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In Privity With the Public Domain: The Standing Doctrine, the Public Interest, and Intellectual Property

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IN PRIVITY WITH THE PUBLIC DOMAIN: THE STANDING DOCTRINE, THE PUBLIC INTEREST, AND INTELLECTUAL PROPERTY

Russell W. Jacobs†

Abstract

*This Article explores two recent Supreme Court cases—*Association of Molecular Pathology v. Myriad Genetics, Inc. *and* Golan v. Holder*—and other intellectual property litigation in the context of the standing doctrine and the public interest.*

These cases present significant public policy questions, but the adversarial nature of the courts makes them ill-equipped to consider the multiple public interests and multiple stakeholder perspectives. As a result, adjudication of these cases in the courts results in propertization of the intellectual property interests, the exclusion of non-parties from the formation of policy, and the exhaustion of any further policy debate after the court decision.

This Article discusses these effects and proposes a public-comment mechanism to mitigate the negative consequences.

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INTRODUCTION

Out of all the patients, researchers, advocacy groups, and biomedical firms interested in expanding the uses of the BRCA1 and BRCA2 genetic sequences for cancer screening and research, only twenty filed suit against the owner of the patents in the gene sequences.[1] Out of those twenty plaintiffs, only Doctor Harry Ostrer survived the defendants' challenge to standing, and thus he alone represented all of those interests in the litigation in which the Supreme Court eventually invalidated the patents in the isolated gene sequences.[2] Doctor Ostrer's case represents an emerging type of intellectual property litigation that departs from the typical model of a rights owner suing an infringer. In such public interest impact litigation, the plaintiffs do not assert a private right against an alleged infringer. Instead, they claim to protect the public domain from encroachment by private rights holders, asserting that they stand, in essence, in privity with the public domain. They challenge not just one patent or copyright, but intellectual property protections which apply broadly across categories of material.

These types of cases raise important policy questions about the nature of the public interest in intellectual property, who may properly advocate for the public interest, and the proper venues for defining the public interest in intellectual property. The standing doctrine—the jurisdictional standard that determines who may bring a case to court—does not do a particularly good job sorting out these issues for public interest intellectual property cases. This Article argues that adjudication of these cases in the courts has three effects: (1) propertization of intellectual property rights (the *private capture of public interests*), (2) two-party adversarial conception of the policy issues (the *binary tendency*), and (3) exhaustion of policy debate (the *finality tendency*).

The *private capture of public interests* arises when either the owner of intellectual property or users of that intellectual property seek to exercise total control of the protected material. The rights holder may attempt to enforce an expansive view of its rights. Stakeholders meanwhile may attempt to wrest control of those rights away from the owner, for example through public interest intellectual property litigation. In both cases, the actors propertize the rights.

1. Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107, 2115 n.3 (2013) (affirming standing for Doctor Ostrer).

2. *Id.* (holding isolated gene sequences ineligible for patent protection under 35 U.S.C.A. § 101 (West 2013)).

Each side claims an interest in the material and wants to capture complete ownership of that interest to the exclusion of others' interests in the material. This approach to intellectual property prioritizes the individual interest in the material (i.e., the property value) at the expense of the purpose of intellectual property to benefit the entire public.

The *binary tendency* refers to the dynamics that result from deciding multi-stakeholder policy decisions in courts structured to resolve conflicts between adversaries. In public interest intellectual property cases, the court may either uphold the rights holder's exclusive interest in its patent or copyright or it may find that intellectual property invalid—it does not have the authority to set a new policy outside of these two options. Thus, when courts hear cases, the binary relationship between the parties excludes introduction of arguments about the broader implications of the decision on the public interest. Public interest intellectual property cases typically implicate four imperfectly aligned interests: (1) an individual litigant's desire to protect its private rights, (2) an adversary's desire to narrow the scope of those alleged rights, (3) the macro-desire to build a large public domain from which the public may pluck, borrow, and revise, and (4) the push for a smaller public domain with stronger private rights to encourage the production of more material for the public to enjoy.[3] In the adversarial system, other stakeholders, such as competitors and consumers, do not have the opportunity to present their inputs. Courts do not issue their decisions based on the perspectives of these non-parties, instead allocating control of the property rights to the rights holder or to the challenger.

The finality tendency refers to the likelihood that a court decision will offer the final word on intellectual property policy questions, because neither of the other branches will take up the issues raised in the litigation. This occurs most strikingly when a court dismisses a case for lack of standing. In such a case, the issues raised in that litigation remain unresolved by any forum.[4] The courts also finally dispose of policy questions when they issue a decision about the

3. *C.f.* Authors Guild v. Google, Inc., 721 F.3d 132, 134 (2d Cir. 2013) (where some copyright holders would benefit from a project to mass digitize books, while other copyright holders would disapprove of those efforts because of the potential loss of revenue).

4. *See, e.g.*, Aharonian v. Gonzales, 77 U.S.P.Q.2d 1449, 1454 (N.D. Cal. 2006) (granting motion to dismiss claims challenging the validity and scope of copyright protection in software source code). Congress did not address the criticism that copyright protections should not extend to source code.

constitutional or statutory soundness of a protection, since the legislative and executive branches tend not to review the policy issues raised in public interest intellectual property litigation.[5] Although Congress could respond to a court decision by enacting legislation that changed the policy within the confines of the decision's parameters, the legislature's inaction results in the court making the final policy decision.

This Article discusses patent and copyright cases that fit the model of public interest intellectual property litigation, including two recent Supreme Court cases.[6] In *Association of Molecular Pathology v. United States Patent and Trademark Office* (*Myriad*), the Supreme Court agreed with Doctor Ostrer's challenge to the validity of patents for isolated BRCA1 and BRCA2 gene sequences, on the basis that no isolated gene sequences should qualify for patent protection.[7] In *Golan v. Holder* (*Golan*), the Supreme Court upheld the constitutionality of the Uruguay Round Agreements Act, which reinstated copyrights for certain foreign works whose terms had already lapsed under prior law.[8]

Part I of this Article sets forth the concepts of intellectual property monopolies, the public domain, and the public interest. Part II discusses the role of standing in public interest intellectual property litigation, exploring the impacts of standing on the formation of intellectual property public policy. Part III proposes a public-input mechanism in the executive and legislative branches as a way to mitigate the challenges of attempting to formulate intellectual property laws through the courts.

5. *E.g.*, Eldred v. Ashcroft, 537 U.S. 186, 222 (2003) (upholding constitutionality of Copyright Term Extension Act). Subsequent to the litigation, Congress did not address the policy questions raised in litigation about the usefulness of the duration of copyright terms.

6. Trademark cases involving the public interest fall outside the scope of this Article, since the public interest trademark cases have arisen under unique rules wherein a party claiming that it represents a portion of the public that find a term disparaging or scandalous has standing to object to registration of that term as a trademark. Lanham Act §§ 2(a), 13, 14, 15 U.S.C. §§ 1052(a), 1063, 1064 (2013); Ritchie v. Simpson, 670 F.2d 1024, 1026-28 (C.C.P.A. 1982).

7. Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107, 2113 (2013) (holding that isolated gene sequences do not qualify for patent protection).

8. Golan v. Holder, 132 S. Ct. 873, 878 (2012) (upholding the constitutionality of provision reinstating copyright protection for certain foreign works that had fallen into the public domain).

I. INTELLECTUAL PROPERTY IN THE PUBLIC INTEREST

A. Private and Public Rights

Copyright law and patent law recognize that certain materials should qualify for private monopolies that allow the owner to exclude the public from unauthorized uses. Patent law grants the patent owner the right to exclude others from making, using, or selling a protected invention.[9] While patents protect inventions, copyrights grant monopolies in creative works, giving the proprietor the right, inter alia, to exclude others from copying a protected work.[10]

In contrast to material protected by copyright and patent law, the public domain consists of the entire range of information available for use by anyone after setting aside those privileged uses of information for which some exclusive rights exist.[11] Everyone may take material from the public domain and adapt it to create new material, thereby continuing the creative cycle through the mining, appropriation, and recombination of the creative fruits of the collective public.[12]

The public domain encompasses material in two broad categories: material ineligible for protection and material whose term of protection has expired. In the first category falls material not covered by an intellectual property right. Material that does not meet the statutory requirements of usefulness, novelty, and non-obviousness may not receive patent protection,[13] nor may abstract ideas, facts, theorems, scientific principles, indispensable expressions, laws of nature, or natural phenomena.[14] Copyright law protections do

9. 35 U.S.C. § 271(a) (2012) ("[W]hoever without authority makes . . . any patented invention . . . infringes the patent."); *Myriad Genetics*, 133 S. Ct. at 2113 (2013) (recognizing exclusive rights that patents would confer on patentee to exclude others from isolating particular gene sequences and creating synthetic gene sequences); Sidney A. Diamond, *The Public Interest and the Trademark System*, 62 J. PAT. OFF. SOC'Y 528, 532 (1980) (discussing the exclusive rights in patents).

10. 17 U.S.C. §§ 102(a), 106 (2012) (setting forth the various creative works eligible for copyright protection, such as literary works, musical works, dramatic works, choreographic works, and the exclusive rights the owner holds in such works); Diamond, *supra* note 9, at 532 ("A copyright proprietor can prevent anyone else from copying his work, either directly or in the form of a translation or adaptation.").

11. Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 362 (1999) (discussing permitted uses of information in the public domain).

12. Tyler T. Ochoa, *Origins and Meaning of the Public Domain*, 28 U. DAYTON L. REV. 215, 261-62 (2002) ("A property interest gives each member of the public an equal right to adapt and transform the material in question, thus promoting creativity.").

13. 35 U.S.C. § 101 (2012).

14. Diamond v. Chakrabarty, 447 U.S. 303, 309 (1980) (discussing exclusions from

not extend to facts, unoriginal material or elements, clichés, material indispensable to an idea's expression, material not fixed in a tangible medium of expression, and ideas themselves.[15] The second category includes material once protected by an intellectual property right, but no longer. Patent and copyright terms expire after fixed periods; when those terms end the materials subject to intellectual property protection enter the public domain.[16]

B. A Balancing of Rights and Incentives

Patent law and copyright law share a common theoretical and Constitutional basis. The Patents and Copyright Clause of the U.S. Constitution grants Congress the following authority: "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."[17] This clause recognizes that information goods often carry high costs of production, but absent intellectual property rights, users may exploit and share that information quite cheaply.[18] The utilitarian approach to patent and copyright law, acknowledged by the founders of the nation, Congress and the Supreme Court since the beginning of the Republic,[19] suggests that

patent protection); Ochoa, *supra* note 12, at 219 (discussing the multiple "public domains"); Eileen M. Kane, *Patent Ineligibility: Maintaining a Scientific Public Domain*, 80 ST. JOHN'S L.R. 519, 543 (2000) (discussing scientific material that forms the public domain); Paul J. Heald and Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1166 (2000) (noting various types of materials to which the public has always had free access).

15. Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPYRIGHT SOC'Y 137, 164-65 (1993) (stating that copyright protection does not extend to unoriginal material, material not fixed in a tangible medium of expression, and ideas not entitled to copyright protection); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990) (arguing that ideas are generally so important to the public that they must live in the public domain).

16. Ochoa, *supra* note 12, at 217 ("[A] large portion of the public domain consists of inventions and works that were formerly subject to patent and copyright protection, but are no longer.").

17. U.S. CONST. art. I, § 8, cl. 8.

18. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989) (discussing the "public good" nature of intellectual property).

19. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, 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 other arts."); Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 816 (1944) ("A patent by its very nature is affected with a public interest. As recognized by the Constitution, it is a special privilege designed to serve the public purpose of promoting the Progress of Science and useful

granting a limited monopoly that gives creators the right to exclude users who do not pay for access to the work will encourage the creation of new material for the public to enjoy.[20] Both the public and the creator benefit—the public from the new materials and the creator from the exclusive rights to commercial development and distribution.[21] The production of new works serves the public benefit of furthering human knowledge and learning through the production of new material.[22] While this monopoly exists the creator may sell the new material free from competition, helping to assure the recovery of the costs of production.[23] The incentives in intellectual

Arts. At the same time, a patent is an exception to the general rule against monopolies and to the right to access to a free and open market."); H.R. REP. NO. 2222, at 7 (1909) (stating that copyright under the Constitution "is not based upon any natural rights that the author has in his writings . . . but upon the ground that the welfare of the public will be served. . . . [T]he policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention, to give some bonus to authors and inventors."); Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L.R. 366, 427 (2004) ("An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned."); Michael D. Davis, *The Patenting of Products of Nature*, 21 RUTGERS COMPUTER & TECH. L.J. 293, 298-99 (1995) (stating that the first patent statute set forth a term of fourteen years—equivalent to the duration of two apprenticeships—to incentivize invention); James Iredell, *Marcus IV*, NORFOLK & PORTSMOUTH J. (Mar. 1788), *reprinted in* 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 379, 382 (John P. Kaminski & Gaspare J. Saladino eds., 1986) (arguing in favor of ratification of the Constitution, and pointing out that the Copyright Clause would "give birth to many excellent writings which would otherwise have never appeared").

20. Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107, 2116 (2013) (tying up the tools of innovation by granting patents to works of nature "would be at odds with the very point of patents, which exist to promote creation"); Golan v. Holder, 132 S. Ct. 873, 889 (2012) ("On the one hand, [a monopoly] can encourage production of new works. In the absence of copyright protection, anyone might freely copy the products of an author's creative labor, appropriating the benefits without incurring the nonrepeatable costs of creation, thereby deterring authors from exerting themselves in the first place. That philosophy understands copyright's grants of limited monopoly privileges to authors as private benefits that are conferred for a public reason—to elicit new creation. The provision of incentives for the creation of new works is surely an essential means to advance the spread of knowledge and learning."); Landes and Posner, *supra* note 18, at 332 (stating that without copyright protection, "[t]here would be increased incentives to create faddish, ephemeral, and otherwise transitory works because the gains from being the first in the market for such works would be likely to exceed the losses from absence of copyright protection").

21. Bonito Boats, Inc. v Thunder Craft Boats, Inc., 489 U.S. 141, 146 (1989) ("The Patent Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the Progress of Science and useful Arts.").

22. Graham v. John Deere Co., 383 U.S. 1, 9 (1966) ("Only inventions and discoveries which furthered human knowledge, and were new and useful, justified the special inducement of a limited private monopoly.").

23. The Authors Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445 (S.D.N.Y. 2012)

property exclusive rights encourage the production of material that the public may enjoy and, when the materials enter the public domain, the public gains the benefit of unrestricted access to this material, with the freedom to adapt and recombine material from the public domain to create new works and inventions.[24]

Justifications for copyright and patent protections most often rely on the utilitarian approach, but a natural rights theory sometimes provides a secondary basis for these bodies of law.[25] This theory posits that the laborer has rights in the fruits of her labor.[26] However, the grant of rights must comport with the "enough and as good" principle, according to which the author's monopoly may not deprive the public of the right to enjoy the common heritage which the author mined to produce the new work.[27]

James Madison opined that since the creation of new inventions benefits both the inventors and the public, "[t]he public good fully coincides in both cases with the claims of individuals."[28] However, achieving this balance can prove to be difficult. Under the utilitarian approach, copyright and patent law must balance the individual's incentive to create against the public's desire for access to new information.[29] The narrow tailoring of the intellectual property

(characterizing "[t]he basic purpose of copyrights" as "[providing] a limited monopoly for authors primarily to encourage creativity"); Dallon, *supra* note 19, at 367-68 (stating that a monopoly provides an incentive to create works and facilitates the recovery of the costs of creation).

24. Wendy J. Gordon, *The Constitutionality of Copyright Term Extension: How Long is Too Long?*, 18 CARDOZO ARTS & ENT. L.J. 651, 683 (2000) ("The public's right is preserved in its ability to make use of the common heritage."); Litman, *supra* note 15, at 965 ("One traditional justification for the public domain is that the public domain is the public's price for the grant of a copyright. The public is said to grant the copyright as an incentive to persuade the author to create and publish original works that will enrich the public domain.").

25. *Golan*, 132 S. Ct. at 901-02 (acknowledging "natural rights" view as a basis for copyright protection); *Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; and Copyright Per Program Licenses: Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 105th Cong. 5 (1997) ("The overarching premise of copyright law is that those who enrich our culture with the fruits of their intellect are no less entitled to be compensated than those who create more tangible products, be they skyscrapers or computers or five-star meals.").

26. Stephen Breyer, *The Uneasy Case for Copyrights*, 84 HARVARD L. REV. 281, 284 (1970) ("The theory that authors have a natural right to the fruit of their labors is an ancient one.").

27. Gordon, *supra* note 24, at 683; Litman, *supra* note 15, at 965 ("When individual authors claim that they are entitled to incentives that would impoverish the milieu in which other authors must also work, we must guard against protecting authors at the expense of the enterprise of authorship.").

28. THE FEDERALIST NO. 43, at 279 (James Madison) (Modern Library ed., 1941).

29. *Golan*, 132 S. Ct. at 900 (2012) (finding that in consideration of the need to grant to

protections should foment creative production without privatizing too much information or keeping it private for too long.[30]

One may characterize this balancing as between public and private interests, as just discussed, or as between multiple public interests. The public has an interest in enjoying free access to information—and therefore weak private rights.[31] But the public also has an interest in the production of new information goods for it to enjoy and mine for the creation of even newer material, which it would want to protect with strong private rights.[32] The public consists of individuals, all of whom have the potential to both create and consume new information goods and therefore seek equilibrium between these interests.[33]

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the creator exclusive rights to encourage the production of new material versus the potential costs for consumers arising from a monopoly, "the original British copyright statute, the Constitution's Framers, and our case law all have recognized copyright's resulting and necessary call for balance"); Robert N. Klieger, *Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection*, 58 U. PITT. L. REV. 789, 864 (1996) ("Patent and copyright law balance the incentive for innovation and expression against society's interest in the efficient dissemination of inventions and expressive works.").

30. Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107, 2116 (2013) (stating that tying up the tools of innovation by granting patents to works of nature "would be at odds with the very point of patents, which exist to promote creation"); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1213 (1996) ("[C]opyright is justifiable only to the extent that copyright protection is necessary to induce additional creative activity."); Edmund W. Kitch, *Graham v. John Deere Co.: New Standards for Patents*, 1966 SUP. CT. REV. 293, 301 (1966) ("[A] patent should not be granted for an innovation unless the innovation would have been unlikely to have been developed absent the prospect of a patent.").

31. Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain (Part II)*, 18 Colum.-VLA J.L. & Arts 191, 266 (1994) ("This is the central problem in intellectual property law: privatizing information reduces competition and impedes widespread uses of such information.").

32. Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain (Part I)*, 18 Colum.-VLA J.L. & Arts 1, 21 (1994) ("However, if social costs (less information consumption) from commodification start appearing to outweigh benefits of increased information production, the specter of the information-poor world arises again in a viciously circular fashion, pushing for the necessity of *more* incentives to produce *more*, and so on.") (emphasis in original).

33. Authors Guild v. Google, Inc., 721 F.3d 132, 134 (2d Cir. 2013) (observing that some holders of copyrights in books would approve of an effort to mass digitize those books, and therefore facilitate broader access to a larger number of works, while some opposed those efforts because of the loss of revenue from and control over their own works); Gordon, *supra* note 24, at 683 ("In short, the authors' rights perspective ends up saying that the copyright statute must, to some extent, serve the public interest, which includes the interest of future creators, as well as the public.").

C. The Anti-Enclosure Movement

In recent years, critics of a perceived expansion of intellectual property rights have grown more vocal.[34] This camp declares a crisis: "[T]here are too many IP rights; they are too strong; 'something' has to be done."[35] These criticisms perceive multiple attacks on the baseline of a strong public domain and limited exclusive rights.[36] Material formerly believed to belong in the commons has now become privatized and subject to new or expanded property rights.[37] For copyrights, critics have focused on term extensions.[38] The criticism against expansion of rights in the field of patents has focused on the granting of patents for "ideas," such as business methods and algorithms.[39] The criticisms extend to patent rights for scientific knowledge, research tools, and, in particular, biological materials like DNA gene sequences.[40] Such genetic materials form the "common heritage of humankind" and subjecting these materials to private property rights introduces market forces which may have disastrous consequences.[41]

To this anti-enclosure camp, the expansions suggest that the field of intellectual property has come to over-emphasize the "property" aspect of the rights, thereby encouraging a desire to "own" and to privatize as much material as possible.[42] This trend has resulted in a race to claim intellectual property protections as broadly and as

34. *E.g.*, James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & CONTEMP. PROBS. 33, 38 (2003) (citations omitted) (noting the "remarkable" expansion of intellectual property rights and that the limits on those rights are "under attack").

35. Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHICAGO L. REV. 183, 183 (2004).

36. Boyle, *supra* note 34, at 39 (citations omitted) (lamenting the removal of facts and ideas from the public domain); Aoki, *supra* note 32, at 6-7 ("These trends have increasingly turned elements of what had heretofore been considered common culture, ideas and information into forms of private intellectual property.").

37. Boyle, *supra* note 34, at 37 (discussing the expansion of rights).

38. Gordon, *supra* note 24, at 676-77 ("[A]n instrumentalist is likely to doubt that incentives will be significantly enhanced by the extra twenty years of copyright term.").

39. Boyle, *supra* note 34, at 38 (2003) (citations omitted) (discussing business methods patents); Kane, *supra* note 14, at 521-22 (discussing patents in algorithms).

40. Eileen M. Kane, *Splitting the Gene: DNA Patents and the Genetic Code*, 71 TENN. L. REV. 707, 725 (2004) (stating that such commodification leads to debates on "the economic valuation of living materials").

41. Boyle, *supra* note 34, at 37 (2003) (holding that the human genome "should not and perhaps in some sense *cannot* be owned").

42. Benkler, *supra* note 11, at 355 (discussing propertization).

quickly as possible.[43]

Even if the rights expansion resulted in increased production of new material (a point in dispute), the broader rights might impose far greater social costs in the form of restricted circulation and diminished competition.[44] The public suffers more restrictions on the use of existing works, which remain under private ownership outside the public domain for longer.[45] Production of new information becomes more expensive or impracticable because of the increased number of fragments of existing information subject to private rights, which carry license fees, and the challenges in locating the rights owners for material created decades earlier.[46] The author or inventor faces a paradox because he wants strong rights for his own works, but weak rights for the material from which he borrows to create the new material.[47] Noting that something must be done, some critics have turned to the courts.

43. Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698, 698-99 (1998) ("[N]obody wants to be the last one left dedicating findings to the public domain . . . .").

44. Merges, *supra* note 35, at 199 (stating that society benefits from stronger rights only if the assets created as a result of those rights outweigh the overall costs); Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 103 (2001) ("[I]ncreases in the scope and reach of property rights benefit commercial producers who sell information goods . . . ."); Jane Ginsburg, *The Constitutionality of Copyright Term Extension: How Long is Too Long?*, 18 CARDOZO ARTS & ENT. L.J. 651,698 (2000) (reasoning that changing the term length probably has little incremental value to most authors).

45. Megan M. La Belle, *Standing to Sue in the* Myriad Genetics *Case*, 2 CAL. L. REV. CIR. 68, 85 (2011) ("[W]hen private parties invalidate bad patents the public as a whole benefits from robust competition, increased consumer choice, and lower prices."); Heller & Eisenberg, *supra* note 43, at 698 (describing the "tragedy of the anticommons"—that is, an underuse of a resource resulting from the private rights that exclude uses by others); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guaranties of Free Speech and the Press?*, 17 U.C.L.A. L. REV. 1180, 1194-95 (1970) (questioning the benefits of stronger copyright protections).

46. Kane, *supra* note 40, at 719 (noting the chilling effect of expanded patent rights on downstream genetic research); Landes & Posner, *supra* note 18, at 343 ("Every potential increase of protection, however, also raises the costs of, or reduces access to, the raw material from which you might have built those products."); Breyer, *supra* note 26, at 326 (highlighting difficulties in locating rights holders).

47. Landes & Posner, *supra* note 18, at 335 ("Some copyright protection is necessary to generate the incentives to incur the costs of creating easily copied works, but too much protection can raise the costs of creation for subsequent authors to the point where those authors cannot cover them even though they have complete copyright protection for their own originality.").

II. STANDING AND THE PUBLIC INTEREST

A. The Doctrine of Standing

Before the courts will consider the merits of any case, including public interest intellectual property cases, the plaintiffs may have to withstand challenges that they do not have the right to bring the lawsuit. The doctrine of "standing" limits the types of disputes that a federal court has the authority to consider. Under Article III of the Constitution, the federal courts may only decide "cases" or "controversies."[48] The U.S. Supreme Court has set forth a three-part test to determine if a litigant has alleged a "case" or "controversy." First, the plaintiff must allege that it suffered an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual and imminent, not conjectural or hypothetical."[49] Second, a causal connection must exist between the injury and the challenged action.[50] Third, the plaintiff's requested relief must redress the injury.[51] Even if a matter passes this three-element test, a federal court may decline to grant standing based on prudential concerns, such as when a litigant asserts the rights of third parties or raises general social grievances.[52]

The standing doctrine serves multiple purposes.[53] First, the doctrine ensures true adversity between the litigants, each with a stake in winning.[54] Second, such litigants have an incentive to effectively

48. U.S. CONST. art. III, § 2 ("The judicial Power shall extend to . . . Cases . . . [and] Controversies."); Hollingsworth v. Perry, 133 S. Ct. 2652, 2659 (2013) ("Federal courts have authority under the Constitution to answer such questions only if necessary to do so in the course of deciding an actual 'case' or 'controversy.'").

49. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations and punctuation omitted); *accord* Perry, 133 S. Ct. at 2659 ("That party must also have 'standing,' which requires, among other things, that it have suffered a 'concrete and particularized injury.'").

50. *Perry*, 133 S. Ct. at 2661 (holding that the litigant must establish a "fairly traceable" causation between the injury and the conduct).

51. *Id.* (requiring that requested relief appear likely to redress the injury); Gene R. Nichol Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 308 (2002) ("The articulated Article III injury standard thus demands concrete and individualized harm, assuring that actual, consequential benefit accrues to the plaintiff from a favorable decision.").

52. *Perry*, 133 S. Ct. at 2662 ("We have repeatedly held that such a 'generalized grievance,' no matter how sincere, is insufficient to confer standing."); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222-23 (1988) ("If a plaintiff can show sufficient injury to satisfy Article III, he must also satisfy prudential concerns about, for example, whether he should be able to assert the rights of someone else, or whether he should be able to litigate generalized social grievances.").

53. Fletcher, *supra* note 52, at 222 (setting forth purposes of standing).

54. Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 461, 469 (2008)

advocate their positions and sharpen the issues before the court.[55] Third, the people most concerned with the outcome of the dispute will have the opportunity to litigate the questions at issue.[56] Fourth, the presentation of a concrete case by parties with an actual stake in the litigation informs the court of the practical consequences of its decision.[57] Fifth, confining the court's jurisdiction to "concrete and particularized" disputes prevents the anti-majoritarian federal courts from taking over the policy-making role of the popularly elected executive and legislative branches.[58] Sixth, the standing doctrine allocates the scarce resources of the federal courts to disputes between parties who have a real stake in the matter.[59]

These general standing rules apply to intellectual property cases as well. In *MedImmune, Inc. v. Genentech, Inc.*, not a public-interest case, but rather a more traditional two-party dispute, the Supreme Court provided guidance on the standards of the standing doctrine specifically applicable to cases seeking a declaratory judgment

("A dispute that satisfies Article III thus has at least two sides, each of which has a stake in winning, and the doctrine of standing ensures that the plaintiff has such a stake.").

55. Baker v. Carr, 369 U.S. 186, 204 (1962) (finding that "the gist of the question of standing" is whether "the appellants [have] alleged such a personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions").

56. Lea Brilmayer, *The Jurisprudence of Article III*, 93 HARV. L. REV. 297, 310 (1979) ("The case or controversy requirement guarantees that the individuals most affected by the challenged activity will have a role in the challenge. This guarantee should be seen as a minimal element of the legitimacy of a legal system which imposes legal burdens upon its members. At some point in the legal process the affected individuals should have their day in court.").

57. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (holding that the standing doctrine "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action"); Eugene Kontorovich, *What Standing Is Good For*, 93 VIR. L. REV. 1663, 1672 (2007) ("The 'abstract' injury shunned by standing doctrine may lead to an 'abstract' presentation of the issues involved, while courts are better suited to make incremental, fact-specific determinations.").

58. Elliott, *supra* note 54, at 462 ("Cases are sorted on a rough democratic theory: if an injury is shared by a large group of people, some cases suggest, such a group can and should take its problem to the legislature or the executive branch, not the courts."); Fletcher, *supra* note 52, at 222 (1988) ("The purposes include . . . preventing the anti-majoritarian federal judiciary from usurping the policy-making functions of the popularly elected branches.").

59. Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 191 (2000) ("Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake."); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 891 (1983) ("Standing, in other words, is only meant to assure that the courts can do their work well, and not to assure that they keep out of affairs better left to the other branches.").

regarding the scope of rights in a patent: "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[60]

The public interest cases discussed in this article follow this standing regime, and application of the standing rules in these circumstances yields the three consequences of the private capture of public interests, binary tendency, and the finality tendency. Applying the *MedImmune* test in *Association for Molecular Pathology v. USPTO*, the Supreme Court upheld the standing of one of the plaintiffs who challenged the validity of the two patents for the BRCA1 and BRCA2 gene sequences on the basis that no isolated gene sequences should qualify for patent protection.[61] Doctor Ostrer contended that he would conduct testing on the BRCA1 and BRCA2 gene sequences, except that Myriad Genetics, the patent owner, threatened legal action.[62]

Emblematic of the *binary tendency*, the courts did not grant standing to any of the other twenty plaintiffs—cancer patients, doctors, genetics researchers, and medical organizations—because either they did not have immediate plans to undertake allegedly infringing activities (despite the declarations of two other researchers who said they would undertake the allegedly infringing testing but for Myriad's general threats) or Myriad had not threatened legal action against them specifically.[63] The remaining parties in the litigation engaged in the *private capture of public interests*, fighting for control of the genetic material, with the Supreme Court ultimately invalidating patents in the naturally occurring genetic sequences, but upholding patents in synthetic gene sequences and diagnostic testing.[64]

Standing has worked out unevenly in other recent public interest intellectual property cases. In *Organic Seed Growers and Trade*

60. MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007) (finding that a patent licensee has standing to challenge the validity of the patent even without stopping payment of the license fee).

61. Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107, 2115 n.3 (2013) (recognizing right that patent, if valid, would confer on patentee to exclude others from isolating particular gene sequences and creating synthetic gene sequences).

62. Ass'n for Molecular Pathology v. USPTO, 689 F.3d 1302, 1318 (Fed. Cir. 2012), *aff'd in relevant part sub nom*. *Myriad Genetics*, 133 S. Ct. 2107, 2115 n.3 (2013).

63. *Id.*

64. *Id.*

Ass'n v. Monsanto Corp., the Court of Appeals for the Federal Circuit agreed with the lower court that plaintiff organic farmers did not have standing to seek a declaratory judgment invalidating defendant's seed patents.[65] These farmers sought to invalidate defendant's seed patents, but more broadly, all patents for transgenic seeds, on the basis that patenting transgenic seeds lead to effects "injurious to the well-being, good policy, or sound morals of society."[66] Although the defendant had initiated a large number of suits against other farmers, those disputes differed factually from the one before the court; the *Organic Seed* plaintiffs did not intend to use the seeds in question and the defendant had publicly stated that it did not intend to sue farmers with trace amounts of seeds on their fields.[67] Emblematic of the *finality tendency*, the court did not consider the substantive arguments and the other branches have not picked up the policy question. Had the court granted standing, the litigation would have determined who could exert control over the seeds, again pointing to the *private capture of public interests*.

Similar challenges arose in a copyright case seeking invalidation of rights in an entire category of works. In *Aharonian v. Gonzales*, a computer programmer challenged the constitutionality of copyright protection for software source code, attempting to exert a *private capture of public interests* by wresting the monopolies away from the source code copyright owners.[68] The court concluded that the plaintiff had suffered an injury-in-fact, namely, that he had to pay license fees to use software source code protected by copyright.[69] Nonetheless, the court dismissed plaintiff's claim challenging the protection of "ideas" for lack of standing since the court viewed that claim as a generalized grievance.[70] The court did not, however, view the claims of unconstitutional vagueness as generalized grievances, since the plaintiff merely sought a declaration that Congress had not properly defined the terms essential to apply the statute to software

65. Organic Seed Growers and Trade Ass'n v. Monsanto Corp., 718 F.3d 1350, 1352 (Fed. Cir. 2013).

66. First Amended Complaint at 2, Organic Seed Growers and Trade Ass'n v. Monsanto Corp., No. 11-cv-2163-NRB (S.D.N.Y. June 1, 2011) (citation omitted).

67. *Organic Seed Growers*, 718 F.3d at 1352.

68. Aharonian v. Gonzales, 77 U.S.P.Q.2d 1449 (N.D. Cal. 2006) (granting motion to dismiss claims challenging the validity and scope of copyright protection in software source code).

69. *Id.*

70. *Id.*

code.[71] Although the court agreed that the plaintiff had standing to assert these claims, it dismissed them for failing to state a claim, pointing towards the *finality tendency*.[72]

In two Supreme Court copyright cases seeking to undo broad protections, the plaintiffs had little to no problems demonstrating standing. In *Eldred v. Ashcroft*, the Supreme Court upheld the constitutionality of the Copyright Term Extension Act (CTEA), which added twenty years to the terms of most copyrighted works.[73] The question of standing did not reach the *Eldred* Supreme Court, but the Court of Appeals for the District of Columbia Circuit concluded that the plaintiffs—individuals, corporations, and associations who depended on works in the public domain (including a book distributor, a book re-printer, a sheet music vendor, a choir director, and a film preservation and restoration company)—had standing to challenge the CTEA.[74]

> The plaintiffs benefit from using works in the public domain and, but for the CTEA, they would be able to exploit additional works the copyrights to which would have expired in the near future. As such, they suffer an injury in fact that is traceable to the CTEA and that we could redress by holding the Act invalid.[75]

The plaintiffs did not set forth any specific works whose copyright they would infringe but for the copyright extension affected by the statute.[76]

In *Golan v. Holder*, the Supreme Court upheld the constitutionality of the Uruguay Round Agreements Act, which reinstated copyrights for certain foreign works whose terms had lapsed under current law.[77] The *Golan* plaintiffs did not face any challenges to their standing. Both cases demonstrate the *binary*

71. *Id.* ("The fact that finding copyright law unconstitutional would affect many people does not transform plaintiff's claim into a generalized grievance, as standing depends only on whether plaintiff has alleged a concrete, particular harm.").

72. *Id.*

73. Eldred v. Ashcroft, 537 U.S. 186 (2003) (upholding Copyright Term Extension Act).

74. Eldred v. Reno, 239 F.3d 372, 373-74 (D.C. Cir. 2001) (confirming standing for plaintiffs who might use works that would pass into the public domain but for the Copyright Term Extension Act), *aff'd sub nom.* Eldred v. Ashcroft, 537 U.S. 186 (2003).

75. *Id.* at 375 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)) (standing not raised on appeal).

76. *See* Second Amended Complaint, Eldred v. Reno, No. 1:99CV00065 (D.D.C. June 24, 1999); First Amended Complaint, Eldred v. Reno, No. 1:99CV00065 (D.D.C. May 10, 1999); Complaint, No. 1:00CV00065 (D.D.C. Jan. 11, 1999) 1999 WL 33743484.

77. Golan v. Holder, 132 S. Ct. at 878 (upholding the constitutionality of provision reinstating copyright protection for certain foreign works that had fallen into the public domain).

tendency, in that the court decided a discrete question of how long these specific rights owners would retain their monopolies, instead of considering the question of copyright term length from the broader policy perspective of how to maximize the production of new material for the public to enjoy. They also show attempts to displace the *private capture of public interests* from the copyright owners—who enjoy a monopoly—to the copyright users, who want to control that monopoly.

B. The Challenge of Standing in Public Interest Intellectual Property Cases

Having discussed how the courts applied the doctrine of standing to public interest intellectual property cases, this section now explores how these cases fit with the concept of "injury in fact" and the six purposes of Constitutionally required standing.[78]

1. Injury-in-Fact

Public interest intellectual property cases raise unique issues with respect to the requirement of suffering an injury-in-fact. The plaintiffs bring these cases seeking to rein in what they view as excessive protections implicating broad categories of material. Yet, a concern for the integrity of the public domain does not equate to a traditionally recognized, concrete injury suffered uniquely by the plaintiff. The Supreme Court recently made clear that to meet the standing threshold, "it is not enough that the party invoking the power of the court have a keen interest in the issue," when it denied standing to backers of an initiative passed by the voters of California, but which the state government declined to defend.[79] When a law creates a general obligation to the public, individuals do not hold the private right to enforce that law.[80] Unlike some other constitutional provisions, the Patent and Copyright Clause does not confer a private right of action on individuals.[81] Nor does the Copyright Act or Patent

78. U.S. CONST. art. III, § 2.

79. Hollingsworth v. Perry, 133 S. Ct. 2652, 2659 (2013) (rejecting standing of parties challenging same-sex marriage in California when state officials declined to defend law that would have banned such marriages).

80. Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 210 (1992) (discussing private rights of actions); Scalia, *supra* note 59, at 895 ("That explains, I think, why 'concrete injury'—an injury apart from the mere breach of the social contract, so to speak, effected by the very fact of unlawful government action—is the indispensable prerequisite of standing.").

81. *See* Sunstein, *supra* note 80, at 210 (contrasting the private rights under the fourth

Act confer a right for an individual to bring an action on behalf of the public domain.[82]

The plaintiffs in *Organic Seed Growers* asserted injuries more properly characterized as generally applicable to the general public. At the heart of their case, they opposed transgenic seeds from a policy perspective because of the potential negative effects on the food supply.[83] They did not use transgenic seeds themselves nor did they want transgenic seeds on their farms.[84] As they did not claim any past or future interest in the protected material, they could not establish standing, and the court declined to consider the broader policy questions relating to transgenic seeds.[85]

Both economic and non-economic injuries may satisfy the injury-in-fact requirement.[86] Multiple cases acknowledge social costs, such as the economic effects of immigration regulations on jobs in a community and the loss of enjoyment of land as a result of the failure to enforce the Clean Water Act, as sufficient injuries to establish standing.[87] The Court has also recognized standing resulting from "opportunity" harms—that is, the injury resulting when a government action or omission forecloses the opportunity to enjoy some benefit.[88] In such cases, the litigant needs to characterize the

Amendment recognized in Bivins v. Six Unknown Named Agents, 403 U.S. 388, 395 (1971), with other constitutional provisions).

82. *See* 17 U.S.C. §§ 101 (2012) (making no allowance for private attorney general suits); 35 U.S.C. §§ 101 (2012) (same).

83. Organic Seed Growers and Trade Ass'n v. Monsanto Corp., 851 F. Supp. 2d 544, 555 (S.D.N.Y. 2012) (finding no standing for seed growers despite active enforcement by the patentee), *aff'd* 718 F.3d 1350 (Fed. Cir. 2013).

84. *Id*.

85. *Id*.

86. Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 169 (2000) (recognizing standing for environmental advocacy organization alleging that members would suffer negative impacts to their recreational, aesthetic, and economic interests from defendant's mercury discharges); Kenneth E. Scott, *Standing in the Supreme Court – a Functional Analysis*, 86 HARV. L. REV. 645, 675-76 (1973) ("[T]he proposition now seems firmly established that standing may stem from injury to noneconomic interests, such as aesthetic, conservational, recreational, or spiritual values.").

87. *Friends of the Earth*, 528 U.S. at 181 (recognizing standing based on citizens' perceived decrease in the "aesthetic and recreational values of the area" affected by the challenged government action); Fed'n for Am. Immigration Reform, Inc. v. Reno, 93 F.3d. 897, 900 (D.C. Cir. 1996) (recognizing standing for communities concerned about immigrants' impact on availability of employment and impact on public services like hospitals and schools); Northwest Forest Workers Ass'n v. Lyng, 688 F. Supp. 1, 3-4 n.2 (D.D.C. 1988) (recognizing standing for workers concerned about guest worker program).

88. Sunstein, *supra* note 80, at 205 (noting the re-characterization of the injury in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), from denial to the medical school based on race to denial to compete for all 100 spots in the class).

injury as an increased risk of harm, rather than in traditional cause-of-action language, since the challenged government program generally targets broad sectors of the population and rarely will yield concrete harms particularized to any one person.[89] Public interest intellectual property plaintiffs could characterize their injuries as opportunity harms. Under this viewpoint, the actions of the government in favor of a private rights holder deprive the plaintiffs of the benefit of material which should belong in the public domain.[90]

Additionally, the Court, at times, has recognized expressive harms—the harms resulting from a government action that conveys a social meaning inconsistent with the principles valued by society, rather than the material consequences of those actions—as injuries-in-fact.[91] Yet, the Court has also said that expressive harms do not per se confer standing on the claimant alleging injury.[92] One may view injuries alleged in public interest intellectual property through the lens of expressive harms. The anti-enclosure movement's opposition to what its adherents characterize as increased propertization of copyrights and patents and the shrinking of the public domain forms the theoretical basis for many of the copyright and patent cases.[93] The plaintiffs would argue that these government actions stand opposed to the nation's values of freedom and a robust commons which enables the civic discourse that fuels our democracy.

Yet, public interest intellectual property plaintiffs do not need to resort to these characterizations in order to establish standing. These

89. Sunstein, *supra* note 80, at 206-07 (citing, as an example, withholding federal funding from projects that threaten endangered species or that discriminate on the basis of race).

90. Ass'n for Molecular Pathology v. USPTO, 689 F.3d 1302, 1320 n.7 (Fed. Cir. 2012) (alleging injury resulting from inability to conduct or benefit from research and to obtain diagnostic tests, and the high fees charged by the patentee), *aff'd in part sub nom.* Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107 (2013); Golan v. Holder, 132 S. Ct. 873 (2012) (reviewing plaintiffs' complaint of required license fees for use of the works and the inability to find the rights holders which would preclude their use of the works); Eldred v. Ashcroft, 537 U.S. 186 (2003) (reviewing the same).

91. Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373, 395-96 (2004) (citing Shaw v. Reno, 509 U.S. 640 (1993)) (recognizing standing to challenge racial gerrymandering claim arising under the Equal Protection Clause).

92. *Id.* at 395-96 (citing Allen v. Wright, 468 U.S. 737, 755 (1984)) ("[T]he stigmatizing injury often caused by racial discrimination . . . accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct.").

93. Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107, 2111 (2013) (unanimously rejecting patent protection for gene sequences, challenged for propertizing natural material out of the public domain, but unanimously upholding the patentability of synthetically created complementary DNA); *Golan*, 132 S. Ct. at 878 (upholding the constitutionality of provision reinstating copyright protection for certain foreign works that had fallen in the public domain).

plaintiffs bring the lawsuits not only for ideological reasons, but because they suffer an economic injury. The protections contested by the plaintiffs in cases like *Myriad*, *Golan* and *Eldred*, might result in harms experienced generally by the public—such as increased propertization—but also in harms experienced solely by a small number of individuals or entities, such as license fees, the lack of access to material held by an unwilling rights holder, the inability to conduct or benefit from research exploiting the patented material, and the inability to create or benefit from derivative works to be created from material now outside the public domain.[94] When viewed from the perspective of such individuals or entities, these cases fit squarely within the traditional approach to articulating harm, and thus support the recognition of their standing to bring claims arising from these protections.

It would seem appropriate to require the plaintiff to assert an interest in a particular protected work, even if the plaintiff's claimed injury arises not from rights unique to that work, but rather to broadly applicable rights. Yet the courts did not require that the *Eldred* or *Golan* plaintiffs identify a specific copyrighted work which they sought to invalidate.[95] In *Eldred*, the District Court for the District of Columbia observed in a footnote that "[u]nless the Plaintiffs' allegation that they prepared to use these works in some way is untrue, the Plaintiffs have constitutional standing as the enactment of the CTEA allegedly caused an injury in fact to their ability to use these works that is redressable by declaratory judgment."[96] Accordingly, in the copyright cases the courts have concerned themselves more with the aggregate impact of the challenged legislation, rather than the injury to each of the plaintiffs.

On the other hand, the patent cases examine each plaintiff's standing individually, rather than based on the harms suffered by the plaintiffs in the aggregate.[97] Under this approach, threats by the

94. *Ass'n for Molecular Pathology*, 689 F.3d at 1320 n.7 (reviewing plaintiffs' alleged inability to conduct or benefit from research and to obtain diagnostic tests, and the high fees charged by the patentee); *Golan*, 132 S. Ct. at 873 (addressing plaintiffs' complaint of the license fees for use of the works and the inability to find the rights holders which would preclude their use of the works); Eldred v. Ashcroft, 537 U.S. 186 (2003) (addressing the same).

95. *Golan*, 132 S. Ct. at 887 (upholding the constitutionality of provision reinstating copyright protection for certain foreign works that had fallen in the public domain); *Eldred*, 537 U.S. at 218 (upholding Copyright Term Extension Act).

96. Eldred v. Reno, 74 F. Supp. 2d 1, 2 n.3 (1999) (upholding Copyright Term Extension Act), *aff'd sub nom*. *Eldred* v. Ashcroft, 537 U.S. 186 (2003).

97. *Compare Ass'n for Molecular Pathology*, 689 F.3d at 1320 n.7 (finding standing for one plaintiff who had received a demand letter, but no standing for other plaintiffs who had not

patentee against third parties do not establish standing, even if the plaintiff would undertake the activities but for the patentee's history of enforcement.[98] The patent plaintiffs had difficulty establishing standing because, for the most part, they had not used the patented inventions challenged in the litigation. In contrast, the copyright plaintiffs alleged that they currently use or have already used the works subject to the statute.[99]

2. True Adversity

The doctrine of standing furthers a fundamental purpose of ensuring true adversity between the litigants, each with a stake in winning.[100] In the public interest IP cases, true adversity depends on how you define the injury. In the clear case, an individual or entity has standing when the rights holder has threatened it with litigation for using the ostensibly protected material.[101] The party threatened with litigation has a stake in winning the case—a favorable decision by the court would result in the ability to exploit the material without the need to pay a license fee. Courts may not even require a threat of litigation, instead accepting the continuation of activity deemed infringing under the law as sufficient to establish the stake in winning, as in *Golan* and *Eldred*.[102] Without either a threat of litigation or current infringing activity, a potential litigant will face difficulties establishing standing. For example, the patients in *Myriad* who would benefit from broader research on the BRCA1 and BRCA2 genes, or concert goers who want to enjoy music pulled back from the

received such letters), *with Eldred*, 537 U.S. 186 (finding standing for a large number of plaintiffs to challenge Copyright Term Extension Act).

98. *Compare Ass'n for Molecular Pathology*, 689 F.3d at 1320 n.7 (finding standing for one plaintiff who had received a demand letter, but no standing for other plaintiffs who had not received such letters) *with* Organic Seed Growers and Trade Ass'n v. Monsanto Corp., 2012-1298 (Fed. Cir. 2013) (finding no standing for seed growers despite active enforcement by the patentee).

99. *Golan*, 132 S. Ct. 873 (upholding the constitutionality of provision reinstating copyrights for certain foreign works that had fallen into the public domain); *Eldred*, 537 U.S. at 193 (upholding Copyright Term Extension Act).

100. Elliott, *supra* note 54, at 469 ("A dispute that satisfies Article III thus has at least two sides, each of which has a stake in winning, and the doctrine of standing ensures that the plaintiff has such a stake.").

101. *Ass'n for Molecular Pathology*, 689 F.3d at 1320 n.7 (finding standing for one plaintiff who had received a demand letter, but no standing for other plaintiffs who had not received such letters).

102. *Golan*, 132 S. Ct. 873 (upholding the constitutionality of provision reinstating copyrights for certain foreign works that had fallen into the public domain); *Eldred*, 537 U.S. at 193 (upholding Copyright Term Extension Act).

public domain after *Golan*, had a stake in knocking down the extension of rights. However, because these downstream users did not exploit the material directly, but rather consumed the fruits of someone else's (infringing) use, that alleged direct infringer had more of a stake in winning the litigation.[103]

When a court confers standing on a plaintiff, the court recognizes that the party has true adversity with respect to the property right in question. Through the litigation they intend to reduce or eliminate the costs for them to exploit the material covered by the intellectual property protection. This position thus serves to propertize the plaintiffs' stance to the intellectual property, feeding the trend of propertization criticized by those supporting the plaintiff's lawsuits against the broad property interests. Evidencing the *private capture of public interests*, the case becomes a property dispute—a winner-takes-all fight to keep exclusive rights or open up the material for free use by all. Per the *binary tendency*, this form of adjudication does not allow for deliberative policy-making involving inputs from multiple constituencies with the end goal of producing policies that enhance the welfare of the general public, policies that balance the incentives to the inventors and authors to produce with the public's ease of accessing the fruits of production.

Conceiving of "true adversity" from the perspective of the plaintiff alone does not address the other side of the dispute. An inadequacy of adversity may arise when the defendant does not have sufficient interest in winning the dispute or does not represent all of the interests adverse to those of the plaintiff. The only question the standing doctrine poses regarding defendants is whether a decision against the defendants would redress the injury asserted by the plaintiff, and not whether the litigation includes the most impacted stakeholders.[104] Public interest plaintiffs commonly sue an agent of the executive branch of the federal government, such as the Attorney General (*Eldred* and *Golan*) or the United States Patent and Trademark Office (USPTO) (*Myriad*).[105] These defendants have the authority to provide relief that will redress the injury, since a decision

103. *See* Nichol, *supra* note 51, at 323 ("A lot of things hurt, in one way or another. Sometimes the harms are subjective, or regarded as such. If, however, a lot of us seem to feel the same way, the injury moves anomalously, closer to an 'objective' reality.").

104. Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013) (requiring that requested relief appear likely to redress the injury).

105. Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107 (2013) (naming USPTO as defendant); *Golan*, 132 S. Ct. 873 (naming Attorney General as defendant); *Eldred*, 537 U.S. 186 (naming Attorney General as defendant).

against the Attorney General would result in invalidation of the copyright statutes and a decision against the USPTO would invalidate a patent registration. The government may also have an interest in assuring the proper execution of the law. However, the government does not have any particular interest in the specific protected material under consideration in the litigation. In the copyright suits, the U.S. Attorney General, as the sole defendant, protects the expanded rights of private owners.[106] This role of the government as a defendant in a binary dispute causes it to neglect its responsibility to represent the entirety of the public interest, not just the interests held by the rights holder or those advocating for the public domain. Accordingly, for true adversity, the government should not substitute for the rights holder.

While rights holders could seek to intervene in cases as interested parties, they may not know that the litigation exists, that a case seeking to reduce the term of copyrights has an impact on their specific copyrights, or that a case seeking to invalidate patents relating specifically to cancer genes would have an impact on other gene patents.[107] Even if all of the affected rights holders joined the litigation, other interests would remain unrepresented—consumers concerned about the price and supply of new material, patients wanting access to new medical research, and competitors who want to limit the scope of protection for the rights holder without imposing a future restriction on the scope of their own rights. Representation of all of these interests in the litigation would not guarantee *effective* representation, either.

Under this landscape, plaintiffs may strategically choose which defendants to sue—for example, an underfunded rights holder who will have difficulty defending the action—and obtain a broad decision with implications beyond that individual rights holder.

3. Effective Representation

Truly adverse litigants with a stake in winning have incentives to advocate their positions.[108] Effective advocacy helps to sharpen the

106. *Golan*, 132 S. Ct. 873 (reviewing Attorney General's defense of the expanded copyright protections); *Eldred*, 537 U.S. 186 (same).

107. FED. R. CIV. P. 24(b) (allowing for permissive joinder of anyone who "has a claim or defense that shares with the main action a common question of law or fact").

108. Mark V. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1706 (1980) ("The basic constitutional requirement enunciated by the Court is that the plaintiff have a personal stake in the action sufficient to ensure a concrete and adversarial presentation. This requirement is phrased as a means to an end: the personal stake is

issues before the court; parties with a stake in the litigation have an incentive to do the research and prepare the arguments for the court.[109] A litigant who has not suffered the principal injury, or who asserts rights on behalf of a non-party, may nonetheless effectively advocate the matter; indeed, it has suffered a significant enough injury to motivate it to come to court.[110] The fact that a party has chosen to devote money and other resources to a dispute by initiating litigation seems to indicate that such party has sufficiently invested in the matter to present an effective case.[111] An organization with no personal stake in a case may offer more effective advocacy than a person with clear standing.[112] For example, a trade association could advocate more effectively for the interests of its members than any of the resource-constrained members could on its own.[113] Nonetheless, effective advocacy does not per se create a case or controversy.[114]

The connection between direct adversity and effectiveness of representation has played out unevenly in public interest intellectual property cases. As the theory goes, individuals who suffer a direct injury would advocate more vigorously than those less directly impacted by the challenged action. However, the public interest

required in that it ensures concrete adversity.").

109. Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEXAS L. REV. 73, 87 (2007) ("In our adversarial system of justice, courts rely on parties to do the work of researching issues and making the best possible arguments for each side so that the court can reach a sound decision. Therefore, according to this argument, it is essential that each party have a *stake* in the litigation that gives it the incentive to do the necessary work.").

110. Marc Rohr, *Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts*, 35 U. MIAMI L. REV. 393, 406, 454 (1981) ("I recommend that courts permit litigants to assert the rights of third parties so long as the litigant appears reasonably likely to represent the interests of those third parties adequately.").

111. Siegel, *supra* note 109, at 89 ("If, as standing doctrine posits, a dollar's worth of injury sufficiently motivates plaintiffs to litigate vigorously, it would seem equally likely that courts would receive vigorous litigation from any party who takes the trouble to sue and who cares enough to pay the litigation costs.").

112. *Id.* at 88 ("Even accepting the notion that the standing and mootness requirements guarantee that parties will have a 'stake' in litigation, there is no necessary link between having such a stake and litigating with the vigor to illuminate issues properly for the court. A litigant with a significant stake in litigation may present poor arguments (perhaps because the litigant has inferior counsel); a non-Hohfeldian litigant may have all the resources of a national advocacy group behind her.").

113. Kelsey M. Heilman, *The Rights of Others: Protection and Advocacy Organizations' Associational Standing to Sue*, 157 U. PENN. L. REV. 237, 251-52 (2008) (citing Hunt v. Wash. State Apple Advertising Commission, 432 U.S. 333, 344-45 (1977)) (discussing benefits of associational standing).

114. Hollingsworth v. Perry, 133 S. Ct. 2652, 2663 (2013) ("No matter how deeply committed petitioners may be to upholding Proposition 8 or how 'zealous their advocacy,' that is not a 'particularized interest' sufficient to create a case or controversy under Article III.").

intellectual property cases litigated thus far do not permit testing of this hypothesis. First, the small sample size (perhaps a dozen cases) would not yield any statistically significant conclusions. Second, public interest advocacy groups like the Electronic Frontier Foundation, the ACLU, and Public Patent and prominent intellectual property scholars like Lawrence Lessig have backed all of the Supreme Court cases identified in this Article,[115] meaning that all of the cases have involved ideological plaintiffs; the cases do not include examples filed solely by non-ideological plaintiffs for comparison.

Third, the inconsistency in outcomes suggests that the type of plaintiff does not correlate with the vigor of the advocacy or the success on the merits. The copyright cases of *Golan* and *Eldred* featured ideological plaintiffs deeply concerned about the encroachment on the public domain threatened by copyright term extensions, as well as individuals who faced direct economic injury because they would have to pay more royalties or forego using certain works and risk smaller audiences.[116] Plaintiffs in both cases included a wide range of parties who demonstrated an array of real impacts of the challenged statutes, and boasted impressive counsel.[117] Their lack of success on the merits does not mean that they lacked a direct stake in the matter or effective representation, merely that they did not convince the courts that the challenged statutes failed constitutional review. On the other hand, plaintiffs in patent disputes have experienced more difficulties with standing.[118] Yet even when only one of twenty plaintiffs survived the standing challenge, the plaintiff side convinced the Supreme Court to issue a sweeping decision

115. Ass'n for Molecular Pathology v. Myriad Genetics, 133 S. Ct. 2107, 2110 (2013) (Public Patent Foundation represented petitioners); Golan v. Holder, 132 S. Ct. 873, 877 (2012) (Stanford Law School programs represented petitioners); Eldred v. Ashcroft, 537 U.S. 186, 191 (2003) (Lessig argued on behalf of petitioners); Ass'n for Molecular Pathology v. USPTO, 702 F. Supp. 2d 181, 183 (2010) (ACLU represented petitioners); *Golan v. Holder*, ELECTRONIC FRONTIER FOUNDATION, https://www.eff.org/cases/golan-v-holder (last visited March 28, 2014) (EFF submitted amicus brief in *Golan*).

116. Golan v. Holder, 132 S. Ct. 873, 878 (2012) (hearing plaintiffs' concern about the expansion of copyright and also faced increased fees to conduct their businesses); Eldred v. Ashcroft, 537 U.S. 186, 222 (2003) (hearing the same).

117. *Golan*, 132 S. Ct. at 878 (upholding the constitutionality of provision reinstating copyright protection for certain foreign works that had fallen in the public domain); *Eldred*, 537 U.S. at 222 (upholding Copyright Term Extension Act).

118. Ass'n for Molecular Pathology v. Myriad Genetics, 133 S. Ct. 2107 (2013) (unanimously rejecting patent protection for gene sequences for the only plaintiff out of twenty to survive the standing challenge); Organic Seed Growers and Trade Ass'n v. Monsanto Corp., 718 F.3d 1350, 1352 (Fed. Cir. 2013) (affirming denial of standing).

unanimously invalidating patents in gene sequences.[119] Thus, the cases in this field do not suggest that directness of adversity has any correlation to effectiveness of representation.

4. Most Direct Stake

Standing limits access to the courthouse so that those most concerned with resolution of the dispute will have the opportunity to direct the litigation.[120] The Supreme Court recently denied standing to individuals who had sponsored a California ballot initiative, which the federal district court found unconstitutional and the state government declined to appeal.[121] The Court held that "[t]hey have no 'personal stake' in defending its enforcement that is distinguishable from the general interest of every citizen of California."[122] Going further, the Court declared that "Article III standing 'is not to be placed in the hands of concerned bystanders, who will use it simply as a vehicle for the vindication of value interests.'"[123]

Under the doctrine of *stare decisis*, the outcome of litigation on the issue may bind non-litigants who have a direct stake in the matter, perhaps even a greater interest than those who brought the case to the court.[124] Considering the binding effect of litigation on not just the parties, but on all those with an interest in analogous intellectual property, the directness of impact thus should play a major role in the determination of "true adversity." While the direct and downstream users share aligned interests in the instant goal of achieving access to the rights, their broader goals might diverge.[125]

For instance, researchers might craft the requested relief

119. *Myriad Genetics*, 133 S. Ct. at 2107 (unanimously rejecting patent protection for gene sequences).

120. Singleton v. Wulff, 428 U.S. 106, 113-14 (1976) ("[T]he courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not.").

121. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

122. *Id.* at 2656.

123. *Id.* at 2663 (quoting Diamond v. Charles, 476 U.S. 54, 62 (1986)).

124. Kontorovich, *supra* note 57, at 1693 (recognizing the need to protect individuals' choices about the exercise of their rights).

125. *See* Brilmayer, *supra* note 56, at 309-10 ("Isn't there a danger that by seeking to change the law too rapidly an ideological plaintiff will take greater risks by framing the issues in a broader, more controversial, manner? . . . The danger is that without a real client, and without a sense of accountability to an identifiable individual, their capacity truly to represent the public interest would be diminished.").

narrowly so that a court decision would not limit their ability to seek protection for their own innovations, while patients might seek broader relief so that they would have unrestrained access to all downstream research. Likewise, the artists who would perform the works pulled back from the public domain, or mine those works to create derivative works, might seek to keep original works in the public domain, but retain robust protections for their new works utilizing elements from those works. Meanwhile, consumers making individual purchases of the new works may prefer to keep all of the works in the public domain, believing that free access to the works would keep prices down. These consumers also have the least invested in the matter since they may choose to purchase other goods, and therefore may not stick with the litigation to the end or devote sufficient resources to advocate for their position. These various interests and viewpoints attest to the multiple competing public interests which all inform the question of balancing the desire for a large and free public domain versus the need for incentives in the form of private, exclusive rights to feed that public domain.

Litigants face this challenge in all areas of law, since prior litigation may set precedent adverse to future parties. When confronted with seemingly adverse case law, plaintiffs may attempt to argue that the dissimilarities in facts should lead to different results. The particular dynamics of public interest intellectual property cases may make such an approach less feasible. In these cases, the initial plaintiffs may take an all-in approach, challenging the constitutionality of a statute (such as in *Eldred*)[126] or the propriety of protection for entire classes of material (such as in *Myriad*).[127] If the court has already decided the questions of broad applicability and invalidated protections that extend to future litigants as well, the factual differences in cases future litigants might bring make no difference—someone else has taken their opportunity to present the case to the court.

To ensure that both the issues presented to the court and the sought-after relief match the real, present-day state of affairs implicated by the complained-of actions, the standing doctrine

126. Eldred v. Ashcroft, 537 U.S. 186, 222 (2003) (upholding constitutionality of Copyright Term Extension Act).

127. Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107, 2111 (2013) (affirming plaintiff's challenge to patent protection for human gene sequences but unanimously upholding the patentability of synthetically created complementary DNA).

requires that the litigants live with the outcome of the litigation.[128] However, to meet the standing threshold, a litigant need only establish it has suffered an injury in fact, and meeting that threshold does not necessarily mean that the litigant will have the most direct stake, the most representative case, or the most effective representation.[129] One broad view of standing goes so far as to argue that the public should have standing to bring claims when a government action expresses "a constitutionally impermissible conception of national political identity."[130]

Such a reading would seem to encompass standing for both patients seeking access to patented cancer diagnostic tests, as with the patients in *Myriad*, and anyone else arguing that some grant of rights interfered with society's understanding of the balancing of interests in intellectual property.[131] The Court denied the *Myriad* patients standing and, thus, the opportunity to have their viewpoints considered (consistent with the *binary tendency* reducing a matter important to multiple stakeholders to a two-party dispute). While these constituents should have the opportunity to influence the policy decision, they do not have as direct an interest in the dispute as others (such as the researchers wanting to conduct testing with the gene sequences). Viewed this way, it seems appropriate to deny standing to the patients in favor of the researchers.

The courts could deny standing to a potential litigant, even if it suffered a direct injury, if that individual or entity would not provide adequate representation for others who also suffered direct injury.[132] For class actions, Federal Rule of Civil Procedure 23 requires that the federal courts consider whether the proposed representative plaintiff

128. Brilmayer, *supra* note 56, at 310 ("In fact, one of the best explanations of the case or controversy requirement may be the desire of courts to ensure the accountability of representatives. . . . The case or controversy requirement guarantees that the individuals most affected by the challenged activity will have a role in the challenge. This guarantee should be seen as a minimal element of the legitimacy of a legal system which imposes legal burdens upon its members. At some point in the legal process the affected individuals should have their day in court.").

129. Siegel, *supra* note 109, at 92 ("Even taking the standing requirement for all it is worth, it requires only that a plaintiff challenging governmental activity show some injury, perhaps a trifling injury, from the challenged activity. It does not require that a suit be brought by the most affected plaintiff.").

130. Cox, *supra* note 91, at 396-97 (setting forth a view of standing based on "expressive harms" rather than "injury in fact").

131. *Myriad Genetics*, 133 S. Ct. at 2107 (unanimously rejecting patent protection for gene sequences; only one plaintiff, a researcher, survived the standing challenge).

132. Brilmayer, *supra* note 56, at 309 (arguing that the courts should not assume that "self-appointed ideological plaintiffs" will always provide adequate representation).

has claims typical of the class and will adequately represent the interests of the entire class.[133] In public interest intellectual property litigation, the court could conduct analysis similar to that applied to representativeness inquiries in class action certification—assessing the litigant's character, the proximity in interests between the litigant and the absentees, and the abilities of counsel.[134]

Yet, to require the courts to determine whether a plaintiff in a public interest intellectual property case will adequately represent those similarly situated creates significant complexities and burdens.[135] In public interest intellectual property cases, the courts do not know the full universe of stakeholders, especially when the plaintiffs do not bring the cases as class actions. *Myriad* presented a unique scenario in which the court could choose the most directly impacted plaintiff from a gallery of differently affected litigants.[136] The court does not usually have that visibility. In the normal case, courts cannot assess the typicality of the claims of the plaintiff or its capacity to adequately represent the interests of those similarly situated when the suit does not include any significant number of other stakeholders.

A court could require the joinder of those absent individuals or entities whose rights the litigation would impact.[137] Under this approach, the original plaintiff would now face the daunting task of navigating a complex and massive multi-party litigation. Only well-resourced parties will choose to proceed. The self-selection of

133. FED. R. CIV. P. 23.

134. Rohr, *supra* note 110, at 455-564 ("In determining the likely adequacy of the representation of a class within the meaning of rule 23, courts have considered the personal character of the representative, his interest in the litigation, and the competence and experience of his counsel. Generally, courts may appropriately consider these factors in the context of third-party standing as well."); Scott, *supra* note 86, at 680 ("This [representativeness] inquiry would focus not only on whether the plaintiff is able and likely to present a technically adequate case, but also on whether his interest is sufficiently representative of that of other persons affected by the government's actions that the relief sought by him will adequately protect them as well.").

135. Scott, *supra* note 86, at 680-81 ("To evaluate which persons or organizations are most representative of the interests of all those affected by the challenged government action is a task for which courts have no suitable tools.").

136. *Myriad Genetics*, 133 S. Ct. at 2107 (unanimously rejecting patent protection for gene sequences and finding standing for only one plaintiff, a researcher).

137. Rohr, *supra* note 110, at 459 ("As the situation typified by this case would fall within the ambit of Federal Rule of Civil Procedure 19, the court should bring the third party into the lawsuit when jurisdictionally feasible. If the court then determines that a conflict of interest exists between the litigant and the third party, it can dismiss the suit for lack of third-party standing . . . .").

litigants makes them more invested in the litigation, but does not necessarily yield a sample representative of the entirety of interests impacted by the policy. Given the large number of stakeholders (e.g., consumers, competitors) in these types of cases, mandatory joinder would prove impracticable for the parties and court.

Even without mandatory joinder, litigation brought by ideological plaintiff classes may efficiently showcase a wide range of stakeholder viewpoints caused by the challenged action.[138] Moreover, ideological organizations bringing impact litigation seeking to advance the public interest tend to put forward a lead plaintiff with the most sympathetic facts.[139] In cases of public interest impact litigation brought by an ideological plaintiff who leads a plaintiff class, an ideological organization that represents directly affected constituents, or an association representing similarly situated members, aggregating resources opens the courtroom to individuals who might not have access otherwise and creates efficiencies compared to bringing multiple individual suits.[140] Well-resourced by an ideological backer, a public interest class of ideological plaintiffs may provide the most effective representation.[141] Indeed, an organization with no direct, personal stake in a particular case may take more of an interest in that case—for ideological reasons—than a party suffering a direct injury.[142]

138. Tushnet, *supra* note 108, at 1713 ("[I]deological plaintiffs, who usually have a reasonably adequate commitment to continuing efforts, will do a better job of representing absentees than will Hohfeldian litigants.").

139. *Id.* at 1713-14 ("[A] public interest litigant will rarely fail to present a sufficiently concrete case. The lore of public interest litigation is replete with tales of trying to find the 'best' plaintiff, that is, the one on whom the legal rule to be challenged operates in the most heart-rending way.").

140. Heilman, *supra* note 113, at 251-52 ("Organizations have resources and expertise that their members lack. . . . In addition, individuals often face significant economic and other barriers to bringing suit in the adversarial system, especially when those individuals have limited resources or claims for only small damages."); Ann M. Southworth, *Collective Representation for the Disadvantaged: Variations in Problems of Accountability*, 67 FORDHAM. L. REV. 2449, 2450 (1999) ("Aggregating claims sometimes increases access to the legal system for individuals who otherwise would be unable to find representation. Achieving systemic change benefiting large numbers of people often is more efficient than seeking redress for each of many aggrieved individuals.").

141. Marie A. Failinger and Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 OHIO STATE L.J. 1, 17 (1984) ("[T]he class suit can secure relief for the client that is not only longer-lasting but also broader-based."); Tushnet, *supra* note 108, at 1713-18 (discussing the advantages of a class of ideological plaintiffs).

142. Heilman, *supra* note 113, at 251-52 ("Where a member of the organization has an actual injury *and* the expert organization has an interest in litigating the claim, the quality of the organization's case presentation will potentially exceed that of the individual plaintiff."); Scalia,

The potential benefits of ideological plaintiff classes rest upon the assumption that the interests of all of those injured by the challenged action will align.[143] Divergence of interests may occur in all multi-party litigation, but the nature of public interest intellectual property cases, which contend with four imperfectly aligned interests (rights holder, rights user, large public domain, and strong private rights) and multiple stakeholders, makes them particular susceptible to this occurrence. The Second Circuit noted in dictum that a proposed class of all holders of copyrights in books reproduced by Google, Inc. as part of its library project would most likely contain members who opposed the project, but also members who benefit from the project and therefore would disapprove of the plaintiffs' efforts.[144]

The *jointness problem* recognizes this possibility of diverging interests.[145] In the case of a large, diffuse, and disorganized class, ideological lawyers may end up driving the case strategy and objectives.[146] An ideological plaintiff may take aggressive steps to push the limits of the law, and therefore lose sight of the immediate needs of those suffering the direct injury.[147] The dominant plaintiff may also define the objectives and strategy of the litigation to the detriment of the other litigants or non-litigants.[148] Non-parties and

supra note 59, at 891-92 ("Often the very best adversaries are national organizations such as the NAACP or the American Civil Liberties Union that have a keen interest in the abstract question at issue in the case, but no 'concrete injury in fact' whatever.").

143. Kontorovich, *supra* note 57, at 1677 ("But it also follows that individuals can attach different values to such injuries, and that these values may be positive or negative. This has important implications."); Failinger and May, *supra* note 141, at 17 ("Law reform proponents have argued that emphasis on the group impact of cases, that is, the aggregate effect of a given case on the poor as a group, is the most effective way to combat the causes of poverty which invidiously affect individual poor persons.").

144. Authors Guild v. Google, Inc., 721 F.3d 132, 135 (2d Cir. 2013) (reversing class certification since the fair use defense might resolve the issues in the case).

145. Kontorovich, *supra* note 57, at 1693 ("The inability to disaggregate governmental conduct that affects many at once will be called the *jointness problem*. . . . Understanding the jointness problem allows one to recognize another public-minded function of the injury-in-fact requirement: protecting individuals' choices about the exercise of their rights.").

146. Southworth, *supra* note 140, at 2451-52 ("Lawyers representing individuals in law reform litigation and lawyers handling class actions generally reported that they played more significant roles than did lawyers representing organizations or individuals where there was no law reform component."); Brilmayer, *supra* note 56, at 309-10 (discussing potential lack of accountability of lawyers to real clients in public interest litigation).

147. Brilmayer, *supra* note 56, at 309-10 (discussing potential lack of accountability of lawyers to real clients in public interest litigation).

148. Kontorovich, *supra* note 57, at 1677 ("If values can be either positive or negative, the ideological plaintiff's interests may be opposed to the interests of other entitlement-holders within the class. This can present problems because the ideological plaintiff is in effect

minority class members may find their interests unrepresented before the courts.[149]

Faced with this possible divergence of strategies, the best resourced stakeholders may rush to the courthouse to define the litigation according to their own interests.[150] The courts could become a battleground over multiple competing viewpoints on the public interest. Liberal standing rules make this possibility more likely, since more stakeholders will meet the standing threshold. Setting a higher evidentiary threshold to establish that the plaintiff represents a public interest would help to address the problem of claims brought with inadequate representation.[151] However, meeting such a standard would require the court and the parties to invest a substantial amount of time and money to gather, review, and test the evidence of representativeness. This use of resources contravenes one goal of the standing doctrine—to engage in a threshold inquiry at the early stages of the dispute before the expenditure of significant resources.

Even assuming that a plaintiff could establish the typicality of its position among the relevant population, should that shared belief entitle it to bring the action? Disapproval of a government policy, even widely shared disapproval, does not compel a conclusion that the policy contradicts the public interest. In some public interest litigation, the claims clearly align with an explicit statutory purpose of furthering a specific public interest, and the statute gives the general public certain rights of action to enforce that purpose (e.g., minimizing pollution).[152] By contrast, the intellectual property statutes do not express one explicit, enforceable public interest

determining the disposition of the entitlements of the class as a whole.").

149. *Id.* at 1678 ("Even if the dissenting class were small, identifiable, and closed, strategic behavior could foil socially valuable action because any one entitlement-holder exercises veto power over a government program that involves the entitlements of many.").

150. Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVT'L L. & POL'Y FORUM 39, 79 (2001) ("In a sense, liberalized standing for citizen suits creates a new commons problem with over-litigation replacing overgrazing.").

151. *See* Lynda J. Oswald, *Challenging the Registration of Scandalous and Disparaging Marks Under the Lanham Act: Who Has Standing to Sue?*, 42 AM. BUS. L.J. 251 (2004) (questioning the adequacy of extrinsic evidence to support a claim that a mark disparages a plaintiff's beliefs).

152. Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 169 (2000) (recognizing standing for environmental advocacy organization alleging that members would suffer negative impacts to their recreational, aesthetic, and economic interests from defendant's mercury discharges).

purpose.[153] Without that express statutory charge, the public interests underlying the statutes remain open to debate.

Accordingly, claims brought on behalf of a public interest should arouse skepticism, and prompt the courts to pause to consider whether the self-appointed defender of the public domain actually represents the public interest. Assuming that the plaintiff does present a plausible claim in support of a public interest, does that same plaintiff or another party in the dispute represent the other public interests? Can the plaintiff speak to the effects of the challenged action for restraints on speech, the incentives to produce new materials, the impact on competitors, and the costs incurred by consumers? It seems unlikely that any one representative or even a class of litigants could represent all of these interests.

5. Concrete Cases Illustrate Real Consequences

Standing serves the further purpose of illuminating the real-world effects of the challenged action on individuals to the court.[154] "The 'abstract' injury shunned by standing doctrine may lead to an 'abstract' presentation of the issues involved, while courts are better suited to make incremental, fact-specific determinations."[155] In this way, the standing doctrine requirement "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."[156]

Public interest litigation tends to present plaintiffs with concrete cases because the counsel seeks lead plaintiffs who illustrate the consequences of the challenged action in a sympathetic and compelling manner.[157] Public interest litigation specific to intellectual property claims raises special challenges with respect to the

153. *See* 17 U.S.C. §§ 101-1301 (2012) (setting forth protections afforded under the Copyright Act and available causes of action, but not any enforceable public benefit); 35 U.S.C. § 101 (2012) (setting forth the same).

154. Brilmayer, *supra* note 56, at 309-10 ("Isn't a traditional plaintiff better able vividly to illustrate the adverse effects of the complained-of activity?").

155. Kontorovich, *supra* note 57, at 1672 (discussing real-world effects rationale).

156. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). *See also* Helen Hershkoff, *Public Law Litigation: Lessons and Questions*, 10 HUMAN RIGHTS REV. 157, 164 (2009) ("[G]iven the indeterminacy of legal norms, adjudication helps to create public meaning by providing a public space in which diverse actors have an opportunity to collaborate in the light of on-the-ground knowledge and local context.").

157. Tushnet, *supra* note 108, at 1713-14 (1980) (discussing ideological lead plaintiffs).

illustration of real consequences. Namely, one plaintiff will present a narrative about the immediate effects it will experience as a result of a copyright term extension or the granting of a patent for a gene sequence. The case proceeds based on the story of that one narrator at that one moment in time. Consistent with the *binary tendency* of reducing these issues to two-party property disputes, the case does not explore the more sweeping saga of the widespread or longer-term effects of more or less restrictive intellectual property protections. The discrete impact of one seed patent on one farmer does not inform the court about the effect of its decision on incentives for biotechnology firms to engage in research and development for biologically modified food products, the impact on competitors who may appreciate the access to the previously protected material but lament the loss of protection in the field, or the consequences for the food supply, international trade, and the economy. The fundamentally public nature of these cases means that individual plaintiffs will rarely illuminate all of the public consequences of a policy for a court. As such, the inherent structure of the courts as forums to decide adversarial disputes makes them ill-suited to consider such a multitude of narratives.

Beneath the specter of the rush to the courthouse, each potential plaintiff must weigh its compelling narrative against the possibility that someone else has a better, or worse, or more representative, or less representative, case. Under the doctrine of *stare decisis*, the first litigation on an issue may preclude all others from having the opportunity to present their narratives. Thus, an adverse decision against the first litigant might preclude substantive review of the real-world impacts on other stakeholders, even when those stakeholders have compelling narratives or experience the effects of the challenged protection in significantly different ways.

After the Supreme Court upheld the constitutionality of the Copyright Term Extension Act in *Eldred v. Ashcroft*, a different set of plaintiffs (an organization seeking to make a free digital library of orphan works and an organization maintaining a free digital archive of creative works, principally films) brought another challenge to the Copyright Term Extension Act.[158] In *Kahle v. Gonzales*, the Ninth Circuit upheld the motion to dismiss the case because the Supreme Court had already held the statute constitutional in *Eldred v.*

158. Kahle v. Gonzales, 487 F.3d 697 (9th Cir. 2007); *see also* Eldred v. Ashcroft, 537 U.S. 186, 221 (2003).

Ashcroft.[159] In dismissing the case, the courts did not consider the real-world impacts of the CTEA on the *Kahle* plaintiffs. Specifically, the free nature of plaintiffs' services, the opening of broad public availability to works that might otherwise remain obscure or difficult to access, and the large reliance on orphan works distinguished the *Kahle* case from *Eldred*.[160] The *Kahle* plaintiffs could not continue their businesses and comply with copyright law at the same time under the CTEA, while the *Eldred* plaintiffs would merely have had to make royalty payments—a real impact, but not a devastating one. The preclusive effect of *Eldred* meant that the courts did not get to consider the impact of the CTEA on entities that faced significant real-world consequences and that had an arguably more sympathetic case. The *Kahle* case provides an example of the *finality tendency* since the result in *Eldred* served to foreclose any further consideration of the issues.

These concerns matter because we want courts to make decisions based on real-world consequences. In the context of public interest intellectual property cases, however, the decisions discussed in this article indicate that those real-world consequences do not impact the substantive analysis. The courts consider whether a policy violates the Constitution or a statute, and the real-world impact of that policy makes no difference to the validity of the policy. The decision in *Myriad* did not turn on the nature or extent of injuries suffered by Doctor Ostrer.[161] The Federal Circuit discussed his activities in connection with the jurisdictional analysis, but did not mention him at all in the analysis of patent eligibility.[162] The Supreme Court's decision mentioned him only briefly in the factual summary and in a footnote acknowledging that he had standing.[163] Likewise, neither *Eldred* nor *Golan* examined the injuries alleged by the plaintiffs in the considerations of constitutionality.[164] Thus, viewing these cases from this perspective, the rush to the courthouse matters not because of the

159. *Kahle*, 487 F.3d at 698 (citing *Eldred*, 537 U.S. at 221).

160. *Id.*

161. Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107 (2013).

162. Ass'n for Molecular Pathology v. USPTO, 689 F.3d 1302, 1315-22 (Fed. Cir. 2012), *aff'd in part sub nom.* Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107 (2013).

163. *Myriad Genetics*, 133 S. Ct. at 2115.

164. Golan v. Holder, 132 S. Ct. 873, 884-94 (2012) (lacking discussion of injuries suffered by plaintiffs in consideration of validity of statute); *Eldred*, 537 U.S. at 199-222 (lacking discussion of injuries alleged by plaintiffs in the assessment of the constitutional claims).

need to present the plaintiff with the most sympathetic facts, but rather the need to find the strongest advocate to argue the case.

This observation about the lack of relevance of the facts of the individual plaintiffs in the substantive analysis counsels that the standing analysis should focus on the adequacy of representation to the exclusion of any consideration of injury. Keeping in mind the *finality tendency* that public interest intellectual property litigation will usually offer the final word on the policy issues, effective representation will serve the courts and society in general better than a plaintiff with sympathetic facts. In *Organic Seed Growers*, the seeds may not have had as direct an impact on the organic farmer plaintiffs as on other stakeholders, but the organic farmers had qualified counsel.[165] The case presented legitimate questions about the proper scope of patent protection for seeds, none of which any branch of government will likely take up since the court declined to extend standing.[166]

6. The Courts Function as Courts, Not Policy-Making Bodies

The standing doctrine limits the role of the courts to adjudicating "concrete and particularized" disputes for the additional reason that the other branches of government have the responsibility to formulate and enact broadly applicable policies.[167] The Constitution established a system of separation of powers that reflects the structural decision to vest certain decision-making power in the political processes.[168] Under this view, common problems shared by large groups properly belong to the popularly elected legislative and executive branches.[169] The courts cite standing as a reason to decline to adjudicate "abstract questions of wide public significance" and "generalized grievances."[170]

165. Organic Seed Growers and Trade Ass'n v. Monsanto Corp., 178 F.3d 1350 (Fed. Cir. 2013).

166. *Id.*

167. Fletcher, *supra* note 52, at 222 ("The purposes include . . . preventing the anti-majoritarian federal judiciary from usurping the policy-making functions of the popularly elected branches.").

168. Hollingsworth v. Perry, 133 S. Ct. 2652, 2659 (2013) ("This is an essential limit on our power: It ensures that we act *as judges*, and do not engage in policymaking properly left to elected representatives.").

169. Elliott, *supra* note 54, at 462 ("Cases are sorted on a rough democratic theory: if an injury is shared by a large group of people, some cases suggest, such a group can and should take its problem to the legislature or the executive branch, not the courts.").

170. FEC v. Akins, 524 U.S. 11, 23 (1998); United States v. Richardson, 418 U.S. 166,

Since courts usually do not inquire whether a plaintiff has alleged that it suffered an injury shared by many, the courts have not approached this consideration with consistency.[171] As an example of the challenges arising from the application of this principle, consider *Aharonian v. Gonzales*.[172] In this case, the Northern District of California dismissed the claim that software code qualified as an "idea" (and therefore exceeded the scope of protection afforded under copyright law) because the claim constituted a "generalized grievance."[173] At the same time, the court declined to dismiss other claims on standing grounds and proceeded to address the constitutionality of the definiteness of terms applicable to copyright protections in source code.[174] In the court's view, even though a pronouncement on constitutionality would affect many people, such claims did not constitute generalized grievances, since "standing depends only on whether plaintiff has alleged a concrete, particular harm."[175] From the plaintiff's perspective, all of the claims arose from a "concrete, particular harm"—the protections for source code resulted in high costs for his business. On the other hand, all of the claims also addressed restrictions applicable equally to all members of the public.

This tension in *Aharonian* reflects the lack of consensus on the proper allocation of authority among each of the branches for deciding policy. The legislature offers many advantages as a policy-setting body. Public policy formed through deliberative democracy—the theory that lawmakers should develop public policy based on conversations about the public interest, and not solely on the legislator's own viewpoint or the interests of a particular group—allows for the contribution and consideration of multiple viewpoints on the public interest, as society comes to reasoned consensus on public policy formulated in furtherance of the public good.[176]

179 (1974).

171. Elliott, *supra* note 54, at 481 (citing FEC v. Akins, 524 U.S. 11, 23 (1998)).

172. Aharonian v. Gonzales, 77 U.S.P.Q.2d 1449 (N.D. Cal. 2006) (granting motion to dismiss claims challenging the validity and scope of copyright protection in software source code).

173. *Id.* at 1454.

174. *Id.*

175. *Id.* at 1453 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 572-73 (1992)).

176. John J. Worley, *Deliberative Constitutionalism*, 2009 B.Y.U. L. REV. 431, 442 (2009) ("In deliberating about matters of public concern, democratic citizens and their elected representatives must distance themselves from their own personal or group interests and impartially adopt laws, policies, and institutions that promote the interests of all citizens."); Samuel Freeman, *Deliberative Democracy: A Sympathetic Comment*, 29 PHILOSOPHY AND PUB.

Deliberative, representative, majoritarian bodies like Congress allow stakeholders to gather, present their interests, discuss and debate policy options, attempt to influence their elected representatives, and, after receiving feedback from the other constituents, moderate their proposals to make them more broadly attractive and inclusive of other stakeholders.[177] The process of enacting legislation through committees and the full bodies in two chambers of Congress takes time, but that time allows for broad participation and consensus building. The public accepts the legitimacy of laws because they have engaged in the deliberative process.[178]

Accordingly, courts often defer to the legislature as the best forum for resolution of these questions.[179] Otherwise, prompt access to the courts by ideological plaintiffs makes the courts into policy-making bodies equal to the executive and legislative branches.[180] The Supreme Court has characterized the term length of copyrights as a policy decision that rests with the legislative branch. "Given the authority we hold Congress has, we will not second-guess the political choice Congress made between leaving the public domain untouched and embracing Berne unstintingly."[181] The Court declined to "reject the rational judgment Congress made" in how it thought

AFFAIRS 371, 377 (2004) ("So one reason deliberative democrats emphasize deliberation is so that citizens' judgments on laws and policies can be informed by consideration that all can reasonably accept in their capacity as democratic citizens.").

177. William N. Eskridge Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1295 (2005) ("When advocates must articulate and defend their proposals to a variety of perspectives and not just to their core supporters, they are more likely to moderate and universalize those proposals.").

178. Freeman, *supra* note 176, at 380 ("What matters most for deliberative theorists then is not hypothetical, but actual deliberation and agreement among free and equal citizens under the realized ideal conditions of deliberative democracy. This is a necessary (if not also sufficient) condition for the legitimacy of laws and the proper exercise of political power.").

179. Golan v. Holder, 132 S. Ct. 873, 878 (2012) (holding that section 514 of the Uruguay Round Agreements Act, which met treaty obligations and revived copyrights in certain foreign works which had fallen into the public domain, did not violate the First Amendment or the Copyright Clause); Authors Guild v. Google, Inc., 770 F. Supp. 2d 666, 667-78 (S.D.N.Y. 2011) ("[T]he establishment of a mechanism for exploiting unclaimed books is a matter more suited for Congress than this Court."), *class certified and motion to dismiss denied*, Nos. 05 Civ. 8136 (DC), 10 Civ. 2977 (DC) (S.D.N.Y. May 31, 2012), *and class certification rev'd*, 721 F.3d 132 (2d Cir. July 1, 2013) (No. 12-3200-cv), *remanded to* No. 05 Civ. 8136 (DC) (S.D.N.Y. Nov. 14, 2013) (dismissed on fair use grounds).

180. Jenny L. Maxey, *A Myriad of Misunderstanding Standing: Decoding Judicial Review for Gene Patents*, 113 W. VA. L. REV. CIR. 1033, 1068-69 (2011) (recognizing that the slow and deliberative nature of the legislative process is better suited to complex, multi-stakeholder issues like patentability of gene sequences); Scalia, *supra* note 59, at 893 (discussing separation of powers function of standing).

181. *Golan*, 133 S. Ct. at 887.

best to meet its Constitutional role to "promote the Progress of Science."[182] Such policy decisions do not fall to the courts for resolution.[183] Whether or not the Congress made a wise decision, the Court should only determine whether it made a constitutional decision, and in the matter of copyright term lengths, Congress has great discretion under the Constitution.[184] Along those lines, the Southern District of New York rejected a proposed settlement regarding the digitization of books because that policy decision rested with the legislative, as opposed to the judicial, branch.[185]

Yet, the structure of the legislature does not always foment the development of public policy through robust deliberation. The political branches may not provide adequate venues to address widely shared injuries, particularly when a large number of individuals suffer an injury so small or impersonal that it would make them unlikely to engage in political action to address the problem.[186] A government based on deliberative democracy carries the additional risk of factions dominating the deliberative process and losing focus on the public interest.[187] This concern has borne itself out in the copyright legislation enacted by Congress over the years. Copyright law has not emerged from debate among legislators, but rather from negotiations between different industries with interests in the copyright regime.[188] Thus, although the mid-1990s witnessed two significant pieces of legislation impacting the term of copyright—the Uruguay Round Agreements Act[189] (the subject of *Golan v. Holder*) and the Copyright Term Extension Act[190] (the subject of *Eldred v. Reno*), both of which expanded the scope of protection for copyrights—the lack of

182. *Id.* at 889.

183. *Id.* at 894 ("Nor is this a matter appropriate for judicial, as opposed to legislative resolution.").

184. *Id.* ("The judgment §514 expresses lies well within the ken of the political branches. It is our obligation, of course, to determine whether the action Congress took, wise or not, encounters any constitutional shoal.").

185. Authors Guild v. Google, Inc., 770 F. Supp. 2d at 667-78 ("[T]he establishment of a mechanism for exploiting unclaimed books is a matter more suited for Congress than this Court.").

186. Siegel, *supra* note 109, at 101-02 (discussing the imbalance of incentives).

187. Stephen L. Elkin, *Thinking Constitutionally: The Problem of Deliberative Democracy*, 21 SOCIAL PHILOSOPHY & POL'Y 39 (2004) (discussing the challenges of how a deliberative democracy will actually work).

188. *See* JESSICA LITMAN, DIGITAL COPYRIGHT 53 (2001) (observing that Congress adopted legislation emerging from industry negotiations).

189. Act of Dec. 8, 1994, Pub. L. No. 103-465, 108 Stat. 3809.

190. Act of Oct. 27, 1998, Pub. L. No. 105-298, 112 Stat. 2827.

engagement with multiple constituencies (including consumers, artists, performers, libraries, retailers, and others) led to a failure of widespread buy-in of the policy. Unsuccessful at either gaining an audience in Congress or obtaining legislation consistent with their interests, some stakeholders turn to the courts, as witnessed in *Golan* and *Eldred*.[191]

Besides allowing certain interest groups to dominate public policy formation on some issues, Congress has also declined to address certain issues at all. This lack of action has led to some stakeholders asking the courts to fill that void. For example, the recent copyright litigation has touched on the issue of orphan works.[192] Although the Copyright Office issued a report on orphan works in 2006 with draft legislation, Congress has not taken action beyond subcommittee hearings in 2008.[193] Likewise, Congress has not responded to the other concerns about terms extensions or the public domain raised in suits like *Eldred v. Reno* and *Golan v. Holder*. Perhaps this lack of action signals that Congress remains committed to expansion of copyright protection, or perhaps it reflects that these stakeholders lack access to Congress.

In the patent realm, a common refrain of criticism rings these days against patent "trolls" or "non-practicing entities".[194] These patent holders do not produce goods or exploit their inventions themselves, but rather seek to extract damages from others, many of whom use the patent unwittingly.[195] Critics decry the unfairness of a

191. Elliott, *supra* note 54, at 491 ("Thus, dismissing a case because an injury is widely shared, on the assumption that the group will mobilize to obtain redress through the political branches, does not take into account the political reality that some groups have more access than others.").

192. Kahle v. Gonzales, 487 F.3d 697 (9th Cir. 2007) (brought by non-profit organizations that provided the public with access to orphan works that otherwise would remain hard to access).

193. *The "Orphan Works" Problem and Proposed Legislation: Hearing Before the S. Comm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong. 2 (2008) (statement made by Marybeth Peters, Reg. of Copyrights), *available at* http://www.copyright.gov/docs/regstat031308.html; U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS (2006), *available at* http://www.copyright.gov/orphan/orphan-report.pdf.

194. James Bessen et al., *The Private and Social Costs of Patent Trolls*, 34 REG. 26, 35 (2011) (arguing that patent trolls have resulted in the loss of over half a trillion dollars in wealth over between 1990 and 2010); Markus Reitzig et al., *On Sharks, Trolls, and Their Patent Prey – Unrealistic Damage Awards and Firms' Strategies of "Being Infringed,"* 36 RESEARCH POL'Y 134, 134 (2007) (arguing that patent "trolls" or "sharks" hold research and development groups captive).

195. Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEXAS L. REV. 1991, 2009 (2007) ("Defining a patent troll has proven a tricky business, but that does not mean the problem does not exist."); Reitzig et al., *supra* note 194, at 134 (arguing that patent

system that allows these patent trolls to profit while they inhibit innovation by legitimate enterprises.[196] Echoing the frustration of industry with these patent trolls, politicians have decried the bullying by these entities and the negative effects on growth and innovation.[197] While legislators have introduced bills that would seek to curb abuses arising from patent troll litigation, they have not introduced bills that would fix the policies or procedures that give rise to these troll patents.[198] Namely, owners of patents have the right to exclude others from using the protected inventions. If legislators believe that trolls assert claims based on overbroad, invalid, or "bad" patents, they should make this material ineligible for patent protection, change the standards for patent examination, or allocate more resources to the USPTO to support more thorough review. Instead, the bills addressing the excesses of patent trolls propose changes to pleading standards, different venues for dispute resolution, and shifting of attorney fees back to an unsuccessful plaintiff.[199]

The executive branch offers some advantages for setting policy. As a democratically elected branch it can claim to represent the will of the people. The executive agencies have expert, specialized staff

"trolls" or "sharks" hold research and development groups captive).

196. David Segal, *Has Patent, Will Sue: An Alert to Corporate America*, N.Y. TIMES, July 14, 2013, at BU1 (profiling Eric Spangerberg, who sued 1,638 companies between 2008 and 2013, and noting that U.S. companies spend $30 billion every year on patent litigation); *Patent Trolls*, ELECTRONIC FRONTIER FOUNDATION, https://www.eff.org/issues/resources-patent-troll-victims (last visited July 15, 2013).

197. Press Release, John Cornyn, U.S. Senator, Cornyn Introduces Bill to Curb Abusive Patent Litigation (May 22, 2013), *available at* http://www.cornyn.senate.gov/public/index.cfm?p=NewsReleases&ContentRecord_id=082eaec c-1983-41a7-b656-156c1b4b77cb ("[A]busive patent litigation, led by a growing number of 'patent trolls' in search of a quick payday, threatens the innovation patents were created to protect."); Press Release, Charles E. Schumer, U.S. Senator, "Patent Trolls" Preying on New York's Technology Industry with Unwarranted Lawsuits (May 2, 2013), *available at* http://www.schumer.senate.gov/Newsroom/record.cfm?id=341612 (observing that patent trolls cost operating companies $29 billion in suits in 2011).

198. John M. Golden, *"Patent Trolls" and Patent Remedies*, 85 TEXAS L. REV. 2111, 2130 (2007) ("[E]nergy might be better directed to devising alternatives or improvements to today's costly court proceedings—such as better initial screening of patents by the U.S. Patent and Trademark Office, more effective reexamination proceedings, or a new brand of administrative 'opposition' proceedings.").

199. Bad Faith Assertions of Patent Infringements, VT. STAT. ANN. tit. 9, §§ 4195-4199 (2013) (creating cause of action by defendant in bad-faith patent lawsuit against party asserting the patent); Patent Abuse Reduction Act of 2013, S. 1013, 113th Cong. (2013) (proposing limits on discovery, heightened pleading standards, and shifting of attorney fees); Saving High-Tech Innovators from Egregious Legal Disputes Act of 2013, H.R. 845, 113th Cong. (2013) (allowing successful defendant to recover attorney fees); Patent Litigation and Innovation Act of 2013, H.R. 2639, 113th Cong. (2013) (setting heightened pleading standards).

with deep policy knowledge.

Yet, these agencies have limited authority and resources. The USPTO lacks a mechanism to solicit and weigh public input on the extension of protection to every new category of technology.[200] Further resource constraints limit the extent of the review which the USPTO undertakes for the validity of patents, which means that some issues will not arise until competitors uncover prior art or the patentee begins exercising its interpretation of its rights.[201] Moreover, the Copyright Office and the USPTO offer mechanisms to challenge registrations under only limited circumstances, such as identification of an incorrect owner on a copyright registration or reexamination of a patent based on prior art not considered during the initial review.[202] If someone wishes to challenge a registered patent or copyright on other grounds, including that patent or copyright protection should not extend to an entire category of materials, or that the registrant asserts rights beyond those afforded by the registration, these agencies do not have the authority to grant relief. The challenger must petition the courts, which provide a "reasonably efficient and conclusive forum for the adjudication of validity."[203]

The courts offer certain other advantages for resolving policy questions. In this venue, litigants may question "the presumptive legitimacy of majoritarian outcomes" and advocate for policy changes contrary to the views of the majority or the most powerful interests.[204] The anti-majoritarian nature of the courts makes them the forum in our tripartite government to seek redress by those who did not find success in a political branch.[205] Narrow approaches to standing may

200. Kane, *supra* note 40, at 731 (2004) ("From a policy perspective, no mechanism for public input exists when the PTO readily embraces new technologies as patentable subject matter and issues patents that may elicit public concern and criticism, such as DNA gene patents. The public interest concerns of nonapplicants cannot be channeled into any meaningful engagement with the PTO.").

201. Kitch, *supra* note 30, at 345-46 (arguing that the courts do better than the Patent Office at making determinations on validity).

202. 35 U.S.C. §§ 302-07 (2012) (setting forth provisions for seeking reexamination of any patent claim based on prior art); 37 C.F.R. § 1.510 (2013); U.S. COPYRIGHT OFFICE, FORM CA FOR SUPPLEMENTARY REGISTRATION, (2006); U.S. COPYRIGHT OFFICE, CIRCULAR 8 SUPPLEMENTARY COPYRIGHT REGISTRATION (2013).

203. Kitch, *supra* note 30, at 345-46 (arguing that the courts do better than the Patent Office at making determinations on validity).

204. Hershkoff, *supra* note 156, at 163 (arguing that courts act to undo democratically made decisions when the democratic process excludes affected groups or results in an outcome that impacts such groups in ways that do not align with the public interest set forth in the Constitution or statutes).

205. Elliott, *supra* note 54, at 491 ("Thus, dismissing a case because an injury is widely

therefore serve to exclude the disadvantaged from the political branches as well as the courts.[206] If the standing doctrine blocks all individuals who could conceivably raise a particular issue from proceeding as plaintiffs, then the doctrine does not just keep out individuals, but rather entire issues as well.[207] Someone wishing to challenge the validity of a patent often has no forum to seek relief other than the courts.[208] An injury remains an injury, whether widespread or unique, and the injured party needs to have an authority to petition to redress the injury.[209] For this very reason, Congress enacted the Declaratory Judgment Act to open the courts to consider patent validity challenges.[210] The Supreme Court set forth a flexible and open test in *MedImmune, Inc. v. Genentech, Inc.* to make it easier for challengers of allegedly invalid patents to access the courts.[211]

Litigation also engages the public in policy debates in ways that legislative or executive action does not. The initiation of the litigation introduces the assertions of the plaintiffs to the public discourse and helps to evolve society's collective opinion.[212] The Court may lead the way in recognizing a principle which the rest of the government will embrace over time.[213] When the legislature or the executive

shared, on the assumption that the group will mobilize to obtain redress through the political branches, does not take into account the political reality that some groups have more access than others."); Scalia, *supra* note 59, at 894 ("There is, I think, a functional relationship, which can best be described by saying that the law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority . . . .").

206. Nichol, *supra* note 51, at 304 ("The malleable, value-laden injury determination has operated to give greater credence to interests of privilege than to outsider claims of disadvantage.").

207. Scalia, *supra* note 59, at 892 (discussing the effect of the standing doctrine on the allocation of powers).

208. La Belle, *supra* note 45, at 85 (discussing the role of the courts for patent validity).

209. Elliott, *supra* note 54, at 481 (citing FEC v. Akins, 524 U.S. 11, 24 (1998)) ("[T]he fact that a political forum may be more readily available where an injury is widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an 'injury in fact.'").

210. 28 U.S.C. § 2201 (2013); La Belle, *supra* note 45, at 73 (discussing purpose of declaratory judgments for patents).

211. La Belle, *supra* note 45, at 85 (citing MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007)).

212. Hershkoff, *supra* note 156, at 164 (finding that public law litigation "forms part of what sociologists call the new social movements in which participants contest public meaning").

213. *Id.* (easing the other institutional actors to internalize new norms); Eskridge, *supra* note 177, at 1300 ("Because of inertia built into our representative democracy, the law does not always change as social norms move from one stage to the next."). In the past, the Supreme Court has led the way on social issues. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954) (ordering school desegregation before legislatures made such changes).

branch fails to act, litigation may offer the only alternative to prompt change.[214] Adjudication by the courts may highlight issues not raised to the legislative branch or given inadequate attention in that venue, and open the door for Congress to take action based on the court's informed opinion.

If no venue exists for resolution of these issues by the government, then private parties will set de facto norms. The more powerful interests will have the leverage to set the terms of engagement. The government should step in when such terms do not reflect the public interest.

7. Efficient Use of Scarce Judicial Resources

Finally, by restricting access to the courts, the standing doctrine aims to cap the size of dockets, thereby making more efficient use of the limited resources of the federal courts.[215] The structure of the federal courts lends itself best to resolution of discrete disputes between small numbers of parties and should devote its resources to these tasks. Thus, for example, consideration of the multiple public interests that would inform the propriety of patent protection for broad categories of inventions makes inefficient use of court resources.[216]

This rationale presumes that the courts will assess the standing of the parties as a preliminary question using a straightforward test that yields consistent results.[217] Contrary to these presumptions, assessments of standing often require the parties and the courts to invest significant resources. The plaintiff may need to gather and submit evidence to establish that it has suffered an injury.[218] An

214. Michael A. Rebell, *Poverty, Meaningful Educational Opportunity, and the Necessary Role of the Courts*, 85 NO. CAROL. L. REV. 1467, 1526-29 (2007) (stating that court actions have produced meaningful changes in education funding; even the filing of a complaint has prompted the executive branch to take action).

215. Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 191 (2000) ("Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake."); Scalia, *supra* note 59, at 891 ("Standing, in other words, is only meant to assure that the courts can do their work well, and not to assure that they keep out of affairs better left to the other branches.").

216. Maxey, *supra* note 180, at 1060.

217. Nichol, *supra* note 51, at 309 ("Standing is meant to be a mere preliminary jurisdictional inquiry. . . . Plaintiffs are either hurt or they are not. Harms are either real or fanciful. They are concrete or abstract, individual or shared, objective or subjective, particular or common, hypothetical or imminent.").

218. *E.g.*, Ass'n for Molecular Pathology v. USPTO, 689 F.3d 1302 (Fed. Cir. 2012) (reviewing twenty plaintiffs' submitted declarations and other evidence of injury), *aff'd in relevant part sub nom*. Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107

appeal on a determination of standing requires the resources of another court. If the appellate court reverses a dismissal based on lack of standing, the trial court must commence the substantive adjudication of the case, perhaps months or years after the plaintiff initiated the case. Consider the *Myriad* litigation. The plaintiffs filed suit in 2009 and the Federal Circuit did not issue its decision on the appeal on the standing issue until 2011, two years later—two years that might make a real difference to a cancer patient seeking to benefit from additional research on or diagnostics with the BRCA genes.[219]

Dismissal of cases due to lack of standing may yield other inefficiencies. Consider the scenario of a party seeking adjudication by the courts before it undertakes a potentially infringing action.[220] If the court dismisses the case on grounds of standing, the litigant must decide to either undertake the infringing activity or forego the proposed use. If the interested party decides to commence use, litigation may follow, but such litigation merely delays adjudication of the issues on the merits. The user will assert a counterclaim or defense equivalent to its affirmative claims in the initial action. The courts could have decided those issues in the first action rather than expending its resources on the standing analysis.

On the other hand, if the party foregoes the contemplated use, the public will lose out on potentially beneficial new material. Declining to hear the merits of a case based on standing has the same practical effect as issuing a decision upholding the patent validity and avoids the challenging policy questions of the proper extent of patent protection. For example, invalidation of seed patents could result in lower food prices since farmers would not have to pay to use seeds each year. Or, invalidation might result in less investment by biotechnology firms in seed innovations since they will not benefit from the patent monopoly to recoup the research and development expenses. Additionally, forestalling the invalidity question might curtail third-party derivative developments based on those seed patents, which remain subject to the control of the patent holder. Thus, while denial of standing may result in an incremental reduction in the use of court resources in the short-term, declining to decide the issues in the case may yield inefficiencies from a broader societal perspective.

(2013).

219. *Id.*

220. Golden, *supra* note 198, at 2126-31 (discussing the options of a potential infringer based on the costs associated with either a license or litigation).

III. A PROPOSAL FOR STAKEHOLDER ENGAGEMENT

Any attempt to mitigate the problems arising from adjudication of public interest intellectual property cases in courts requires attention to the stakeholder access problem. Given the limitations in the structure and resources of the federal courts, requiring or encouraging massive multi-party litigation does not present a workable solution. Instead, a mechanism to seek and assess public comment could exist in the agencies responsible for intellectual property—the legislative branch's Copyright Office and the executive branch's USPTO. The agency would compile the results of the public comments and present those comments and its recommendations in a report to the court. This process would allow for stakeholder input, provide the court with broader inputs on the public interest, and inform the legislature of issues that might require legislative action.

The procedure could work as follows. Upon the initiation of a public interest intellectual property case, the court would approve a question or questions for public comment. The parties could move to dismiss the action before commencement of the public comment period, but not on the grounds of standing, since the results of the public comment period would inform the issues of injury, representativeness, and effectiveness of representation in the standing analysis. For instance, questions for the cases discussed in this Article might include the following:

1. How do patents in seeds contribute to the progress of science?
2. Do patents in seeds encourage or discourage more innovation for the public to enjoy?
3. How do the copyright terms in the Copyright Term Extension Act contribute to the progress of the arts?
4. Do copyright terms of this length result in the creation of more works for the public to enjoy?

The agency would take the charge from the court and initiate a public comment period. It would identify stakeholders—owners of impacted property rights, competitors, consumer advocacy groups, public domain advocacy groups—and invite them and anyone else in the public to submit comments on the action. These agencies could efficiently identify and contact impacted stakeholders since they already know and engage with their stakeholder communities.

In a somewhat analogous procedure currently employed for

another type of action with multiple stakeholders, the federal courts may direct counsel in class actions to distribute notice of the action to class members.[221] Class counsel generally knows the members of the class and has an incentive to find the members in order to achieve a result that addresses the shared claims of the entire class. In public interest intellectual property cases, the stakeholders do not belong to one class with shared beliefs. In fact, some stakeholders will hold viewpoints on the policy contrary to those of the plaintiffs. Thus, the plaintiffs do not have an incentive to locate all of the impacted stakeholders. The court itself does not know who other than the litigants may speak to the effects of the policy. If the court administered the public comment period, the proceeding could become quite adversarial and might resemble a bankruptcy hearing with multiple stakeholders claiming rights in the property. The agencies, however, work with the stakeholders on a daily basis.

The agency would take sixty days to identify stakeholders and open the issue for public comment for an additional sixty days. After a further sixty days, it would issue its report. The public-comment period would thus delay the litigation. Yet, formation of public policy merits expenditure of time and other resources to understand the policy choices and their impact on the stakeholders. This procedure offers a relatively efficient way to assess those options. Considering that the litigation discussed in this Article often lasted many years, a period of six months at the beginning of the litigation would not delay the matter substantially. The benefit of gathering valuable information at the start of the litigation outweighs the harm of any delay.

Further, the existence of a forum for stakeholders to advocate their interests to the government would counteract the *binary tendency*. When the government inquires how a policy impacts a stakeholder, the government acknowledges that those views matter. The policy options expand beyond completely private rights or completely public rights to total-welfare-enhancing models, for example, compulsory licensing or limited fair use exceptions for research. Even if the final policy ends up aligning with one of the two extremes, the engagement of the affected communities will lead to more buy-in by the stakeholders.

The mere filing of one of these disputes might prompt the initiation of policy development by the executive or legislative

221. FED. R. CIV. P. 23(c)(2).

branch. This may, in turn, lead to suspension of the action as the parties participate in the policy development through the other branches.

As a result of the initiation of the public comment period, additional stakeholders will learn of the litigation. They then might voluntarily join as parties to the litigation. This development would offer the advantage of providing the court with more viewpoints and more briefing on the issues. On the other hand, the addition of multiple parties could make the litigation unwieldy. However, that possibility exists even today since stakeholders already have the option to attempt to join as parties. In the event of a massive multi-party litigation, the court would still have the option to dismiss parties for lack of standing. If it does so, it should pay particular attention to the adequacy of representation, since, as discussed in this Article,[222] the injuries suffered by the particular plaintiffs do not change the answers to the substantive questions. For those parties who do remain in the case, the court could suggest that parties with overlapping interests combine their resources and a designated representative would submit briefs and motions on behalf of all of the parties sharing the same interests.

The agencies would consider the comments in light of the questions posed by the court as well as their general duty to consider the public interest in their work.[223] This obligation towards the public interest extends to both the public benefits of expanding protection and the public harms of contracting protection. The agency would compile the comments with these considerations in mind and issue its own recommendation based on these inputs and its expert opinion.

The court could give as much or as little weight to the agency report as it deemed appropriate based on the circumstances of the case. In more discrete cases, the additional information would most likely confirm the positions advocated by the parties to the suit. In more complex cases with wider effects, the contributions from the public would illuminate the broader set of real-world consequences. Nonetheless, the report might not have any impact on the questions the court would need to decide. For instance, the opinions of various constituencies that longer copyright terms would not result in the production of more works for the public to enjoy would not dispose of the constitutional question of Congress's authority to set term

222. *See* discussion *supra* Part III.B.5.

223. Ritchie v. Simpson, 170 F.3d 1092, 1098 (Fed. Cir. 1999) ("[T]he Board has a duty to obtain the views of the affected public.").

lengths.[224] The report, however, would nonetheless aid the court in understanding the public impact of the legislation. Perhaps more importantly, the report would inform the executive and legislative branches of the public's views of the policy and if they should consider changes to the policy. The public-comment period thus would serve the important role of engaging constituents in the policy-making process.

Given the potential value of the public-comment period, it might seem appropriate to require the agencies to initiate this mechanism even if litigation has not commenced. This Article has focused on the challenges of litigation, and this proposal specifically addresses those challenges by providing a mechanism to inject the policy implications into the litigation. The court's questions define the purpose and scope of the public-comment period. Without this direction, the agencies would not have direction on when to initiate this process, and would often lack the authority to implement any policy changes without new legislative action. Thus, policy recommendations submitted to Congress *sua sponte* will likely fall flat.

After the court issues its decision, the legislative or executive branch may seek to change the policy within the bounds set forth by the court. These branches will benefit from the court's analysis, the public input, and the agency's recommendation. The stakeholders will have engaged with the policy issue through their participation in the public-comment period and, having ownership in the issue, may seek to influence the other branches to change the policy.

Without this process, stakeholders will face many instances where no branch considers the issues raised by the litigants. Significant stakeholders should have the opportunity to present their concerns and have the government consider those inputs, particularly in the face of a substantial policy shift. This mechanism would open up that opportunity and thereby counteract the *finality tendency*.

This Article has argued that the current interaction of standing with public interest intellectual property cases leaves some issues without a forum for resolution. This proposal does not guarantee that a governmental body will resolve the issue of orphan works, for example. But, the process would engage the stakeholders and force

224. Eldred v. Ashcroft, 537 U.S. 186, 199 (2003) (upholding Copyright Term Extension Act not because such a term would or would not result in the production of more works, but rather because a term of life plus seventy years met the constitutional restriction to "limited times").

the agency to take a position on the issue.[225] It would also serve to develop a record of the consequences of current policy on orphan works. Perhaps, these steps would suffice to move the policy process along so that the executive or legislative branch would change the policy.

Even if the government did not change a policy based on these inputs, the opening up of the policy process to multiple stakeholders would change the dynamics away from the *private capture of public interests*. This Article has discussed public interest intellectual property cases that define the disputes as control over the property by the purported rights holder or by the plaintiff. The rights holder seeks to retain exclusive control, while the plaintiff seeks to wrest such exclusivity from the rights holder in favor of free access. When multiple stakeholders participate in the policy process, the framing of the issue shifts, focusing instead on how to enhance the welfare of all of the stakeholders. They all benefit from development of the material and no one group of stakeholders will dictate control of the material.

CONCLUSION

The role of the courts matters in disputes over intellectual property policy, because the tension between private rights and public rights will not go away. Technological and scientific innovation multiplies the volume of new information goods at a breakneck rate, but this pace of development also makes it more challenging for rights holders to protect their goods. The need to stay ahead of the curve and offer a competitive advantage creates pressures to stake rights as broadly as possible.[226] Less than a month after the Supreme Court invalidated Myriad's patents in the isolated BRCA1 and BRCA2 gene sequences, Myriad filed multiple suits against laboratories offering testing for the BRCA1 and BRCA2 gene sequences.[227] Organizations like the Electronic Frontier

225. The Copyright Office has taken the lead on the orphan works issue and developed draft legislation, which has not moved out of committee. *The "Orphan Works" Problem and Proposed Legislation: Hearing Before the S. Comm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong. 2 (2008) (statement of Marybeth Peters, Reg. of Copyrights), *available at* http://www.copyright.gov/docs/regstat031308.html; U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS (Jan. 2006). Litigation with stakeholder engagement might provide more impetus for Congress to respond to the proposal.

226. Heller and Eisenberg, *supra* note 43, at 698-99 ("[N]obody wants to be the last one left dedicating findings to the public domain.").

227. Complaint, Univ. of Utah Research Found. v. Gene By Gene Ltd., No. 2:13-cv-

Foundation and the Public Patent Foundation have dedicated themselves to fighting this trend and have robust litigation programs.[228] With Congress unable or unwilling to address many of these issues, organizations like this will continue to seek resolution of these issues in the courts.[229]

Without some modification to the process for resolving these disputes, the trend toward *private capture of public interests* will intensify. Each side will initiate litigation to seek to enforce the rights or to invalidate those rights. The *binary tendency* will reinforce this trend as the victories in litigation encourage the parties to try to move the line in the sand. Under-organized or under-resourced constituencies will watch from the sidelines as the courts mediate the balance between private rights and the public domain. The *finality tendency* will continue to leave certain issues undecided and impose opportunity costs on those considering using or adapting the material, leading to foregone developments which the public might have enjoyed. Enhanced engagement with a wider range of stakeholders, possible through the public-comment period, will help to change

00643-EJF (D. Utah July 10, 2013) (including Myriad Genetics, Inc. as one of five plaintiffs alleging that defendants' genetic testing infringes multiple patents); Complaint, Univ. of Utah Research Found. v. Ambry Genetics Corp., No. 2:13-cv-00640-RJS (D. Utah July 9, 2013) (including the same).

228. *About EFF*, ELECTRONIC FRONTIER FOUNDATION, www.eff.org/about (last visited July 24, 2013) ("From the beginning, EFF has championed the public interest in every critical battle affecting digital rights. . . . EFF fights for freedom primarily in the courts, bringing and defending lawsuits even when that means taking on the US government or large corporations."); PUBLIC PATENT FOUNDATION, www.pubpat.org (last visited July 24, 2013) ("Undeserved patents and unsound patent policy harm the public by making things more expensive, if not impossible to afford; by preventing scientists from advancing technology; by unfairly prejudicing small businesses; and by restraining civil liberties and individual freedoms. PubPat represents the public's interests against undeserved patents and unsound patent policy.").

229. General media sources decry the recent overall inaction by Congress. *E.g.*, Sean Sullivan, *Everything You Need to Know about the Politics of the Student Loan Fight*, WASHINGTON POST (July 1, 2013), http://www.washingtonpost.com/blogs/the-fix/wp/2013/07/01/everything-you-need-to-know-about-the-politics-of-the-student-loan-fight/ (observing that gridlock characterizes Congress and led to a spike in student loan rates); *94 Percent of Americans Say Congressional Inaction Harming Economy*, NO LABELS (Dec. 1, 2011), http://www.nolabels.org/press-releases/no-labels-poll-94-percent-americans-say-congressional-inaction-harming-economy. Specifically regarding public interest intellectual property issues, Congress has failed to act on the issue of orphan works although the Copyright Office drafted legislation intended to provide incremental relief for the problems resulting from the inability to locate the owners of copyrighted works. *See The* "*Orphan Works*" *Problem and Proposed Legislation: Hearing Before the S. Comm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong. 2 (2008) (statement of Marybeth Peters, Reg. of Copyrights), *available at* http://www.copyright.gov/docs/regstat031308.html.

the approach of intellectual property policy to greater focus on the public interest.