

## Copyright Porn Trolls, Wasting Taxi Medallions, and the Propriety of “Property”

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### INTRODUCTION

This Paper relates two stories with a common moral. The first, discussed in Section I, describes how copyright porn trolls have in effect, and to the chagrin of courts and commentators, engaged in a massive extortion scheme. The second, discussed in Section II, describes how beneficiaries of taxi medallions have resorted to rioting and violence to fend off competition from new transportation services like Uber and Lyft.

Section III sums up the moral to both stories: tragedy follows when the law tries to protect fuzzy and ill-defended privileges with rules better suited for protecting common law property. With both copyright and taxi medallions, lawmakers have created entitlements that have only some of property’s virtues, and no good claim to its name, but powers as great or greater than those that the common law affords to property owners. We would have less reason to worry about mass extortion by copyright trolls and violence by the dependents of taxi medallions if we limited their privileges to liability remedies.

This Paper concludes that “privilege” offers a more accurate description of copyrights and taxi medallions than “property” does. They possess only some of the attributes of property, such as exclusivity or alienability. Property consists of more than just a few admirable functional features, however. It has roots in nature, custom, and the common law. And the remedies that it puts at the disposal of property owners prove too powerful when invoked in the service of poorly defined and ill-defended privileges.

We might well wonder whether lawmakers should create copyrights and taxi medallions at all. Both rely on artificially

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imposing scarcity—barring free enjoyment of public goods in the first place and free access to public customers in the other—a practice that has the immediate effect of making their select beneficiaries much better off and everybody else a little worse off. Even if we can in theory excuse those temporary costs as a just price for greater long term gains, such as stimulating the creation of original expressive works and preventing failure in the market for personal transportation services, in practice things do not always work out so nicely. The combination of concentrated benefits, diffuse costs, and unchecked political power invites a public choice disaster, wherein a privileged few successfully lobby for greater power and wealth, leaving the rest of us with less of both.<sup>1</sup>

Those represent valid concerns about copyrights and taxi medallions, but they are not ones pressed by this Paper. Here, it suffices to observe that woe follows when the law endows statutory privileges with powers equal to or greater than those that protect property, and to counsel less coercive remedies as a cure. That would not only generate welcome policy effects but also help safeguard the propriety of “property.”

#### I. COPYRIGHT PORN TROLLS

Copyright plaintiffs’ attorneys across the United States have, of late, made a business out of accusing thousands of John Does at a time with having infringed their clients’ pornographic films via public file sharing services.<sup>2</sup> These suits apparently aim at little more than winning subpoenas to uncover the identities of the defendants, whom the plaintiffs then threaten with the Copyright Act’s extraordinary remedies and public disclosure of the suspected porn use. These hardball tactics have netted millions in settlement payments from guilty and innocent alike—and attracted sharp criticism. Judges and commentators alike have described the phenomenon as little better than mass extortion. This Section reveals the dirty tricks played by Internet porn trolls and blames their success on the notion that copyright deserves not just the same protections afforded to common law property but even greater ones.

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<sup>1</sup> For evidence of that effect, see Emily Badger, *The Taxi Industry Is Crushing Uber and Lyft on the Lobbying Front, 3,500 to 1*, WASH. POST WONKBLOG (July 31, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/07/31/the-taxi-industry-is-crushing-uber-and-lyft-on-the-lobbying-front-3500-to-1/>.

<sup>2</sup> See generally Christopher Civil, *Mass Copyright Infringement Litigation: Of Trolls, Pornography, Settlement and Joinder*, 30 SYRACUSE J. SCI. & TECH. L. 2 (2014); Amy Rosen, *The Big Lawsuits Keep on Coming: An Analysis of Extortive Pornographic “Trolling Lawsuits” and Preventive Approaches*, 95 J. PAT. & TRADEMARK OFF. SOC’Y 165 (2013).

The last decade has seen an astonishing increase in copyright lawsuits, filed against thousands of John Doe defendants at a time, accusing all of taking part in the illegal sharing of pornographic files. These lawsuits, which bear all the marks of trolling expeditions, have become the most common form of copyright litigation in several U.S. districts.<sup>3</sup> In some, they represent more than half of all new cases filed.<sup>4</sup>

How do these cases arise? Typically, a small firm that represents producers holding copyrights in pornographic films examines traffic on BitTorrent, an open source file-sharing network, to see if it can identify unauthorized copying and distribution of the copyrighted works. If successful, this monitoring generates lists of thousands of suspect Internet Protocol (IP) addresses.<sup>5</sup> The firm then seeks to convince a court to permit joinder of all the defendants in a single suit—an effort that, if not always successful, succeeds often enough to make these massive lawsuits profitable. If it can surmount that hurdle, the plaintiff law firm then uses court-ordered discovery to force Internet Service Providers (ISPs) to reveal the persons behind the IP addresses.<sup>6</sup>

Once it has the names and contact information for thousands of defendants in hand, the copyright porn troll can begin reaping settlement payments of a few thousand dollars from each. The troll reminds reluctant defendants that litigation will reveal their alleged porn viewing habits to the public and, more relevantly for present purposes, expose them to the prospect of up to \$150,000 in statutory damages for each infringed work.<sup>7</sup> The result: easy money from cowed defendants, innocent and guilty alike.

Perhaps due to the vast amount of fast money to be made, copyright porn trolls have hardly covered themselves in honor. Their practices have won judicial rebuke and sanctions. Judge Otis D. Wright of the U.S. Central District of California described one such lawsuit pending before him as “essentially an extortion scheme.”<sup>8</sup> Another firm participating in the practice has faced

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<sup>3</sup> Matthew Sag, *Copyright Trolling, an Empirical Study*, 100 IOWA L. REV. 1105, 1107 (2015).

<sup>4</sup> *Id.* at 1108.

<sup>5</sup> Note that IP here stands for “Internet Protocol” and not “Intellectual Property.”

<sup>6</sup> *See, e.g., Digital Sin, Inc. v. Does 1–176*, 279 F.R.D. 239, 241 (S.D.N.Y. 2012) (compelling disclosure of Does’ identities by third-party ISPs).

<sup>7</sup> *See* 17 U.S.C. § 504(c) (2012).

<sup>8</sup> *Malibu Media, LLC v. Does 1–10*, No. 2:12-CV-3623-ODW, 2012 WL 5382304, at \*4 (C.D. Cal. June 27, 2012).

claims of identity theft and manufacturing litigation.<sup>9</sup> A class action lawsuit was recently filed charging the plaintiff pornographers with racketeering, fraud, defamation, and other charges, all arising out of their association with litigation trolling strategies.<sup>10</sup> Perhaps most of the blame for these infelicities should fall on the characters involved and the lure of easy money. Nonetheless, it seems as if a certain moral stink pervades the whole business of copyright porn litigation.

The common law would never support anything akin to this sort of mass extortion. That copyright has encouraged porn trolls to adopt such tactics suggests that its privileges not only match the legal potency of property rights but exceed it. And, indeed, porn trolls' suits rely crucially on special provisions of the Copyright Act to win access to legal remedies unknown in the common law. A fellow could write an entire book about the virtues of conceiving copyright as a form of statutory privilege rather than as a form of property.<sup>11</sup> Suffice it here to say that the lawsuits brought by copyright porn trolls show all too clearly the woes that follow when statutory privileges acquire powers not just equal to those of property, but greater than them.

But the problem is not simply that copyright has arrogated unto itself coercive powers even greater than those afforded to owners of private property. If copyrights functioned with the same efficiency as tangible property—if copyright transactions had low costs, in other words—it might not be such a bad idea to extend to copyrights the protections given to property. In actuality, transactions in copyrights impose notoriously high costs. The problems start with the occasional but typically thorny difficulties of establishing who has good title to a given work. They continue into questions about the fuzzy border between copying and fair use.

Most notably for present purposes, transactions in Internet porn copyrights evidently impose considerable enforcement costs. It proves difficult for copyright holders to protect their works via self-help measures, to detect when infringement happens, and to obtain service over the responsible parties. Whether we rue that situation or not, the economic fact remains: transactions in

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<sup>9</sup> See Andrea Peterson & Timothy B. Lee, *Firm Accused of Uploading Porn, Shaking Down People Who Download It*, WASH. POST SWITCH BLOG (Aug. 16, 2013), <http://www.washingtonpost.com/blogs/the-switch/wp/2013/08/16/firm-accused-of-uploading-porn-shaking-down-people-who-download-it/>.

<sup>10</sup> See David Kravets, *Porn Studios Accused of Screwing Their Fans in BitTorrent Lawsuits*, WIRED (July 9, 2012), <http://www.wired.com/2012/07/porn-studios-screw-fans/>.

<sup>11</sup> See TOM W. BELL, *INTELLECTUAL PRIVILEGE: COPYRIGHT, COMMON LAW, AND THE COMMON GOOD* (2014).

Internet porn copyrights do not possess the same relatively low costs that characterize traditional forms of property. As Section III discusses below, that fact has ramifications for the efficiency of protecting copyrights with property remedies (or, as we might say in copyright's case, property-plus remedies). First, though, the next Section will find similar attributes in taxi medallions.

## II. WASTING TAXI MEDALLIONS

The privilege that cities grant to taxis—the exclusive right to serve passengers flagging down rides—has come under pressure from Uber, Lyft, and other networked transportation services. This fresh competition has driven down the value of taxi medallions, causing their holders to complain of theft by private parties and takings by public ones. Such claims look unlikely to move courts, however, which typically treat taxi medallions not as types of property but as government-granted privileges protected by the Fourteenth Amendment's due process clause.<sup>12</sup> Frustrated by the dissipation of their rents, taxi drivers and medallion holders have resorted to blocking traffic and physically assaulting their new competitors. That speaks less to the injustice of denying them legal relief, however, than it does to the inefficiencies of granting taxi services transferable and exclusive rights to serve a particular segment of the transportation market. Treating taxi medallions like property has fostered an undue sense of entitlement, exacerbating conflict and discouraging innovation. This Section discusses the problem and what to do about it.

Of what use is a taxi medallion? Generally speaking, it affords a legal entitlement, exclusive but enjoyed collectively by all licensed taxis within a given municipality, to transport on public streets passengers who have been solicited on those streets.<sup>13</sup> Outside of that privilege fall for-hire vehicles, which cannot legally solicit paying passengers on public streets but must instead pick up only those who have arranged ahead of time for a ride.<sup>14</sup> The distinction between customers who flag down rides on city streets and customers who otherwise arrange for transport has long protected limos and other private car

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<sup>12</sup> Note that this Paper uses “privilege” solely as a legal term of art and not to describe the social effects of phenomena like racism or sexism.

<sup>13</sup> See *People v. Ethridge*, 215 N.Y.S.2d 664, 667–68 (Nassau Cnty. Ct. 1961) (holding that a vehicle not responding to street hails, but rather operating solely in response to previous arrangement, need not be licensed as a taxi). Cf. *People v. Betzig*, 79 N.E.2d 747 (N.Y. 1948) (finding evidence of cars on private property with “taxi” signs in their windows sufficient to support a conviction for operating a taxicab for hire).

<sup>14</sup> Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 YALE J. ON REG. 125, 134 (2013).

services from taxi licensing requirements.<sup>15</sup> Uber, Lyft, and similar networked services argue that they enjoy the same loophole. On that point, however, opinions differ—and blood has flowed.<sup>16</sup>

Functionally speaking, Uber, Lyft, SideCar, Hailo, and similar services work like taxis hailed not by hand but by smartphone app. They allow passengers with Internet access to connect with independent contractors willing and able to provide private car services. These companies do not themselves own or operate vehicles; they instead run markets for personal transportation and make money from charging commissions on sales.<sup>17</sup>

Lyft's general counsel, Kristin Svercheck, has described the company as little more than an Internet site. "What we're really doing is acting as an intermediary, allowing two individuals to connect," she explained.<sup>18</sup> She insists on that characterization to support her claim that Lyft enjoys the shelter of section 230 of the Communications Decency Act, a 1996 law passed to protect websites from bogus defamation claims, but written in terms so broad that it protects many other kinds of intermediary services.<sup>19</sup> Her theory has yet to receive judicial scrutiny; there has of yet been no court opinion directly relating to ride-sharing apps.

Regardless of whether that particular defense ends up benefitting Lyft and other networked transportation companies, they enjoy other advantages over taxis and similarly regulated services. One of the biggest: simply avoiding the hassles and expenses of the regulations themselves. The typical taxi sports dozens of mandatory signs and stickers, purchased from the licensing authority—to say nothing of the medallion itself—attached to the vehicle via holes punched through its sheet metal.<sup>20</sup>

Unless and until local authorities force them to comply with the same regulations applicable to taxis, moreover, networked

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<sup>15</sup> See, e.g., *People v. Sullivan*, 103 N.Y.S.2d 503 (Ct. Spec. Sess. App. Part 1951), *aff'd*, 103 N.E.2d 542 (N.Y. 1952).

<sup>16</sup> See, e.g., Carol Matlack, *Paris Cabbies Slash Tires, Smash Windshields in Protest Against Uber*, BLOOMBERG BUSINESSWEEK (Jan. 13, 2014), <http://www.businessweek.com/articles/2014-01-13/paris-cabbies-slash-tires-smash-windshields-in-protest-against-uber> (reporting on injuries resulting from attack of Paris cabbies on Uber vehicles).

<sup>17</sup> Stephanie Francis Ward, *'App' Me a Ride: Internet Car Companies Offer Convenience, but Lawyers See Caution Signs*, A.B.A. J., Jan. 2014, at 13, 13.

<sup>18</sup> *Id.* at 17.

<sup>19</sup> *Id.* at 14; 47 U.S.C. § 230 (2012).

<sup>20</sup> Emily Badger, *Is This Worth \$350,000? No One Knows*, WASH. POST, June 22, 2014, at G1.

transportation companies do not have to buy insurance for their drivers (who instead provide their own), run background checks on them (though they often do so voluntarily), use only drivers that have commercial licenses, or submit their vehicles to special inspection.<sup>21</sup> Beneficiaries of the taxi privilege have fought back, lobbying to have the same regulations which burden them imposed on their new competitors.<sup>22</sup> “We are not afraid of competition, but we want fair competition,” explained Joel Wood, a Teamsters organizer advocating on behalf of taxi drivers in the D.C. area.<sup>23</sup>

In some markets, competition from networked transportation services has evidently driven down the value of taxi medallions.<sup>24</sup> Even in municipalities that have not seen medallion values slip, people who work in the taxi industry feel threatened by the loss of paying customers. Drivers feel “a lot of vulnerability and anger” about the issue, explained Bhairavi Desai, executive director of the National Taxi Workers Alliance, a group recently created to respond to the new competitive threat.<sup>25</sup> “We have always had illegal pickups and it’s always been an economic issue for drivers, especially in times of recession, but now multibillion-dollar companies are orchestrating these illegal pickups.”<sup>26</sup>

Those threatened by changes to the taxi status quo feel so much anxiety and frustration that they have resorted to civil disobedience. Taxi drivers in London, Paris, and other cities protested the advent of new competition by parking in public streets, blocking traffic.<sup>27</sup> Their strong feelings have unfortunately boiled over into violence, resulting in slashed tires, smashed windows, and physical injuries.<sup>28</sup>

Why have those who work in the taxi industry responded so strongly to the advent of networked transportation services? Perhaps because the rhetoric of property, misapplied to taxi medallions, has given them an inflated sense of entitlement. Opponents of networked transportation services thus accuse

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<sup>21</sup> Luz Lazo, *Taxicab Interests Unite to Fight*, WASH. POST, Aug. 11, 2014, at B1.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Badger, *supra* note 20.

<sup>25</sup> Lazo, *supra* note 21.

<sup>26</sup> *Id.*

<sup>27</sup> Mark Scott, *Traffic Snarls in Europe as Taxi Drivers Protest Against Uber*, N.Y. TIMES BITS BLOG (June 11, 2014), <http://bits.blogs.nytimes.com/2014/06/11/taxi-protests-against-uber-in-europe-to-snarl-traffic>; *Taxi Drivers Across Europe Protest Against Uber App – In Pictures*, GUARDIAN (June 11, 2014), <http://www.theguardian.com/uk-news/gallery/2014/jun/11/taxi-drivers-across-europe-protest-uber-app-in-pictures>.

<sup>28</sup> Matlack, *supra* note 16.

them of “stealing work” from licensed drivers—as if paying customers could be owned.<sup>29</sup>

We see the same mindset at work in legal arguments, made by the holders of taxi medallions, that if a city were to reform its transportation policies to allow more competition to the detriment of established services, it would thereby take the private property embodied in the medallions and owe just compensation for doing so.<sup>30</sup> Research into the market price of taxi medallions, which indicates that their present values do not reflect expectations of continued rents, makes that claim look economically dubious.<sup>31</sup> Research into the applicable legal precedents makes it look utterly hopeless.<sup>32</sup> Just as it seems to encourage violence in the street, however, calling taxi medallions “property” seems to encourage outlandish arguments.

Bombastic rhetoric aside, taxi medallions do not constitute property except in a strained sense of the word. Unlike any traditional kind of property, taxi medallions do not exist in a state of nature, by custom, or at the common law; they arise solely by legislative fiat.<sup>33</sup> Though the right of exclusive use has been described as the foremost attribute of property,<sup>34</sup> the rights secured by a taxi medallion belong not to any particular individual but only collectively—by all those licensed to serve

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<sup>29</sup> Lazo, *supra* note 21 (quoting Joel Wood, a Teamsters organizer advocating on behalf of taxi drivers).

<sup>30</sup> Badger, *supra* note 20 (discussing arguments of Michael Shakman and Edward Feldman, Chicago attorneys suing the city on behalf of investors and companies that rely on taxi medallions).

<sup>31</sup> See Peter Van Doren, *Should Taxi Medallion Owners Be Compensated?*, CATO INST. CATO AT LIBERTY (June 23, 2014, 3:59 PM), <http://www.cato.org/blog/should-taxi-medallion-owners-be-compensated>.

<sup>32</sup> Steve Oxenhandler, Comment, *Taxicab Licenses: In Search of a Fifth Amendment, Compensable Property Interest*, 27 TRANSP. L.J. 113 (2000) (surveying the law to conclude that taxi medallion reform can give rise to valid takings claims only if the government expressly creates a compensable property interest or requires the holder to divest all interests in the license without surrendering it to the government, and that only abolishing the excludability or alienability of the medallion rises to the level of a taking).

<sup>33</sup> To statist legal positivists, who care more about practical effects than origins or moral legitimacies, those deficiencies hardly disqualify taxi medallions as property; indeed, the seminal article in that line of thinking expressly includes taxi medallions as a form of legal entitlement meriting the label “property.” See Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 735 (1964). As the discussion immediately below indicates, however, courts have not followed scholars in that characterization.

<sup>34</sup> See, e.g., *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) (“The hallmark of a protected property interest is the right to exclude others.”); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731 (1998) (explaining the right to exclude as “a necessary and sufficient condition of identifying the existence of property”). *But see* Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371 (2003) (criticizing the view that exclusion is the sine qua non of property and arguing for also defining property in terms of acquisition, use, and disposal).

passengers flagging down paid transport on public streets.<sup>35</sup> Whereas property traditionally enjoys free alienability, taxi medallions cannot be transferred without the supervision and approval of licensing authorities.<sup>36</sup>

From observations such as these, some authority has it that taxi medallions simply do not qualify as property. As *O'Connor v. Superior Court* put it, “A license or permit to engage in the taxicab business, issued by the city pursuant to its police power, does not convey a vested property right.”<sup>37</sup> Other authority, following the lead of the Supreme Court in *Goldberg v. Kelly*, which held that welfare recipients facing termination of their benefits enjoyed certain due process rights under the Fourteenth Amendment,<sup>38</sup> has afforded taxi medallions property-like protections in certain situations. *Flower Cab Co. v. Petite* held that where a municipal ordinance gave each taxi license holder exclusive possession of the license, the right to assign it with few qualifications, and automatic renewal absent revocation or suspension, the license qualified for protection under the Fourteenth Amendment, meaning that the municipality could not unilaterally impose a moratorium on taxi license transfers.<sup>39</sup> That probably speaks less to whether taxi medallions qualify as property as a theoretical matter, though, than it does to whether government agencies simply have to follow through on their promises.

At all events, authorities agree that municipalities have very broad discretion to grant or refuse taxi licenses.<sup>40</sup> As the court in *Yellow Cab Co. v. Ingalls* put it, “A license, permit, or certificate of public convenience and necessity to operate motor vehicles on the public streets of a municipality for the conduct of a strictly private business is not an inherent right but is a mere privilege.”<sup>41</sup> Furthermore, “the vast majority of states do not

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<sup>35</sup> At present, for instance, New York City licenses 13,237 taxis. Wyman, *supra* note 14, at 131.

<sup>36</sup> *Travel House of Buffalo, Inc. v. Grzechowiak*, 296 N.Y.S.2d 689, 697 (App. Div. 1968) (holding that unauthorized transferees of taxi medallions were not entitled to renewal of licenses), *aff'd*, 250 N.E.2d 355 (N.Y. 1969); *Vill. Taxi Corp. v. Beltre*, 933 N.Y.S.2d 694 (App. Div. 2011) (rendering illegal and unenforceable an agreement allowing for the conveyance of a taxicab license without involvement of municipal authorities).

<sup>37</sup> *O'Connor v. Superior Court*, 153 Cal. Rptr. 306, 310 (Ct. App. 1979).

<sup>38</sup> 397 U.S. 254, 261–63 (1970); *see also* *Atkins v. Parker*, 472 U.S. 115, 128 (1985) (stating in dictum that hearings determining an individual’s continued eligibility for food stamps must satisfy due process); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 578 (1972) (conjecturing that an employee of a public university could have a “property” interest in his employment sufficient to give him due process rights).

<sup>39</sup> 658 F. Supp. 1170, 1175, 1180 (N.D. Ill. 1987).

<sup>40</sup> 9A EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 26:177 (3d ed. rev. 2007 & Supp. 2014).

<sup>41</sup> 104 So. 2d 844, 847 (Fla. Dist. Ct. App. 1958).

consider a taxicab license a Fifth Amendment, compensable property interest.”<sup>42</sup> More specifically, taxi medallion holders have no property claim to the gains they enjoy thanks to regulatory barriers on competition, leaving cities free to raise caps on the number of licensed taxis—even if doing so causes the market value of taxi medallions to crash.<sup>43</sup>

More than a form of property, taxi medallions resemble government-granted privileges. This does not strip them of all legal standing, of course. When *Goldberg v. Kelly* held that beneficiaries of public welfare may enjoy Fourteenth Amendment due process rights, such as the right to a pre-termination hearing, the Court did not do so because it equated welfare benefits to property.<sup>44</sup> Charles A. Reich, whose scholarship the Court cited, did not even call them a kind of “new property” (a name that Reich popularized for various government entitlements). Rather, the Court went only so far as to observe, “It may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity.’”<sup>45</sup>

The Court’s observation, while true, invites the conclusion that “property” and “gratuity” exhaust the options. Not so. Restricting us to those two choices alone would constitute the fallacy of the excluded middle. In fact, the Court’s analysis leaves room for a third category of legal entitlement: privilege. This middle option describes welfare benefits better than either “property” or “gratuity” does. This, the *Goldberg* Court itself recognized when it retorted, “The constitutional challenge cannot be answered by an argument that public assistance benefits are ‘a “privilege” and not a “right.””<sup>46</sup> As the Court implied, to call them privileges only begins the analysis.

*Goldberg* completed the analysis by holding that welfare benefits may enjoy some of the same protections—those relating to due process—that the Fourteenth Amendment bestows on property, proper. Though the Court in *Goldberg* could have made more clear what kind of entitlement it had in mind, it still deserves credit for developing the jurisprudence of privileges. How appropriate, too, that it did so while interpreting the scope

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<sup>42</sup> Oxenhandler, *supra* note 32, at 132.

<sup>43</sup> See *Minneapolis Taxi Owners Coal., Inc. v. City of Minneapolis*, 572 F.3d 502, 509 (8th Cir. 2009).

<sup>44</sup> 397 U.S. 254, 261 (1970).

<sup>45</sup> *Id.* at 262 n.8.

<sup>46</sup> *Id.* at 262 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969)).

of the Fourteenth Amendment, which itself speaks of “privileges.”<sup>47</sup>

More relevantly for present purposes, taxi medallions fall short of property not merely as a matter of legal doctrine but of actual practice. The problem arises from the imperfect enforcement of medallion holders’ supposedly exclusive (albeit collectively shared) right to pick up passengers hailing rides on city streets. It has long been the case that, whether for want of ability or will, municipal authorities fail to stop a great many unlicensed taxi rides. For instance, so-called “gypsy cabs” began appearing on the streets of New York City in the early 1960s, when the supply of taxi medallions began to fall behind market demand.<sup>48</sup> Today, in upper Manhattan and the outer boroughs of New York City, for-hire vehicles illegally pick up an estimated 100,000 street-hail passengers per day.<sup>49</sup>

Even absent Lyft and other networked ride sharing services, the holders of taxi medallions would suffer a great deal of trespass on their privileges. The advent of new competitors merely worsens the difficulties of policing the borders of the taxi privilege. As the next section discusses, that makes taxi medallions poor candidates for the power of property’s remedies.

### III. THE PROPRIETY OF “PROPERTY”

What do extortionate porn trolls and rioting taxi drivers share in common? At root, they both arise from the same basic problem: legal entitlements with very high enforcement costs. Those enforcement costs constitute a species of transaction costs. Like other transaction costs, they make it difficult for contesting parties to negotiate voluntary transfers of the entitlements in question—to license porn downloads or lease taxi medallions, for instance. Standard economic theory suggests that we should therefore enforce these entitlements not with a property rule but with, at most, a liability one. This Section explains.

Both those who hold copyrights in pornographic films and those who hold taxi medallions find it very expensive to enforce their legal entitlements. They typically find it difficult to discover when transgressions of their entitlements occur in the first

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<sup>47</sup> U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”). Note, however, that whereas “privilege” appears in the first clause, the *Goldberg* Court’s analysis focused on the second.

<sup>48</sup> See Wyman, *supra* note 14, at 171.

<sup>49</sup> *Id.* at 134.

instance. And even when decreasing revenues make it evident that many such transgressions must have occurred, they find it difficult to identify the responsible parties. Even once having caught and identified a responsible party, the privilege holders find it expensive to enforce their entitlements.

In the particular case of Internet porn, those who hold copyrights find it very costly, if not impossible, to identify exactly who has infringed their works. They must therefore resort to legally and ethically dubious mass joinder lawsuits against unidentified John Does, described above, or learn to live with Internet infringers. Stopping even known infringers is not, moreover, technically easy. Given the small prospect they have of catching repeat offenders, copyright porn trolls have to resort to dire threats of statutory damages and the prospect of public embarrassment if they want to get any traction in the effort to end infringement. There is no self-help remedy akin to the fences and locks that owners of tangible property employ as their first and typically sufficient line of defense.

The shame suffered by those accused by copyright porn trolls represents yet another kind of transaction cost. To the extent that consumers do not want to be associated with buying or licensing the use of a pornographic work, legal exchanges grow more and more costly. At some limit, for some consumers, shame can render transaction costs infinite. It all adds up to yet another reason to question the propriety of claiming that copyright porn trolls act in defense of property rights.

Those who hold, or directly benefit from, taxi medallions face not only high enforcement costs but also the discouraging effects that result from their collective enjoyment of the exclusive right to convey taxi passengers. The long history of unlicensed taxis demonstrates that they are not easy to catch in any event. The advent of networked transport services makes it even more difficult to identify when a passenger has hailed a ride and, if so, whether a taxi should have done the job. And as with copyright, there are no effective self-help remedies. The spasms of violence exhibited by frustrated taxi drivers against their new competitors reflect not a reasoned long-term strategy for defending their privileges but a mere atavistic release.

On top of those problems, individual medallion holders or drivers have only diluted incentives to enforce their industry-wide privilege, since the benefits of the effort largely accrue to other parties. Despite rioting and attacks on competitors' vehicles, the taxi industry thus largely relies on public officials to police the boundaries of the taxi medallion's exclusive market. But this mechanism suffers its own incentive

problem—one that results from the agent-principal relationship existing between law enforcement officers and the taxi medallion holders they defend.<sup>50</sup> And, of course, law enforcement officers find it difficult to catch unlicensed taxi services even when they feel sufficiently motivated to try.

Yet another kind of transaction cost, one deeply rooted in human psychology and particularly associated with property claims, also deserves mention: the endowment effect.<sup>51</sup> Because it causes those who think they own something to systematically overvalue it, the endowment effect threatens to raise transaction costs in goods—such as copyrights or taxi medallions—that the law imbues with property-like attributes. Far from a mere theoretical concern, this effect has been observed in the laboratory under controlled conditions.<sup>52</sup> We should thus expect that the more someone holding a copyright or taxi medallion regards it as a vested property right rather than as a contingent privilege, the endowment effect will skew their assessment of its value and raise the costs of transacting with them.

Scholars of law and economics have long observed that when high transaction costs inhibit voluntary transactions, property rules offer a less efficient mechanism for allocating rights to an entitlement than liability rules do.<sup>53</sup> The law thus ordinarily empowers property owners to enforce their rights through injunctive relief while limiting the victims of negligence—who cannot very well know beforehand with whom they should bargain—to damages. The high transaction costs associated with the enforcement of Internet porn copyrights and taxi medallions suggests the wisdom of adopting a similar policy. We should in other words stop treating those copyrights as worthy of the same protections afforded to property rights and instead remedy them only by payment of damages.<sup>54</sup>

In the case of copyright, the problem goes beyond a privilege endowed with legal remedies *equal* to those protecting property.

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<sup>50</sup> See generally Gary J. Miller, *The Political Evolution of Principal-Agent Models*, 8 ANN. REV. POL. SCI. 203, 205–06 (2005) (defining the “canonical” principal-agent model economists have developed).

<sup>51</sup> See Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 194–97 (1991), available at <http://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.5.1.193>.

<sup>52</sup> See generally Christopher Buccafusco & Christopher Sprigman, *Valuing Intellectual Property: An Experiment*, 96 CORNELL L. REV. 1 (2010).

<sup>53</sup> See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

<sup>54</sup> Other scholars have already suggested this approach to intellectual property, albeit for reasons grounded not in economic efficiency but in the First Amendment. See Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998).

After all, it would not prove so troubling if copyright porn trolls sought only injunctions against infringement. Rather, the problem comes from copyright holders invoking powers even *greater* than those that the common law affords property owners. As detailed above, copyright porn trolls need not show that the defendants they accuse of infringement have inflicted any damages or reaped any unjust profits. Rather, the availability of statutory damages allows copyright porn trolls to go straight to threatening with liability of up to \$150,000 for each work allegedly infringed.<sup>55</sup> A sum that large—or even one considerably smaller—would represent hundreds of times more than the actual losses suffered by the copyright holder.

Some scholars have argued that so extreme a result violates the Eighth Amendment's edict against excessive fines.<sup>56</sup> Courts have not smiled on such arguments, however, reasoning that the fines referenced in the Eighth Amendment must go to government coffers, whereas statutory damages go to private ones.<sup>57</sup> Regardless, it remains indisputable that statutory damages far exceed even the most generous monetary relief that the common law affords to property owners. Here, copyright not only pretends to the status of property—it exceeds it.

#### CONCLUSION: TOWARD A JURISPRUDENCE OF PRIVILEGES

Copyright porn trolls and wasting taxi medallions alike demonstrate how public policy can suffer when statutory privileges pretend to the status of property rights: mass extortion and violence in streets. At root, these problems arise because both Internet porn copyrights and taxi medallions suffer from very high enforcement costs. This makes them poor candidates for the title of "property." We would do better to recognize them as statutory privileges.

What follows from recognizing copyrights and taxi medallions as statutory privileges? It means we should not safeguard them with remedies as powerful as those that protect traditional forms of property. *Goldberg* teaches that statutory privileges merit only due process protections under the

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<sup>55</sup> 17 U.S.C. § 504(c) (2012).

<sup>56</sup> See, e.g., Stephan Kinsella, *Copyright Censorship Versus Free Speech and Human Rights; Excessive Fines and the Eighth Amendment*, CENTER FOR STUDY INNOVATIVE FREEDOM (Sept. 6, 2011), <http://c4sif.org/2011/09/copyright-censorship-versus-free-speech-and-human-rights-excessive-fines-and-the-eighth-amendment/>.

<sup>57</sup> See, e.g., *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 586 (6th Cir. 2007); see also Jeffrey Stavroff, Comment, *Damages in Dissonance: The "Shocking" Penalty for Illegal Music File-Sharing*, 39 CAP. U. L. REV. 659, 686–87 (2011) (reviewing case law).

Fourteenth Amendment—not the full panoply of rights that common law property enjoys in the Fourteenth Amendment and elsewhere in the Constitution. Sound economic theory suggests that indefensible and ill-defined privileges, such as copyrights in Internet porn and the taxi medallions facing networked competition, deserve neither injunctive remedies better suited for protecting property nor statutory damages far in excess of those that the common law would allow.

More than just those particular answers to the question of what to do about copyright porn trolls and wasting taxi medallions, this Paper has sought to contribute to the jurisprudence of privilege. Courts and commentators too often categorize statutory entitlements like copyrights and taxi medallions as “property,” apparently convinced by features such as exclusivity and transferability, undaunted by the absence of any pedigree from natural rights or the common law, and unable to think of any more fitting label. It proves especially puzzling and distressing that self-avowed friends of property, such as some conservatives, classical liberals, and libertarians, would abuse the good name of property in such a fashion. They should instead safeguard “property” against the confusion that will follow if it comes to refer not to a traditional, natural, common law right but to a bestiary of modern, artificial, statutory privileges, such as welfare benefits, farm subsidies, copyrights, and taxi medallions.

In calling for further development of the jurisprudence of privilege, this Paper proposes not something totally unknown, but something too often forgotten. As Adam Mossoff has ably documented, the law contained “omnipresent references to patents as privileges in the late eighteenth and early nineteenth centuries.”<sup>58</sup> We could use more of that sort of talk today. Patents, copyrights, and other types of IP too often get classified as, well, intellectual *property*. We must speak clearly about these complicated and abstract matters if we want to think clearly about them. Good jurisprudence demands nothing less. On this point, we could learn something from our predecessors.

In the long term, we should aim for courts and commentators to appreciate that sometimes “privilege” offers a better description of many legal entitlements than “property” does. The latter term has been overextended to subjects that possess only some of the attributes of property, such as exclusivity or

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<sup>58</sup> Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. 953, 969 (2007).

alienability. Property consists of more than just a few functional features, however. It will always have roots in nature, custom, and the common law that statutory privileges, whatever their merits, of necessity lack. And in particular instances, as this Paper has documented with regard to copyright porn trolls and wasting taxi medallions, the remedies enjoyed by property owners will prove too powerful if put in the service of poorly defined and poorly defended privileges.