material from Sherlock Holmes stories and novels by

15. Critics of contemporary trademark law lament that it has turned away from its public purpose. *See, e.g.*, Glynn S. Lunney, Jr., *Trademark’s Judicial De-Evolution: Why Courts Get Trademark Cases Wrong Repeatedly*, 106 CAL. L. REV. 1195, 1197 (2018) (“Once upon a time, trademark law served the interests of consumers. No more. Today, trademark law serves the interests of trademark owners . . . [S]ince the enactment of the Lanham Act, courts have re-written the statute into a bloated and sometimes-incoherent morass. As a result, trademark law today protects far too much and reaches far too broadly. Rather than ensure competition, it serves instead to restrict competition and to maximize the profits of trademark owners. Rather than promote consumer welfare, it has become a form of corporate welfare.”).

16. *See generally* La Belle, *supra* note 2, at 43 (“[P]atent validity challenges are complaints about government conduct that implicate important public interests and potentially affect many parties not before the court.”); John F. Duffy, *Standing to Challenge Patents, Enforcement Risk, and Separation of Powers*, 83 GEO. WASH. L. REV. 628, 637 (2015) (arguing in favor of broader standing for consumers to challenge patent validity, observing that “[t]he beneficiaries of a well-functioning patent system are consumers,” and “[t]he restrictions on granting patents—especially the conditions for patentability—are even more plainly designed to benefit consumers”). *Cf.* Michael J. Burstein, *Rethinking Standing in Patent Challenges*, 83 GEO. WASH. L.R. 498 (2015) (arguing in favor of expanding standing to facilitate patent validity challenges).

Arthur Conan Doyle could be reused freely once copyright in those stories and novels expired:

The Doyle estate's business strategy is plain: charge a modest license fee for which there is no legal basis, in the hope that the "rational" writer or publisher asked for the fee will pay it rather than incur a greater cost, in legal expenses, in challenging the legality of the demand. The strategy had worked with Random House; Pegasus was ready to knuckle under; only Klinger (so far as we know) resisted. In effect he was a private attorney general, combating a disreputable business practice—a form of extortion He has performed a public service—and with substantial risk to himself The willingness of someone in Klinger's position to sue rather than pay Doyle's estate a modest license fee is important For exposing the estate's unlawful business strategy, Klinger deserves a reward¹⁷

Justice Rehnquist also invoked the concept of a private attorney general in *Fogerty v. Fantasy, Inc.*, determining that the same standards should be applied when awarding attorneys' fees to prevailing copyright defendants as are applied to prevailing copyright plaintiffs (rejecting a "dual standard" that favored plaintiffs). He first recognized that some private attorney general schemes are designed to especially incentivize "impecunious 'private attorney general' plaintiffs who can ill afford to litigate their claims against defendants with more resources."¹⁸ He then distinguished copyright law—both because the plaintiffs can be "corporate behemoths" and the defendants can be "starving artists" (and vice versa) and because:

[T]he policies served by the Copyright Act are more complex, more measured, than simply maximizing the number of meritorious suits for copyright infringement. The Constitution grants to Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." . . . We have often recognized the monopoly privileges that Congress has authorized, while "intended to motivate the creative activity of authors and inventors by the provision of a special reward," are limited in nature and must ultimately serve the public good Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible. To that end, defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement. In the case before us, the successful defense . . . increased public exposure to a musical work that

17. *Klinger v. Conan Doyle Estate, Ltd.*, 761 F.3d 789, 792 (7th Cir. 2014).

18. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994).

could, as a result, lead to further creative pieces. Thus a successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright.¹⁹

Note, however, that the private attorneys general who litigate to preserve public-serving limitations and the public domain do not necessarily hold exclusive rights of the type that lead me to classify IP as a private-law attorney general scheme (although some, like the defendant in *Fogerty*, can be owners in their own right as well as defenders of limitations on the public domain).²⁰ This distinction should not limit these litigants' ability to champion the public interest—which, as Justice Rehnquist explained, relies as much on articulation of limits as it does on the exercise of rights. As I will explain below, however, the law of standing can be understood to advantage private-law attorneys general over public-domain attorneys general—threatening the balance at the heart of copyright and patent law.

To understand the relevance of standing and the other doctrinal limitations that impact private-law attorneys general, we need a fuller understanding of the benefits and potential risks associated with private enforcement of public law—to which I turn in Part II.

II. BENEFITS AND RISKS OF PRIVATE ATTORNEYS GENERAL AND THE SPECIAL CASE OF THE PRIVATE LAW AG

The private attorney general technique is deployed to serve a wide range of public policy goals—in fields including securities regulation, environmental protection, antitrust, civil rights, access to government information, consumer protection, and many more. It is lauded by its champions for augmenting the enforcement power of the government and thereby more thoroughly achieving important policy goals.²¹ As the Supreme Court explained in the context of securities regulation:

19. *Id.* at 526–27.

20. *Id.* at 526 (“[I]t is by no means always the case that the plaintiff in an infringement action is the only holder of a copyright; often times, defendants hold copyrights too, as exemplified in the case at hand.”).

21. For a summary of the potential advantages and disadvantages of private enforcement of public law, with references to the extensive literature advocating for and against, see Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 661–71 (2013); see also Golden, *supra* note 2, at

[M]eritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC).²²

Typical private attorney general regimes do not rely merely on the availability of private lawsuits to attract litigants to public causes, but also offer incentives in the form of enhanced damages and attorneys' fees.²³ As alluded to in the quote from *Fogerty v. Fantasy* above, these incentives can be especially important for under-resourced individuals who might not otherwise be in a position to litigate in the public interest.

Another benefit sometimes attributed to private attorney general enforcement is that private parties can “have comparative informational advantages for detecting violations.”²⁴ Private parties represent more “eyes on the ground” to identify violations.²⁵ And there is a potential informational advantage beyond simply having more eyeballs devoted to monitoring: some types of harms the government might want to avoid are harms to the public as a whole that result from harms that are experienced in personal ways by individual victims—e.g. emotional harms, privacy harms, and reputational harms. The economy might suffer, for example, if individuals cannot be confident that their personal financial records will be maintained securely.²⁶ Intellectual property falls into this category for unique reasons I discuss below.

546–58; Stephenson, *supra* note 6, at 106–21; Morrison, *supra* note 6, at 607–18.

22. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 313 (2007).

23. See Burbank, *supra* note 21, at 676 (“The two primary types of statutory rules that can be used to incentivize private enforcement are those allocating responsibility for costs and attorneys’ fees and those governing available remedies.”); Michael T. Morley, *Spokeo: The Quasi-Hohfeldian Plaintiff and the Non-federal Federal Question*, 25 GEO. MASON L. REV. 583, 590 (“At best, statutory damages seek to incentivize the plaintiffs’ bar to enforce federal laws—arguably reducing the need for federal enforcement—and to ensure that plaintiffs receive adequate compensation when the amount of damages they have suffered is difficult to prove or quantify.”).

24. Burbank et al., *supra* note 21, at 663.

25. *Id.* at 664 (quoting Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1413 (2000)).

26. See generally Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 862 (2022) (“Legal intervention should be designed to ensure that socially beneficial information practices continue. Our economy depends upon the collection and sharing of personal data.”).

A number of risks are also associated with private attorneys general. One is that the incentives to bring suit (in the form of supra-compensatory damages and attorneys' fees) will be miscalibrated in a way that attracts frivolous lawsuits claiming extravagant remedies and extorting settlements from defendants.²⁷ A related risk is that private attorneys general will leverage a powerful cause of action that is designed to promote a particular public end to pursue a different—or even antithetical—goal. Consider, for example, an antitrust plaintiff who brings suit to harass a competitor (and thereby to damage the competition the law is designed to promote).²⁸ More generally, there is simply the risk that the incentive to litigate will be too

27. Cf. Morrison, *supra* note 6, at 611 (explaining that one critique “casts private attorneys general as ‘extortionist[s]’ who abuse the power granted them both to assert marginal or even ‘phony claim[s]’ and to extract settlements from defendants eager to avoid the risks of a full trial”) (quoting *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Human Res.*, 532 U.S. 598, 618 (2001) (Scalia, J., concurring)); Morley, *supra* note 23, at 590 (“At worst, statutory damages allow plaintiffs’ lawyers to enrich themselves at the expense of legitimate businesses based on minor, technical statutory violations that cause no real harm. Laws that provide for statutory damages frequently also allow plaintiffs to recover attorneys’ fees. And plaintiffs’ attorneys typically can aggregate claims for statutory damages through class actions. As a result, a defendant can face ruinous liability—many times its net worth—based on de minimis statutory violations that caused no concrete harm to anyone.”); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975) (raising the concern that “in the field of federal securities laws governing disclosure of information even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial”); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (“Private securities fraud actions, however, if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law.”).

28. See, e.g., *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (rejecting an antitrust claim where “[i]t is inimical to the purposes of these laws to award damages for the type of injury claimed here”). See generally Michael J. Meurer, *Controlling Opportunistic and Anti-Competitive Intellectual Property Litigation*, 44 B.C. L. REV. 509, 510–11 (2003) (“Antitrust law is supposed to promote competition, but it can be used by a plaintiff to exclude competitors or to extract a wrongful settlement payment. Some antitrust plaintiffs bring suits hoping the courts will mistakenly block activities that increase the efficiency of the plaintiffs’ competitors. Antitrust law has responded by crafting standing rules that exclude plaintiffs who are unlikely to be good ‘private attorneys general,’ clarifying vague antitrust criteria so defendants can avoid the risk of anti-competitive suits, and easing summary judgment requirements for antitrust defendants in certain circumstances to discourage opportunistic lawsuits.”).

successful and the deterrence it promotes too powerful, such that potential defendants invest too heavily in precautions and/or forego socially beneficial activity.

Is there anything distinctive about *private-law attorneys* general when it comes to the benefits and risks just described? In particular, is there anything especially beneficial or risky about empowering private actors to promote public purposes by granting them property rights? Intellectual property rights offer a useful test case for examining these questions.

With regard to the benefits of private attorneys general, the case for intellectual property rights is mixed. In several ways, the benefits of enlisting private enforcers are especially strong. First, the law can be difficult to enforce—especially in the digital age when infringement by anonymous individuals is ubiquitous.²⁹ Augmenting the enforcement power of the government by enlisting private litigants might make enforcement more realistic (and, indeed, both patent and copyright rely primarily on private enforcement).³⁰ Perhaps more importantly, intellectual property owners are uniquely situated to identify behavior that causes the societal harms the law is intended to prevent. The logic underlying the constitutional grant of authority for patent and copyright law is that authors and inventors would invest too little in the development of works of knowledge and technology if they had to compete in the marketplace with producers of substitute works. But this economic logic does not apply to all authors or inventors, nor to all of a given author or inventor's works. Some works would be produced without the incentive of

29. See, e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 929–30 (2005) (“When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement.”).

30. This has changed somewhat for copyright, which has increasingly been subject to criminal enforcement. See Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J.L. & TECH. 469, 481–85 (2011); Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 WASH. U. L.Q. 835 (1999). Another way in which the government participates in enforcement is through amicus briefs by the Solicitor General. See generally Pamela Samuelson, *The Solicitor General's Mixed Record of Success in Supreme Court Copyright Cases* (March 7, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4381579 [<https://perma.cc/84HB-W4Z4>].

exclusive rights. Indeed, in some cases the wide and free dissemination of works produces reputational and other benefits that motivate further creativity and invention.³¹ In other words, the *right to include* can be as or more important than the *right to exclude* for producing the motivations that are the linchpin of IP's utilitarian rationale.³² The authors and inventors the law seeks to incentivize are in a particularly good position to determine whether inclusion or exclusion is more important in an individual case, and therefore to decide whether and how to enforce the law (although of course they may not account for positive and negative externalities).³³ What's more, relying solely on the government to enforce laws intended to motivate creativity and invention would prompt concerns about censorship and technological incompetence that have loomed large in

31. See generally Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183 (2004); Yochai Benkler, *Coase's Penguin, Or, Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002).

32. On the importance of the right to include in tangible and intangible property, see ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 295–96 (2011); Molly Shaffer Van Houweling, *Tempting Trespass or Suggesting Sociability?*, 51 U.C. DAVIS. L. REV. 731, 739 (2017); Daniel B. Kelly, *The Right to Include*, 63 EMORY L.J. 857, 922–23 (2014); Donald J. Kochan, *I Share, Therefore It's Mine*, 51 U. RICH. L. REV. 909 (2017); see also Kellen Zale, *Sharing Property*, 87 U. COLO. L. REV. 501, 579 (2016).

33. Cf. Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 619 (2008) (“There may be a variety of reasons for tolerating use. Reasons can include simple laziness or enforcement costs, a desire to create goodwill, or a calculation that the infringement creates an economic complement to the copyrighted work—it actually benefits the owner.”); Rebecca S. Eisenberg, *Patent Costs and Unlicensed Use of Patented Inventions*, 78 U. CHI. L. REV. 53 (2011) (“It is not obvious whether unlicensed use should concern patent policymakers. When patent owners refrain from asserting their rights, perhaps they have no objection to the activity. On the other hand, some unlicensed uses may slip through the system because it is simply too costly for owners and users to identify each other and to sort out their rights.”); Rebecca S. Eisenberg, *Noncompliance, Nonenforcement, Nonproblem? Rethinking the Anticommons in Biomedical Research*, 45 HOUS. L. REV. 1059, 1062 (2008) (“With patents, the burden of inertia is on the property owner to identify infringers and to enforce the patent against them. When owners face high costs of detection and enforcement, it is unlikely that they will bother to pursue claims of relatively low value (such as claims against noncommercial academic researchers). In this context, high transaction costs work to the advantage of low-value users, mitigating rather than aggravating the risk of an anticommons.”).

ongoing policy debates about alternatives to intellectual property, such as public funding and prizes.³⁴

As for the risks of the private attorney general mechanism, here too intellectual property raises both familiar issues and unique variations. With regard to the problem that incentives to litigate may be harnessed to extort settlements, patent and copyright have become vivid illustrations of this phenomenon. Although policy debates and academic literature reveal various definitions of and opinions toward patent and copyright “trolls,” there is widespread recognition that some litigants wield their intellectual property rights in ways that punish and deter lawful behavior without yielding significant benefits in terms of creativity or invention.³⁵ The plaintiffs in these cases are typically

34. On these concerns (and counterarguments), see generally Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970 (2012); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 307–08 (1970).

35. See, e.g., *Commil USA, LLC v. Cisco Systems, Inc.*, 575 U.S. 632, 646 (2015) (“Some companies may use patents as a sword to go after defendants for money, even when their claims are frivolous.”); *id.* at 1932 (Scalia, J., dissenting) (referring to the “*in terrorem* power of patent trolls”); *Halo Electronics, Inc., v. Pulse Electronics, Inc.*, 136 S. Ct. 1923, 1937–38 (2016) (Breyer, J., concurring) (“[T]he risk of treble damages can encourage the company to settle, or even abandon any challenged activity. To say this is to point to a risk: The more that businesses, laboratories, hospitals, and individuals adopt this approach, the more often a patent will reach beyond its lawful scope to discourage lawful activity, and the more often patent-related demands will frustrate, rather than ‘promote,’ the ‘Progress of Science and useful Arts.’”); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 396 (2006) (Kennedy, J., concurring) (“An industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees For these firms, an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent.”); *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 691 (7th Cir. 2012) (“[I]nfringement suits are often baseless shakedowns. Ruinous discovery heightens the incentive to settle rather than defend these frivolous suits”); *id.* at 691 (observing that broad discovery request gave the plaintiff “the appearance of a ‘copyright troll.’”).

On patent trolls, see generally Golden, *supra* note 2; Colleen V. Chien, *From Arms Race to Marketplace: The Complex Patent Ecosystem and Its Implications for the Patent System*, 62 HASTINGS L.J. 297 (2010); Robert P. Merges, *The Trouble with Trolls: Innovation, Rent-Seeking, and Patent Law Reform*, 24 BERKELEY TECH. L.J. 1583 (2009); John M. Golden, “Patent Trolls” and Patent Remedies, 85 TEX. L. REV. 2111 (2007); Mark P. Gergen et al., *The Supreme Court’s*

not authors or inventors especially well-situated to judge the harm the alleged infringement poses to their markets and incentives, but rather non-practicing transferees.³⁶ Meanwhile, the defendants and bystanders whose behavior is punished and chilled are often engaged in the very type of creative and inventive activity the law is designed to foster—behavior that generates both private benefits and positive externalities.

Like legendary trolls who jump out from under bridges to surprise unsuspecting travelers, copyright and patent trolls often exercise their undue leverage in circumstances where alleged infringers are surprised to find their activities subject to infringement liability. They often learn too late, when they have already made significant investments that are then subject to holdup by the IP owners who seek injunctive relief or other supra-compensatory remedies. This is a widespread risk in patent law, which imposes liability even on independent inventors. It is also a risk in copyright law, where the ubiquity of copyrighted works and widespread tolerated use may lead to good faith misunderstanding of the law or perceptions of implied permission.³⁷ Note that it is also a risk—albeit a smaller one—in tangible property. Although tangible property typically provides better

Accidental Revolution? The Test for Permanent Injunctions, 112 COLUM. L. REV. 203 (2012).

On copyright trolls, see generally Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 IOWA L. REV. 1105 (2014); Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 85 U. COLO. L. REV. 53 (2014); Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723 (2013) [hereinafter *The Uneasy Case*]. *But cf.* Shyamkrishna Balganesh & Jonah B. Gelbach, *Debunking the Myth of the Copyright Troll Apocalypse*, 101 IOWA L. REV. ONLINE 43, 44–45 (2016) (critiquing Sag for overstating the extent of copyright troll litigation while acknowledging that “[c]opyright trolling, to the extent that it eviscerates the copyright system’s core goals and values, remains a deeply problematic phenomenon that courts are yet to develop a coherent strategy to curb”).

36. See generally *The Uneasy Case*, *supra* note 35, at 726–27 (explaining how changes wrought by the Copyright Act of 1976 made fractional copyrights alienable, thus expanding the universe of enforcers and creating new business models for copyright trolls). *Cf.* Jeanne C. Fromer, *The New Copyright Opportunist*, 67 J. COPYRIGHT SOC’Y U.S.A. 1, 2–3 (2020) (contrasting the “copyright opportunist,” and explaining: “The opportunist is related to the troll in that the opportunist sees the courthouse as a principal mechanism to earn money. Yet the opportunist can be entirely distinct in that the opportunist might want to act in furtherance of copyright law’s goal of promoting artistic or cultural progress by creating and distributing the opportunist’s works.”).

37. See generally Wu, *supra* note 33.

notice than intellectual property,³⁸ there are circumstances in which the information costs of investigating tangible property rights and avoiding infringement are so high that strict enforcement of trespass law would be undesirable due to the risk of holdup.³⁹

Although it is difficult to generalize across the wide range of private attorney general regimes, it seems that holdup risks imposed by private-law attorney general regimes that grant property rights (especially rights attached to intangibles) may be systematically worse than typical private attorney general regimes. Typical attorney general regimes give private parties rights to bring causes of action against behavior that the relevant law defines as unlawful and subject to liability to both the government and private parties. Pollution forbidden by environmental laws, for example, is typically forbidden and actionable even if a polluting factory's neighbors do not mind. By contrast, copyright and patent law generally forbid behavior that is unlawful *if and only if* it is unauthorized by the IP owner.⁴⁰ The existence of widespread tolerated use, and of a public domain that can be nearly impossible to distinguish from the owned domain, mean that copyright and patent claims are especially likely to catch defendants by surprise and upset their reasonable expectations (and investments).⁴¹ This means more opportunity for holdup

38. See generally Clarissa Long, *Information Costs in Patent and Copyright*, 90 VA. L. REV. 465, 483–84 (2004).

39. See generally Stewart Sterk, *Property Rules, Liability Rules, and Uncertainty About Property Rights*, 106 MICH. L. REV. 1285 (2008); Gergen et al., *supra* note 35, at 248–49 (observing how “the structure of the troll problem is quite general, and traditional equitable approaches have developed to handle analogous problems in a targeted way”).

40. By this I do not mean that the behavior is lawful so long as the owner does not object. Liability can certainly arise based on behavior that precedes any objection. I mean only that behavior that would be infringing if authorized can be lawful if authorized—in contrast to behavior in violation of public law prohibitions that are not subject to waiver by any private actor. There are some exceptions in the limited realm of criminal IP infringement. See generally Manta, *supra* note 30.

41. Cf. Greenberg, *supra* note 35, at 83 (observing that “a lot of people are exposing themselves to liability and that there is an immeasurable number of unenforced copyrights that trolls could buy up after identifying the infringement, much of which is of nominal or no commercial value. Typically, the infringement is committed by those likely to think that copyright protection is much narrower in scope than it actually is . . .”); *The Uneasy Case*, *supra* note 35, at 729 (suggesting that “systematic underenforcement of otherwise

and leverage that allows plaintiffs to extort settlements and chill even lawful behavior.

An additional reason why private-law attorney general schemes can especially be subject to abuse is that their private law trappings can cause courts to lose sight of their public law purposes, and to characterize as actionable “theft” behavior that may in fact promote the purposes of the law.⁴² This one-sided conception of IP in fact distorts both public law and private law. A compelling theory of private law emphasize how it promotes the self-determination and substantive equality of all individuals, not just rights-holders.⁴³ A compelling theory of IP could thus combine the collective goal of promoting progress with a vision of relational justice between individuals. I will leave the elaboration of that theory for another day. For purposes of this essay, my point is that the private law mechanism deployed by IP should not obscure its primary public purpose.

Finally, recall the concern that private attorneys general can be over motivated not only by the promise of settlements and supra-compensatory remedies, but also by private motives antithetical to the purpose of the law (e.g. an antitrust plaintiff trying to stifle competition). Examples abound in copyright and patent. Copyright plaintiffs might be motivated to deploy law that is supposed to serve as an “engine of free expression” to instead stifle critical speech.⁴⁴ Patent plaintiffs may be motivated by a

actionable” copyright claims that “manifests itself in the creation of a balance between actionable claims of infringement that are actually enforced and actionable claims that are instead tolerated and treated as de facto noninfringing claims” represents an “enforcement equilibrium that is integral to the functioning of copyright as an institution”).

42. See, e.g., *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005) (“Get a license or do not sample”); *Grand Upright Music Ltd. V. Warner Bros. Records, Inc.*, 780 F.Supp. 182 (S.D.N.Y. 1991) (“Thou shalt not steal.”). *But cf.* *Oil States Energy Services, LLC v. Green’s Energy Group, LLC*, 584 U.S. 325, 333-36 (2018) (explaining that patents are “public rights” with a constitutionally and statutorily circumscribed purpose).

43. See Dagan & Dorfman, *supra* note 5. Regarding how one-sided conceptions of IP fail to reflect the balance embodied in tangible property law, see generally Michael A. Carrier, *Cabining Intellectual Property Through A Property Paradigm*, 54 DUKE L.J. 1 (2004); Oskar Liivak & Eduardo M. Peñalver, *The Right Not To Use in Property and Patent Law*, 98 CORNELL L. REV. 1437, 1440–41 & nn.18–20 (2013) (citing commentary critiquing and embracing the idea of IP as property).

44. See generally Rebecca Tushnet, *Fair Use’s Unfinished Business*, 15 CHI.-KENT J. INTELL. PROP. 399 (2016); M. Margaret McKeown, *Censorship in*

law that is supposed to generate technological progress to instead shelve innovative technology that might compete with their incumbent products.⁴⁵ Courts sometimes successfully reject this type of abuse; but, again, the private property model through which the law operates sometimes leads courts to elevate the right to exclude above the public purposes of the law.⁴⁶

III. DOCTRINAL DISCIPLINE OF PRIVATE-LAW ATTORNEYS GENERAL

Courts have recognized both the benefits and risks of private attorney general schemes. They have developed doctrines regarding both statutory interpretation and Article III standing that purport to balance these benefits and risks. For example, the Supreme Court has developed a “zone of interest” test to determine whether plaintiffs are intended to fall within the class of private attorney’s general authorized by a statute that creates a private cause of action.⁴⁷ In *Lexmark International v. Static Control Components, Inc.*, the Court applied this test to hold that only a plaintiff who alleges an injury to a commercial interest in reputation or sales falls within the zone of interest of the false advertising provision of the Lanham Act,⁴⁸ because the relevant enumerated purposes of the act are directed at protecting commercial actors against unfair competition.⁴⁹ In antitrust, courts require that plaintiffs “prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and

the Guise of Authorship: Harmonizing Copyright and the First Amendment, 15 CHI.-KENT J. INTELL. PROP. 1 (2016).

45. See, e.g., Robin C. Feldman & Prianka Misra, *The Fatal Attraction of Pay-for-Delay*, 18 CHI.-KENT J. INTELL. PROP. 249 (2019).

46. See, e.g., *Fox News Network, LLC v TVEyes, Inc.*, 883 F.3d 169 (2d Cir. 2018) (rejecting fair use defense where defendant’s activity “deprives Fox of revenues” without discussing argument that Fox offered licenses only on censorial terms).

47. See, e.g., *Clark v. Securities Industry Ass’n*, 479 U.S. 388, 401 (1987) (explaining that “the test denies a right of review if the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit”); *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (explaining that the zone of interests test “applies to all statutorily created causes of action.”).

48. 572 U.S. at 129–32.

49. *Id.* at 131.

that flows from that which makes defendants' acts unlawful."⁵⁰ These doctrines are credited by their fans with reducing the potential of private attorneys general to extort settlements and disserve the purposes of the laws they purport to enforce.⁵¹

The Court's Article III standing rules are another limit on whether private parties can bring actions that implicate broad public interests. In *Lujan v. Defenders of Wildlife*, the Court denied standing to such plaintiffs unless they can establish an "injury in fact" that is "concrete and particularized" and "actual or imminent."⁵² The requirement of a concrete and particularized injury has generally been understood to mean that private attorneys generally cannot be random members of the public; they must have some personal stake in the dispute apart from their desire to collect statutory damages and/or attorneys' fees. The Court has long held, however, that this personal stake can be established by the statutory scheme itself, where Congress creates a substantive right for which a particular plaintiff qualifies.⁵³ IP and other private-law attorney general regimes seem like apt examples of this: Congress has identified a class of people who qualify as owners of a right, defined behavior that violates that right, and created a cause of action for infringement.

The Court has recently called into question the longstanding understanding that Congress could establish Article III standing by allocating substantive rights to individual litigants. First, in *Spokeo v. Robins*, the majority insisted that "concrete and particularized" refers to two separate requirements, remanding a

50. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

51. See, e.g., Jonathan M. Jacobson & Tracy Greer, *Twenty-One Years of Antitrust Injury*, 66 ANTITRUST L.J. 273, 274 (1998) ("*Brunswick* has substantially improved antitrust analysis. It has helped ensure that the antitrust laws remain true to their essential proconsumer underpinnings. It has helped in preventing firms from using the antitrust laws strategically to subvert competition. And it has reduced the ability of quick-strike artists to extort nuisance settlements.")

52. 504 U.S. 555, 560 (1992).

53. See generally Erwin Chemerinsky, *What's Standing After Transunion LLC v. Ramirez* (2021), 96 N.Y.U. L. REV. ONLINE 269, 269–70 (2021) ("For decades, the Supreme Court has held that Congress, by statute, can create rights that would not otherwise exist, and that the infringement of these rights is a sufficient injury to permit standing to sue in federal court. For example, in 1975, in *Warth v. Seldin*, the Court stated: 'Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.'" (quoting 422 U.S. 490, 514 (1975)).

case to the Ninth Circuit for failure to determine whether any injury to the plaintiff caused by an alleged violation of the Fair Credit Reporting Act (FCRA) was not only specific to him, but also “‘real,’ and not ‘abstract.’”⁵⁴ The Court further elaborated on the concreteness requirement in *TransUnion v. Ramirez*,⁵⁵ another FCRA case in which the Court held that most of the plaintiffs lacked a concrete injury sufficient to establish standing in federal court where misleading information in their credit reports (identifying them as potential terrorists) had not been shared with third parties.⁵⁶ The majority explained that the fact that Congress has created both a substantive right and a private right of action for a class of people does not necessarily give people falling within that class Article III standing to sue:

Congress may enact legal prohibitions and obligations. And Congress may create causes of action for plaintiffs to sue defendants who violate those legal prohibitions or obligations. But under Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been *concretely* harmed by a defendant’s statutory violation may sue that private defendant over that violation in federal court.⁵⁷

Spokeo and *TransUnion* have been subject to withering critique for being untethered to constitutional text and Supreme Court precedent, for undermining important statutory schemes establishing a variety of substantive rights, and for aggrandizing the Court’s power at the expense of Congress.⁵⁸ This power grab

54. 578 U.S. 330, 338-43 (2016).

55. 594 U.S. 413 (2021).

56. *Id.* at 437-39. The Court also held that the defendant’s alleged failure to provide the plaintiffs requested copies of the credit files accompanied by a summary of their rights as required by the statute was insufficient to support standing because it did not produce a concrete injury. *Id.* at 439-40.

57. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021).

58. *E.g.* Jonathan R. Siegel, *The New Standing Problem and Its Legislative Solution*, 109 IOWA L. REV. 299, 300 (2023) (“The Court’s continued tightening of standing doctrine poses a problem that demands a solution. This Article discusses a legislative solution.”); Elizabeth Earle Beske, *Charting A Course Past Spokeo and Transunion*, 29 GEO. MASON L. REV. 729, 735 (2022) (“If Spokeo was a ‘misstep,’ *TransUnion* is a face plant.”); Chemerinsky, *supra* note 53, at 272; Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of TransUnion v. Ramirez*, 101 B.U. L. REV. ONLINE 62, 71 (2021) (characterizing *TransUnion* as “an activist decision that nullifies Congress’s power to protect consumers and that enables courts to rewrite privacy laws to alter how they are enforced”); Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285 (2018); Lauren E. Willis, *Spokeo Misspeaks*, 50 LOYOLA L.A. L. REV. 233, 245 (2017); William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 197 (2016) (“These terms [concrete,

is both muscular and arbitrary. The Court gives little guidance for what will count as a “concrete harm,” clarifying only its lack of deference to congressional judgment about what might count and a preference for harms recognized by “history and tradition.”⁵⁹

One of the only defenses commentators have offered for the Court’s newly demanding concrete harm requirement in *Spokeo* and *TransUnion* is that it might weed out some plaintiffs seeking to leverage de minimis statutory violations into windfalls untethered to valid public purposes.⁶⁰ On this view, the concrete harm requirement would appear to be available as a tool for policing the excesses of private-law attorney general schemes that I warned about above. Constitutionalizing a harm requirement is strong and dangerous medicine, however. And when the only

intangible, real], and the Court’s explanation of them, do little work to answer to core question. And to the extent they do point to a general approach, that approach is a wrong turn.”). For critiques of Article III standing doctrine more generally, see, for example, Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 167 (1992); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988).

59. *TransUnion*, 594 U.S. 413 at 424-25 (“What makes a harm concrete for purposes of Article III? As a general matter, the Court has explained that ‘history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider.’ . . . And with respect to the concrete-harm requirement in particular, this Court’s opinion in *Spokeo v. Robins* indicated that courts should assess whether the alleged injury to the plaintiff has a ‘close relationship’ to a harm ‘traditionally’ recognized as providing a basis for a lawsuit in American courts That inquiry asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury. *Spokeo* does not require an exact duplicate in American history and tradition. But *Spokeo* is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts.”) (citations omitted).

60. See, e.g., Morley, *supra* note 23, at 592 (“*Spokeo* appears to create a check—however limited—on the worst excesses of the legislative process. Taken at face value, the ruling precludes Congress from empowering quasi-Hohfeldian plaintiffs to force defendants into burdensome and expensive litigation in which they might be held liable for statutory damages as well as five-, six-, or even seven-figure attorneys’ fees, despite the complete absence of any real harm.”); *id.* at 603 (“Unlike other doctrines that frustrate legitimate suits from truly aggrieved plaintiffs, however, *Spokeo* is designed solely to weed out the legal detritus from federal dockets. Through jurisdictional abnegation, federal courts can stop devoting resources to abusive litigation in which plaintiffs seek grossly disproportionate statutory damages and exorbitant attorneys’ fees based on minor, technical, and ultimately innocuous violations of complex statutory schemes.”).

discernable constitutional guidepost is tradition, the requirement seems to reinforce rather than rectify the worst tendencies of the private-law attorney general model. Although neither copyright nor patent law requires a showing of actual harm to make out a violation⁶¹ (to the frustration of critics of overreaching in IP, especially in the era of patent and copyright trolls⁶²) it seems likely that courts following *TransUnion* will use the private law logic of IP to place it within the tradition of tangible property rights (like the right to exclude from land) for which an injury can be established merely upon a showing of violation of the right.⁶³ Or, worse, courts may favor corporate IP interests with

61. See, e.g., Rebecca S. Eisenberg, *Patents and the Progress of Science: Exclusive Rights and Experimental Use*, 56 U. CHI. L. REV. 1017, 1034 (1989) (observing that “the fact that a defendant’s use of a patented invention has caused no harm to the plaintiff is not ordinarily a defense to a patent infringement claim.”). But cf. Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871 (2007) (arguing that many personal uses do not amount to copyright infringement despite the plain language of 17 U.S.C. 106 and offering as one possible rationale that “the harm caused by each consumer is de minimis”).

62. See, e.g., Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1188 (2010) (recommending “that copyright owners be required to prove commercial harm when they make claims of infringement other than those involving exact or near-exact copies that operate in the same market as the allegedly infringed work”); Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U.L. REV. 969 (2007); Christopher Buccafusco & David Fagundes, *The Moral Psychology of Copyright Infringement*, 100 MINN. L. REV. 2433 (2016); Christina Bohannon & Herbert Hovenkamp, *IP and Antitrust: Reformation and Harm*, 51 B.C. L. REV. 905, 973 (2010); Christopher Sprigman, *Copyright and the Rule of Reason*, 7 J. TELECOMM. & HIGH TECH. L. 317 (2009). See generally Wendy J. Gordon, *The Concept of “Harm” in Copyright*, in INTELLECTUAL PROPERTY AND THE COMMON LAW 452 (Shyamkrishna Balganesh ed., 2013). Cf. Greenberg, *supra* note 35 (arguing for fair use burden shifting in cases involving “copyright trolls”); *The Uneasy Case*, *supra* note 35, at 769–70 (arguing that “the availability of statutory damages for nonauthor plaintiffs [should] depend on their establishing the existence of some compensable harm”). But see Jane C. Ginsburg, *Copyright: No Longer a Property Right?*, MEDIA INST. (Nov. 24, 2015), <http://www.mediainstitute.org/IPI/2015/112415.php> [<https://perma.cc/C5UL-5ZLG>].

63. See *Spokeo, Inc. v. Robins*, 578 U.S. 330, 344 (2016) (Thomas, J., concurring) (“Many traditional remedies for private-rights causes of action—such as for trespass, infringement of intellectual property, and unjust enrichment—are not contingent on a plaintiff’s allegation of damages beyond the violation of his private legal right.”); Solove & Citron, *supra* note 58, at 65 (expressing “doubt that the Court will curtail lawsuits under copyright law for lack of harm,” while observing that “[i]f *Spokeo* and *TransUnion* are carried to their logical conclusion, common and longstanding private rights of action for countless laws, including copyright law, might no longer be viable in federal court.”);

clear monetary interests over actual authors and inventors whose interests are primarily dignitary.⁶⁴

While courts have not deployed *Spokeo*, *TransUnion*, or other constitutional standing precedents to question IP owners' standing or rein in copyright trolls,⁶⁵ constitutional standing has

Thomas F. Cotter, *Standing, Nominal Damages, and Nominal Damages "Work-around" in Intellectual Property Law After Transunion*, 56 U.C. DAVIS L. REV. 1085, 1118 (2023) ("[I]f history and tradition are a guide, then as the preceding Section demonstrates there would appear to be no constitutional impediment if courts were to continue awarding nominal damages or penalties for the infringement of patent or copyright rights today."); Christopher Morten, *TransUnion is a Double-Edged Sword: Should the Legal Left Wield It?*, L. & POL. ECON. PROJECT (Sept. 20, 2021), <https://lpeproject.org/blog/transunion-is-a-double-edged-sword-should-the-legal-left-wield-it> [<https://perma.cc/NN8T-A9Q3>] ("*TransUnion* keeps the doors of federal courts open to remedying harms to property and capital while closing them to remedy harms to non-physical, non-monetary interests such as knowledge, dignity, and privacy . . ."). *But see* Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 118 n. 34 (2022) ("Cotter is more confident than I am that copyright statutory damages survive *TransUnion*. While equitable remedies in IP do pass the Court's history test, those remedies are under attack by the Court too. . . . But statutory damages do not have the same history, and they seem to do exactly what Justice Kavanaugh objects to—allow a plaintiff to sue to recover money not because they can show a loss but simply because Congress believed they should be able to recover that money.").

On the relevance of trespass law to standing, see generally Baude, *supra* note 58, at 200 ("Various early cases in England and America featured this basic intuition that invasion of legal rights was necessarily an injury. As early as the fourteenth and fifteenth centuries, English courts had allowed suits for trespass (to persons and to property) even when there had been no damage and no injury in fact apart from the legal injury of the trespass itself.").

64. See Chemerinsky, *supra* note 53, at 283–84 ("Perhaps the Court will draw a distinction and allow suits under statutes when there also is an alleged economic harm But where the injury is a dignitary one . . . *TransUnion* creates doubts as to whether standing will be allowed."). On the role of authors (as opposed to non-author owners) in the copyright system, see generally Molly Van Houweling, *Authors Versus Owners*, 54 HOUS. L. REV. 371 (2016).

65. The Ninth Circuit has deployed the logic of *Spokeo* in a slightly different way, using it to defeat an argument alleging that the "financial benefit" prong of the vicarious liability standard for secondary copyright infringement could be satisfied by benefit of other owners' copyrights. *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 673–74 (9th Cir. 2017) ("Here, Perfect 10 argues for a rule that would allow a court to hold Giganews liable under a theory of vicarious liability by showing only that Giganews benefits financially from the infringement of another's works, regardless of whether Giganews received any financial benefit from the specific infringement alleged. Such a rule would allow cases to be built on the rights of owners and the actions of users not before the court. At the very least, Perfect 10's proposed rule is in significant tension with Article III's standing requirement.").

played a different role in intellectual property disputes: courts have deployed the requirements of Article III standing to close the courthouse door to plaintiffs who seek to challenge intellectual property rights—holding that their claims are not sufficiently concrete or particularized, or that the injury they claim is not sufficiently imminent. Although the Supreme Court held the Federal Circuit’s Article III justiciability rule too restrictive of validity challenges in *MedImmune, Inc. v. Genentech, Inc.*,⁶⁶ Article III standing continues to present a serious hurdle for public-domain attorneys general in the Federal Circuit.⁶⁷

Statutory standing requirements have been used to defang notorious copyright troll Righthaven, but only because of a faulty assignment of the rights necessary to establish the right to sue. *Righthaven LLC v. Democratic Underground, LLC*, 791 F. Supp. 2d 968 (D. Nev. 2011); *see also* *RooR v. Smoke This Too, LLC*, 2017 WL 5714576, at *2 (S.D. Fla. 2017) (no standing for purported licensee without valid exclusive license from registered trademark owner); *Cramer v. Cecil Baker & Partners, Inc.*, 2019 WL 2774181, at *2 (E.D. Pa. 2019) (no standing where plaintiff “has not established copyright ownership of the photograph”); *Fahmy v. Jay Z*, 908 F.3d 383 (2018) (copyright plaintiff who had transferred relevant exclusive rights lacked standing). *See generally* *The Un-easy Case*, *supra* note 35, at 744 (describing the statutory standing “solution” as “entirely temporary”).

The zone of interest test was recently applied to limit the reach of the anticircumvention provisions of 17 U.S.C. § 1201. *VidAngel LLC v. ClearPlay, Inc.*, 2023 WL 8018981, at * 4 (D. Utah, Nov. 20, 2023) (“[T]he zone of interests of Section 1201 includes copyright owners and owners of an access control measure, but does not extend to those who merely allege competitive disadvantage flowing from the alleged violation of copyrights or circumvention of access control measures in which they have no legal interest.”).

66. 549 U.S. 118 (2007).

67. *See generally* Brief of Public Knowledge as Amicus Curiae Supporting Affirmance at 3, *Spokeo v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339) (“The Federal Circuit’s . . . cramped declaratory judgment standing doctrine, which looks much like *Spokeo*’s test, already stands in the way of . . . obtaining declaratory judgments of invalidity. Applying *Spokeo*’s ‘real-world harm’ test to appeals of administrative challenge proceedings . . . could make those proceedings lopsidedly unfair, with patent owners always being able to appeal adverse decisions but certain patent challengers being denied the symmetric privilege. This would discourage interest-based groups and others from bringing important challenges to questionable patents, thus enhancing ‘the in terrorem power of patent trolls’ who assert such patents.”); *Burstein*, *supra* note 16; Megan M. La Belle, *Public Enforcement of Patent Law*, 96 B.U. L. REV. 1865, 1871 (2016) (“The ACLU, the Public Patent Foundation, and Consumer Watchdog have all attempted to intervene on the public’s behalf to challenge suspect patents in recent years. These efforts have mostly been unsuccessful, however, because of the Federal Circuit’s overly restrictive standing doctrine in patent cases. And while public interest groups may challenge patents at the PTO, the Federal

Standing has repeatedly been an obstacle for parties seeking to appeal Patent Trial and Appeal Board (“PTAB”) denials of validity challenges. The inter partes review process under the American Invents Act allows anyone to challenge the validity of a patent by petitioning for inter partes review.⁶⁸ Whether a review is then conducted depends on the Patent Office’s determination of whether “there is a reasonable likelihood that the petitioner would prevail.”⁶⁹ The statute provides that this threshold determination is not subject to appeal;⁷⁰ but if the petition is granted and review is conducted, the outcome may be appealed to the Federal Circuit by any dissatisfied party.⁷¹ This clear provision of statutory standing to appeal does not establish Article III standing, however, and the Federal Circuit frequently dismisses appeals from unsuccessful PTAB outcomes for lack of constitutional standing.⁷² For example, in *Consumer Watchdog v.*

Circuit recently dismissed Consumer Watchdog’s appeal from an unfavorable PTO decision for lack of Article III standing. So even though public interest organizations may have the incentive to challenge bad patents, they face serious legal and practical constraints.”).

68. 35 U.S.C. § 311 (“[A] person who is not the owner of a patent may file with the Office a petition to institute an inter partes review of the patent.”). See generally *Cuozzo Speed Technologies, LLC v. Lee*, 579 U.S. 261 (2016).

69. 35 U.S.C. § 314(a).

70. 35 U.S.C. § 314(d) (“The determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable.”).

71. 35 U.S.C. § 141(c).

72. See, e.g. *Allgenesis Biotherapeutics Inc. v. Cloudbreak Therapeutics, LLC*, 85 F.4th 1377 (Fed. Cir. 2023) (no standing for competitor to appeal from Patent Trial and Appeal Board’s rejection of inter partes validity challenge); *General Electric Company v. United Technologies Corp.*, 928 F.3d 1349 (Fed. Cir. 2019) (same); *Phigenix, Inc. v. Immunogen, Inc.*, 845 F.3d 1168 (Fed. Cir. 2017) (same); *Consumer Watchdog v. Wisconsin Alumni Research Foundation*, 753 F.3d 1258 (Fed. Cir. 2014) (same); *AVX Corp. v. Presidio Components, Inc.*, 923 F.3d 1357 (Fed. Cir. 2019) (same); *JTEKT Corp. v. GKN Automotive LTD.*, 898 F.3d 1217 (Fed. Cir. 2018) (same); *Momenta Pharmaceuticals, Inc. v. Bristol-Myers Squibb Co.*, 915 F.3d 764 (Fed. Cir. 2019) (same); see also *Cuozzo Speed Technologies, LLC v. Lee*, 579 U.S. 261, 279 (2016) (observing that parties that initiate inter partes administrative review of patent validity “need not have a concrete stake in the outcome; indeed, they may lack constitutional standing”). Cf. *East Iowa Plastics, Inc. v. PI, Inc.*, 832 F.3d 899 (8th Cir. 2016) (holding that plaintiff lacked standing to seek cancellation of competitor’s trademarks). *But cf.* *Amerigen Pharmaceuticals Limited v. UCB Pharma GmbH*, 921 F.3d 1076, 1083 (Fed. Cir. 2019) (holding that patent challenger had standing to appeal from PTAB decision where launch of its tentatively approved drug was blocked by the patent); *Samsung Electronics Co., Ltd. v. Infobridge Pte.*

Wisconsin Alumni Research Foundation,⁷³ the Federal Circuit dismissed an appeal by a consumer advocacy group challenging the validity of a patent covering human embryonic stem cell cultures. The group, Consumer Watchdog (“CW”) had argued that the patent was invalid on the grounds of anticipation and obviousness, and that the “broad and aggressive assertion of the . . . patent ha[d] put a severe burden on taxpayer-funded research in the State of California where CW is located.”⁷⁴ The court held that CW lacked Article III standing, despite the clear statutory right to appeal, explaining that “the statutory grant of a procedural right does not eliminate the requirement that Consumer Watchdog have a particularized, concrete stake in the outcome of the reexamination.”⁷⁵

In subsequent cases the Federal Circuit has held that even competitors operating in the industry impacted by the challenged patent do not necessarily have standing to appeal adverse inter partes review outcomes.⁷⁶ Judge Hughes has objected to this line of cases, pointing out that “government action that excludes an appellant from effectively competing in a market, such as erroneously upholding its competitor’s patent, provides a benefit to the competitor and causes competitive harm to the appellant that presumptively leads to economic injury.”⁷⁷ This objection, voiced in advance of *TransUnion*, seems even less likely to turn the tide in the Federal Circuit now. But the Federal Circuit shows no signs of imposing a requirement that patent *owners* demonstrate a concrete injury—apart from violation of their statutory rights—to establish Article III standing. In other words, in this IP realm constitutional standing is a serious hurdle only for *public-domain attorneys general*.⁷⁸

Ltd., 929 F.3d 1363, 1367–68 (Fed. Cir. 2019) (holding that patent challenger had standing to appeal from PTAB decision where it would have received additional revenue from patent pool if challenged patent was removed).

73. 753 F.3d 1258 (Fed. Cir. 2014).

74. Opening Brief of Appellant at 2, *Consumer Watchdog v. Wisconsin Alumni Research Foundation* (Fed. Cir. 2014) (No. 13-1377).

75. *Consumer Watchdog*, 753 F.3d at 1262.

76. *E.g.* *General Electric Company v. United Technologies Corp.*, 928 F.3d 1349 (Fed. Cir. 2019).

77. *General Electric*, 928 F.3d at 1358 (Hughes, J., concurring).

78. In *Already, LLC v. Nike, Inc.*, the Supreme Court upheld dismissal of a counterclaim of trademark invalidity on mootness grounds. In so doing, it rejected arguments based on a broad theory of standing to challenge invalid trademarks that harm the public domain. 568 U.S. 85, 96–100 (2013) (“Already’s

This one-sided application of standing requirements in intellectual property cases is unfortunate and ironic.⁷⁹ Both IP owners and challengers have important roles to play in acting as private attorneys general who advocate for the public interest in the progress of science and the useful arts. The “private law” property form of the rights held by IP owners should not obscure this fact; and even viewed from a purely private law perspective, IP should acknowledge the importance of protecting defendants from unjustified threats to their autonomy.⁸⁰ And yet the property-like nature of IP rights can make them vulnerable to exploitation by owners who leverage their rights to hold up defendants whose behavior promotes rather than impedes the purposes of the law.⁸¹ The current application of the Supreme Court’s standing jurisprudence to intellectual property disarms both courts and public-domain attorneys general from fully addressing this risk.

arguments boil down to a basic policy objection that dismissing this case allows Nike to bully small innovators lawfully operating in the public domain. This concern cannot compel us to adopt Already’s broad theory of standing.”).

79. See generally La Belle, *supra* note 2; La Belle, *supra* note 70; Burstein, *supra* note 16; Kali N. Murray, *Rules for Radicals: A Politics of Patent Law*, 14 J. INTEL. PROP. LAW 63 (2006). On the insufficient incentives to challenge bad patents, see generally Joseph Farrell & Robert P. Merges, *Incentives to Challenge and Defend Patents: Why Litigation Won’t Reliably Fix Patent Office Errors and Why Administrative Patent Review Might Help*, 19 BERKELEY TECH. L.J. 943 (2004).

80. See generally Dagan & Dorfman, *supra* note 5; HANOCH DAGAN, A LIBERAL THEORY OF PROPERTY (2021) (developing a theory of property centered on concern for individual autonomy, self-determination, and self-authorship); *id.* at 58 (“[C]opyright—just as any other property type—must comply with the thin but still noteworthy constraints entailed by property’s commitment to relational justice.”).

81. See generally McKeown, *supra* note 44, at 13 (observing that “the Copyright Act is a powerful tool, whatever the motive for filing suit. As the Electronic Frontier Foundation stated: ‘Stern threats making vague claims about ‘stolen intellectual property’ are often effective even if there’s no legal merit to them. In part that’s because copyright law’s penalties are so far out of proportion to any actual harm.’”). *But cf.* Garcia v. Google, 786 F.3d 733, 745 (9th Cir. 2015) (refusing to recognize, for purposes of analyzing question of irreparable harm to support preliminary injunction, claimed harms that are “untethered from—and incompatible with—copyright and copyright’s function as the engine of expression”).

CONCLUSION

Copyright and patent law can usefully be conceived as examples of a distinctive sub-category of private attorney general regimes: the private-law attorney general. This categorization helps us to recognize how these regimes present a distinctive mix of the benefits and risks generally associated with private attorney general regimes.

In the case of IP, it is critically important that private-law attorneys general be matched with public-domain attorneys general, in order to ensure that both sides of the IP balance receive vigorous representation. Unfortunately, the Supreme Court's standing doctrine can be understood to disarm many public-domain attorneys general while failing to police abuses by IP owners who leverage their rights to extort settlements and chill the very creative and inventive behavior the law is designed to foster.⁸² This imbalance cannot be defended as reflecting a principled distinction between private and public rights: IP takes a private law form but also has a very public purpose.

There are many doctrinal avenues for righting this imbalance. The most obvious would be to take the Supreme Court's controversial Article III standing doctrine seriously in the IP realm—imposing a concrete injury requirement that requires

82. The Article III standing requirement is not an obstacle to all would-be public-domain attorneys general. Some plaintiffs seeking to invalidate overreaching IP claims can show enough of an imminent injury (in the form of a forthcoming infringement suit, for example) to establish Article III standing. Defendants in IP infringement suits also often advocate on behalf of the public domain; as established in *Fogerty*, these defendants can be eligible for attorneys' fees that serve to subsidize their advocacy for the public domain. See *supra* n. 18 and accompanying text. As Xiyin Tang has argued, the class action mechanism can also serve as a reform mechanism that can promote the public interest. Xiyin Tang, *The Class Action as Licensing and Reform Device*, 122 COLUM. L. REV. 1627, 1677 (2022) (observing that "the hybrid public-private settlement approval process means that user rights may oftentimes be better represented through settlement than through the power-broker-driven legislative lobbying process"). And IP cases implicating the public domain often draw the attention of amici and intervenors—including, in some cases, the U.S. Government. See, e.g., *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 540–43 (2013) (relying heavily on views of amici regarding costs of excluding foreign-produced works from copyright law's first sale doctrine); *New York Mercantile Exchange, Inc., v. IntercontinentalExchange, Inc.*, 497 F.3d 109, 113 (2d Cir. 2007) (noting view expressed in amicus brief submitted by United States that "settlement prices are facts, even if they are not facts the idea of the prices have merged with their expression, and even if merger did not apply, the prices are not copyrightable because they are short phrases").

plaintiffs to allege consequential damages to interests the law is designed to protect.⁸³ Another would be to rely on the more modest tool of statutory standing to require harm to a degree consistent with IP law's public purpose. Another would be to continue the courts' relaxed attitude toward IP owner standing but recognize that the IP regimes Congress has established aim to prevent injury to both IP owners and the public domain (as they must, in light of their Constitutional authorization). Private attorneys general can help to enforce those regimes, but they should be empowered on both sides of the IP balance.

83. *See, e.g., Morten, supra* note 63 ("In theory, the same logic the Court used to kick thousands of TransUnion's plaintiffs out of court should make it harder, perhaps impossible, for corporations to enforce various forms of so-called 'intellectual property' (IP) against competitors and the public. By marshaling TransUnion to challenge the enforceability of some IP rights, we might squeeze a small glass of lemonade from TransUnion's lemons But embracing TransUnion to undermine TransUnion is risky, and trusting courts to apply it even-handedly may be pollyannaish.").