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Cyberspace Property Rights: Private Property Interests in the Context of Internet Webpages

I. INTRODUCTION

UNDER YOUTUBE'S TERMS OF USE, IT OWNS MOST CONTENT on its webpage and may remove content that it deems inappropriate "at any time, without prior notice and at its sole discretion."¹ Imagine YouTube's reaction if the government mandates service providers remove content from its webpage without YouTube's consent.² Then also imagine the alternative scenario where a court strikes down YouTube's Terms of Use as a violation of a state constitution, mandating that YouTube repost a user's video it removed without prior notice.³ Such situations are not entirely hypothetical, and they certainly are not far-fetched.⁴ In fact YouTube has had recent—and very public—situations where it complied with a government-sanctioned demand to remove certain politically charged videos, prompting the

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1. YouTube, Terms of Service, <http://www.youtube.com/t/terms> (last visited Mar. 2, 2010).

2. *See, e.g.*, 17 U.S.C. § 512(c)(1)(C) (2006) (mandating that a service provider of online material will not be liable for copyright infringement if "upon notification of claimed infringement . . . [it] responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity").

3. *See, e.g.*, *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 79, 88 (1980) (holding that a state may exercise its police powers to extend civil liberties to include the right to freedom of speech in privately owned areas of a public character).

4. *See, e.g.*, Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1165–66 (2005) ("Following California's lead [in decisions like *Pruneyard*], states should interpret their own constitutions' free speech clauses to grant individuals the right to express themselves in privately-owned forums for expression that are the functional equivalent of traditional public forums."). Professor Nunziato argues that the Supreme Court's holding in *PruneYard* is illustrative of the positive effect that state action to regulate private property could have on the freedom of speech. *Id.*

user who posted the videos to insist that YouTube replace them on the webpage.⁵ Government action to regulate the content of Internet webpages could tread heavily on the private property interests of website providers⁶ such as YouTube.⁷

The property problem arises because the Internet, including its webpages, has many characteristics of a public area, like a shopping mall, so a government could exercise its police powers to regulate the content of an Internet webpage even if it is controlled by a private entity. The United States Supreme Court's holding in *PruneYard Shopping Center v. Robins*⁸ is particularly relevant to this problem. There, the Court addressed whether a state could interpret its constitution to protect the dissemination of politically charged pamphlets by high school students in a privately owned shopping mall.⁹ Ultimately, the Court found that a state may exercise its police powers to extend its citizens' civil liberties.¹⁰ The Court's holding, however, did not necessitate compensation to the mall-owner under the Fifth Amendment Takings Clause¹¹ because the mall-owner's reasonable business expectations were not sufficiently affected.¹² The Court's holding embodies a potential dilemma for website providers: by allowing states to exercise their police powers to regulate private property of a public character, the constitutionally protected property rights of a website provider may be in danger.¹³

5. See generally Letter from Trevor Potter, General Counsel, McCain-Palin Campaign, to Chad Hurley, CEO, YouTube, L.L.C. et al. (Oct. 13, 2008) (available at [http://www.eff.org/files/McCain%20 YouTube%20copyright%20letter%2010.13.08.pdf](http://www.eff.org/files/McCain%20YouTube%20copyright%20letter%2010.13.08.pdf)). The user's request—the re-posting of campaign videos removed subsequent to takedown notices—sounded in the freedom of speech, stating that YouTube's immediate compliance with the demands of potential copyright holders “deprives the public of the ability to freely and easily view and discuss the most popular political videos of the day.” *Id.* at 1. In fact, Mr. Potter specifically quoted a federal district court judge: “The First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Id.* at 3 (quoting *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957, 960 (D.N.H. 1978)).

6. The First Amendment rights of the website provider itself are outside the scope of this Article, but such an argument should make for an interesting issue. See generally Marjorie A. Shields, Annotation, *First Amendment Protection Afforded to Web Site Operators*, 30 A.L.R. 6TH 299 (2008). This Article instead focuses upon private property interests of website providers.

7. In the context of this Article, “website provider” or “provider” means the individual or entity that creates a webpage, while “Internet user” or “user” generally refers to individuals or entities that access and surf the content of webpages.

8. 447 U.S. 74 (1980).

9. *Id.* at 79.

10. *Id.* at 78–79.

11. *Id.* at 84. The Fifth Amendment to the United States Constitution states, in pertinent part, “nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

12. See *PruneYard*, 447 U.S. at 82–83 (“There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center.”).

13. Some scholars argue that states should interpret their respective constitutions to extend individuals' rights to express themselves on private property. See, e.g., Nunziato, *supra* note 4, at 1165–66.

Certainly, one state should not control the content of the Internet,¹⁴ especially if the webpage on which that content appears is the private property of a website provider. If a state attempts to regulate a webpage, the constitutional property rights of the website provider are abridged,¹⁵ so the question arises of how much control the website provider has over its own webpage when weighed against the state's interest in regulating the webpage. This Article examines one answer to that question: individual website providers have full private property interests in their respective webpages, with the rights to use, dispose of, and exclude others from their virtual space as they see fit.

Where a court recognizes a government's ability to regulate the content of privately owned property, like webpages, the analysis necessarily involves the Takings Clause of the Fifth Amendment.¹⁶ Website providers likely have strong interests in maintaining the right to use, control, and exclude others from the content of their webpages, particularly in the context of commercial enterprises.¹⁷ When a government mandates modification of a webpage, a taking should be recognized due to the possibility of interference with the economic and personal value of certain webpages.¹⁸

Whether a state government may regulate webpages in light of the Supreme Court's holding in *PruneYard* has yet to be decided, but the question raises important issues that courts will face as governments seek to regulate the content of the Internet with more frequency. Part II of this Article addresses how the common law impliedly extends private property rights to the context of the Internet. Specifically, Part II analyzes how courts have found causes of action, such as trespass to chattels and conversion, to be applicable to disputes in cyberspace to implement the public policies of property rights on the Internet, even where the elements are only marginally met. Lastly, Part III of this Article addresses the application of *PruneYard* to the context of the Internet in light of the frequent comparisons of cyberspace to physical space when applying modern legal concepts.

14. See generally Mark A. Lemley, *Place and Cyberspace*, 91 CAL. L. REV. 521, 525 (2003) (observing that the Internet is very different from the physical world because of the "automatic interconnection between data offered by different people in different places").

15. See *infra* Part III.

16. See *PruneYard*, 447 U.S. at 82–84; see also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004–05 (1984) (describing a three-factor test to determine "whether a governmental action has gone beyond 'regulation' and effects a 'taking'"). In *Ruckelshaus*, Monsanto brought a suit to protect data, which a federal statute required to be disclosed to the EPA. 467 U.S. at 998–99. Monsanto alleged that the federal statute compelling data disclosure constituted a taking without just compensation in violation of the Fifth Amendment. *Id.* The Court held that Monsanto had a cognizable interest in its intangible property, data, which is protected by the Fifth Amendment Takings Clause. *Id.* at 1003–04. In analyzing Monsanto's claim for an unconstitutional taking, the Court identified three relevant factors: the character of the government action, the action's economic impact on the property owner, and the action's interference with the reasonable business expectations of the property owner. *Id.* at 1005.

17. See generally *Ruckelshaus*, 467 U.S. at 1005 (focusing on Monsanto's "reasonable investment-backed expectation" to analyze whether the regulation violated the Takings Clause).

18. See *infra* Part III.C.2.

Part III also discusses the ramifications of the Fifth Amendment Takings Clause if website providers have private property interests in their webpages.

II. WEBSITES ARE PRIVATE INTANGIBLE PROPERTY DUE TO THE PUBLIC POLICIES BEHIND COMMON LAW PROPERTY CAUSES OF ACTION

Public policies realized by common law favor recognition of a website provider's private property interest in its webpage. To recognize a taking where the government regulates a webpage,¹⁹ a court must determine that it is intangible property²⁰ because a webpage is not tangible, as it does not have or possess physical form.²¹ Further, the Takings Clause is violated where the government regulates intangible property for public use without just compensation.²² Thus, courts will first have to consider the public policies of recognizing a new intangible property right in an Internet webpage in order to find a violation of the Takings Clause from government regulation.

While such intangible property rights on the Internet are not universally accepted,²³ some courts have found that disputes in cyberspace fit into private property causes of action.²⁴ Judicial treatment of two causes of action, (1) trespass to

19. Webpages are "simple text file[s] that contain[] not only text, but also a set of . . . [instructions] that describe how the text should be formatted when a browser displays it on the screen." Marshall Brain, *How Web Pages Work*, HOW STUFF WORKS, <http://computer.howstuffworks.com/web-page1.htm> (last visited Mar. 12, 2010); see also *Astroworks, Inc. v. Astroexhibit, Inc.*, 257 F. Supp. 2d 609, 618 (S.D.N.Y. 2003) (referring to a webpage as "an idea reduced to practice" in the context of discussing conversion of intellectual property). While webpages are intimately connected to their servers and domain names, courts and legislatures have not definitively declared yet that they are the private property of the website provider.

20. See *Ruckelshaus*, 467 U.S. at 1003-04.

21. BLACK'S LAW DICTIONARY 1219 (8th ed. 2005) (defining tangible as "having or possessing physical form"); see also *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1024 (S.D. Ohio 1997) ("The Internet is not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks.").

22. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

23. See, e.g., *America Online, Inc. v. St. Paul Mercury Ins. Co.*, 347 F.3d 89, 96 (4th Cir. 2003) (holding that "instructions, data, and information" on computers are not tangible property); *Universal Tube & Rollform Equip. Corp. v. YouTube, Inc.*, 504 F. Supp. 2d 260, 269 (N.D. Ohio 2007) (denying a claim that the domain name youtube.com constituted a trespass to plaintiff's chattel, utube.com, because plaintiff could not link the intangible domain name to a physical object (i.e., computer) since a third party's computers hosted plaintiff's website); *Network Solutions, Inc. v. Umbro Int'l, Inc.*, 529 S.E.2d 80, 86 (Va. 2000) (finding that a domain name confers a "contractual right to use a unique domain name for a specified period of time" and demurring a decision on whether a domain name is a form of intellectual property).

24. See, e.g., *Kremen v. Cohen*, 337 F.3d 1024, 1035-36 (9th Cir. 2003) (analogizing common law private property principles to domain-name disputes to avoid a "free-for-all" among the parties); *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1072 (N.D. Cal. 2000) (finding a strong likelihood that eBay would prevail on the merits of a trespass to chattels claim where defendant sent electronic signals to eBay's computer system in order to mine information); *America Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444, 451-52 (E.D. Va. 1998) (holding that sending unauthorized messages through AOL's computer systems constituted a trespass of chattels); see also *Margae, Inc. v. Clear Link Techs., LLC*, 620 F. Supp. 2d 1284, 1287-88 (D. Utah 2009) (finding, in dicta, that a webpage is tangible property capable of conversion).

chattels and (2) conversion, serves as a good illustration of the public policies behind recognition of property rights in a webpage. This Part does not argue that regulating a webpage under all circumstances constitutes a trespass or conversion.²⁵ It instead examines the public policies and legal theories some courts have advanced for recognition of private property interests on the Internet and argues that those policies are applicable in the context of a webpage.

A. Trespass to Chattels: Policies in Favor of Property Interests in Webpages, Despite Trespass to Chattel's Imperfect Application in Cyberspace

Courts have not decided whether webpages are property,²⁶ but some have determined that website servers constitute the property of the website provider under the doctrine of trespass to chattels. The Internet is connected to physical objects, such as website servers,²⁷ and website providers have legitimate business interests in excluding others from their virtual space. As a result, courts have applied the policies behind the trespass to chattels doctrine²⁸ to grant website providers property rights in the context of the Internet, even where the elements of the cause of action are only marginally met.²⁹

Under the *Restatement (Second) of Torts*, an individual commits trespass to chattels by intentionally: “(a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another.”³⁰ The use of the word “or” means that the plaintiff may prove either that the defendant dispossesses him of the property or at least intermeddles with it.³¹ By its very nature, a website is simultaneously accessible by a large number of people,³² so a single Internet user

25. It should be noted that if websites are not property, the analysis will take a much different turn. See generally *Network Solutions*, 529 S.E.2d at 86–87 (declining to decide whether a domain name is a form of intellectual property and noting that extending a garnishment action to domain names would incite a slippery slope of actions for garnishment of services). If domain names are property, however, whether they constitute private or public property may be the essential determination for the court considering the property rights of the website provider. See generally *infra* notes 55–57 and accompanying text.

26. *But see Margae*, 620 F. Supp. 2d at 1286–88 (stating, in dicta, that webpages are property and thus capable of being converted).

27. Raymond Shih Ray Ku, *Open Internet Access and Freedom of Speech: A First Amendment Catch-22*, 75 TUL. L. REV. 87, 93–94 (2000) (citing Steve Bickerstaff, *Shackles on the Giant: How the Federal Government Created Microsoft, Personal Computers, and the Internet*, 78 TEX. L. REV. 1, 44 (1999)).

28. See *Bidder's Edge*, 100 F. Supp. 2d at 1069 (describing a trespass to chattels action).

29. See, e.g., Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 35 (2000) (noting a lack of commonsense in finding that a “loss of computer processing cycles” is sufficient to show impairment in a trespass claim). *But see Intel Corp. v. Hamidi*, 71 P.3d 296, 303–04 (Cal. 2003) (holding that there was no evidence that the plaintiff in a trespass to chattels claim had been “dispossessed of its computer, nor did [the defendant’s] messages prevent [the plaintiff] from using its computers for any measurable length of time”).

30. RESTATEMENT (SECOND) OF TORTS § 217 (1965).

31. See *id.*

32. See generally Lemley, *supra* note 14, at 526 (“While there are some constraints on simultaneous usage of a website or the Internet itself, for most users and for most purposes bandwidth is effectively infinite.”).

likely does not dispossess the website provider of its webpage. However, courts may find intermeddling in the context of the Internet through an analysis of electronic access.³³

Some district courts agree that access to a website server constitutes intermeddling with the physical property of another, even though no physical touching occurs.³⁴ *Bidder's Edge*, for example, involved the defendant's unauthorized use of a "software robot," which is a computer program that functions throughout the Internet to gather information on others' webpages.³⁵ Despite the plaintiff's requests for the defendant to cease its activities, the defendant in *Bidder's Edge* used the robot to "crawl" the plaintiff's website to compile information for inclusion in its own database.³⁶ The district court held that trespass to chattels is actionable where there is an "intentional interference" with the possessory interest of another's personal property.³⁷ The court found that electronic signals sent by an individual to gather information from another's server or computer system are tangible enough to support the plaintiff's trespass action.³⁸ The district court found an actionable trespass even where the plaintiff did not allege that it would suffer physical damage to its computer systems or that it would lose any revenue.³⁹

For the tort of trespass to chattels to be actionable, some harm or impairment to the chattel must occur.⁴⁰ When analyzing the harm element, courts consider whether the intermeddling "diminishes the condition, quality[,] or value of

33. See generally *Bidder's Edge*, 100 F. Supp. 2d at 1069 (discussing "intentional interference" with a chattel by sending unwanted electronic signals).

34. *Compare CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1021 (S.D. Ohio 1997) (finding that spam-like mass emails sent by the defendant over the plaintiff's computer network were sufficiently tangible to constitute an actionable trespass, despite the fact that they were electronic messages), with *America Online, Inc. v. St. Paul Mercury Ins. Co.*, 347 F.3d 89, 96 (4th Cir. 2003) (holding that "instructions, data, and information are abstract and intangible, and damage to them is not physical damage to tangible property").

35. *Bidder's Edge*, 100 F. Supp. 2d at 1060.

36. *Id.* at 1062.

37. *Id.* at 1069.

38. *Id.* Similarly, in *LCGM* the district court found that an actionable trespass occurred where the defendant intentionally accessed the plaintiff's computers and computer network to send spam, viewing the computers and network as the property upon which the defendant trespassed. *America Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444, 452 (E.D. Va. 1998).

39. *Bidder's Edge*, 100 F. Supp. 2d at 1079 ("The quality or value of personal property may be 'diminished even though it is not physically damaged by defendant's conduct.'" (quoting *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1022 (S.D. Ohio 1997))).

40. See generally Ned Snow, *Accessing the Internet Through the Neighbor's Wireless Internet Connection: Physical Trespass in Virtual Reality*, 84 NEB. L. REV. 1226, 1244-46 (2006) (discussing potential ways to satisfy the requisite harm in a trespass to chattels claim for Wi-Fi joyriding); see also Mathew Bierlein, *Policing the Wireless World: Access Liability in the Open Wi-Fi Era*, 67 OHIO ST. L.J. 1123, 1146 (2006) (noting that even if courts extend doctrine of trespass to chattels to "electronic conduct," establishing damages "remain[s] a pressing concern").

personal property.”⁴¹ Intermeddling in the context of cyberspace could give rise to two possible harms: (1) the transmittal of viruses; or (2) decreased website server or computer system performance.⁴²

Neither of these possible harms has been met with any firm acceptance by scholars or courts. While transmittal of a computer virus can cause a website’s value to decrease where the virus spreads to other computers or networks in contact with it,⁴³ such occurrences are rare and may not cause physical harm.⁴⁴ Similarly, a lower rate of website server or computer system performance is a complicated and highly contested matter. Heavy traffic on a webpage may cause the webpage to load more slowly for other users, having the effect of chilling visitors to a website,⁴⁵ but such an argument is tenuous. It has been frequently met with negative reaction from scholars⁴⁶ and courts.⁴⁷

While some courts have accepted the possibility that harm may be found where an electronic touching occurs,⁴⁸ a finding of harm is not necessary to the recognition of private property interests in webpages for purposes of a taking. Instead, “[a]ll legal property rights, whether tangible or intangible, are born of important policy considerations.”⁴⁹ One must consider these public policies in order to determine that the Fifth Amendment Takings Clause protects website providers’ property interest in their webpages.

41. *Bidder’s Edge*, 100 F. Supp. 2d at 1071; *see also* *CompuServe*, 962 F. Supp. at 1022 (“Harm to the personal property or diminution of its quality, condition, or value as a result of defendants’ use can also be the predicate for liability.”).

42. *See generally* Snow, *supra* note 40, at 1244.

43. *See id.* at 1246 (discussing the devaluation of a wireless Internet router when a virus is transmitted through it to the Wi-Fi operator’s network).

44. *See generally* *Bidder’s Edge*, 100 F. Supp. 2d at 1070 (finding that trespass to chattels is actionable only if the “defendant’s unauthorized use [of the plaintiff’s computer system] proximately resulted in damage to plaintiff”).

45. *See* Aleksika: Search Engine Marketing, Website Optimization, <http://www.aleksika.com/site-optimization/webpage-load-time/> (last visited Mar. 2, 2010) (“[E]commerce sites are losing \$1.1 to \$1.3 billion in revenue each year due to customer click-away caused by slow loading websites.”).

46. *See, e.g.,* Burk, *supra* note 29, at 35 (“[T]he court found a diminution in value from the loss of computer processing cycles and the use of computer memory required to handle the bulk e-mail messages. No matter that the e-mail messages processed by the recipient systems were precisely the type of communications the equipment was meant to process . . .”).

47. *See, e.g.,* *Universal Tube & Rollform Equip. Corp. v. YouTube, Inc.*, 504 F. Supp. 2d 260, 263, 268–69 (N.D. Ohio 2007) (dismissing the plaintiff’s trespass to chattels claim, despite the plaintiff’s allegation that the defendant caused thousands of visitors to access the plaintiff’s website, which caused its web servers to crash several times); *Intel Corp. v. Hamidi*, 71 P.3d 296, 303–04 (Cal. 2003) (holding that there was no evidence that the plaintiff in a trespass to chattels claim had been “dispossessed of its computers, nor did Hamidi’s messages prevent Intel from using its computers for any measurable length of time”).

48. *See, e.g.,* *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1022 (S.D. Ohio 1997) (finding a harm in a trespass claim because “defendants’ multitudinous electronic mailings demand the disk space and drain the processing power of plaintiff’s computer equipment,” which make those resources unavailable to the plaintiff’s subscribers).

49. Adam Mossoff, *Is Copyright Property?*, 42 SAN DIEGO L. REV. 29, 29 (2005).

Several courts have found the presence of protectable interests in trespass to chattels cases, even where the harm occurs to something other than the physical object being electronically touched.⁵⁰ In *CompuServe*, for example, the district court found that the elements of the *Restatement (Second) of Torts* were met where “the plaintiff’s business reputation and goodwill with its customers” were harmed.⁵¹ This conclusion seems to contradict the language of the *Restatement* because the comments make clear that the main purpose of the harm requirement is to protect the “possessor’s materially valuable interest in the physical condition, quality, or value of the chattel.”⁵² The *CompuServe* court focused instead on the vaguer language that the possessor may safeguard his “legally protected interest” by use of reasonable force against harmless interference with his possession.⁵³ Thus, the public policy behind the district court’s analysis in *CompuServe* was to protect property rights in cyberspace due to their effect on business expectations stemming from the Internet.⁵⁴

Private property interests in Internet webpages should be similarly protected in the future. Property rights are the products of policies, such as maintaining the legitimate business practices of commercial enterprises, whether they are individual or collective efforts.⁵⁵ Website providers should be able to use, possess, and dispose of their webpages in any manner they see fit as a general function of the classic definition of property interests.⁵⁶ This has been a basic utility of the concept of property since property rights first began to take shape in American law.⁵⁷ Website providers have particular and unique interests in seeing the data files that make up its webpage arranged in a certain way on users’ computer screens.⁵⁸ While many website providers may have personal or social motivations for creating a webpage, providers of online businesses especially have a need for property rights in their webpages. Government regulation of webpages would directly impede on those motivations because providers would be unable to arrange their webpages as they

50. See, e.g., *eBay, Inc. v. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058, 1071 (N.D. Cal. 2000) (lending credence to the plaintiff’s claim that it could not use its own servers for its own purposes due to the defendant’s excessive usage of its bandwidth capacity); *America Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444, 452 (E.D. Va. 1998) (recognizing injury to plaintiff’s possessory interest in its computer equipment and injury to its business goodwill as a result of defendant’s trespass).

51. See *CompuServe*, 962 F. Supp. at 1023.

52. *Id.* (quoting RESTATEMENT (SECOND) OF TORT § 218 cmt. e (1965)).

53. *Id.*

54. See *id.*

55. See Mossoff, *supra* note 49, at 33.

56. *Id.* at 40.

57. See *id.* at 33 (explaining that preeminent property law cases demonstrate the “basic truth” that “every tangible property entitlement . . . implicates the same questions about utility, personal dignity, and freedom”); see also *Johnson v. M’Intosh*, 21 U.S. (8 Wheat) 543 (1823) (examining the transfer of land from the Native Americans to the first settlers); *Pierson v. Post*, 3 Cai. R. 174 (N.Y. Sup. Ct. 1805) (discussing property in the context of wild animal hunts).

58. See Brain, *supra* note 19 (defining “webpages” as “simple text file[s] that [contain] not only text, but also a set of [instructions] that describe how the text should be formatted when a browser displays it on the screen”).

see fit. Recognition of the basic intangible property right in an Internet webpage would allow website providers to protect their interests, business or otherwise, as a matter of public policy.

Due to these policies on the Internet, many courts have recognized property interests even where the cause of action does not perfectly match-up with the facts of the case. The trespass to chattels cause of action does not provide a perfect avenue for a website provider to sue anyone it does not want to regulate its webpage. Instead, courts that have addressed trespass to chattels claims have recognized the property interests of individuals and entities on the Internet to implement policies such as facilitation of business and commerce in cyberspace.⁵⁹ Website providers should be able to virtually exercise property rights on their webpages for the very same policy reasons.

B. Conversion: Website Providers' Exercise of Exclusive Control over the Content of Their Precisely Defined Webpages

Although courts have not determined that webpages themselves may be converted, one court has recognized that a domain name may be the premise for the action of conversion.⁶⁰ A property interest in a domain name is particularly relevant to the analysis of whether websites are private property because a webpage is intimately connected to the domain name.⁶¹ While not all courts recognize that a domain name is private property,⁶² the analysis which some courts have used to address the subject is helpful to illustrate the property characteristics of webpages.

To establish conversion of a domain name, the plaintiff must allege and prove that (1) it owns or has the right to possess the domain name; (2) someone has wrongfully dispossessed it of that property right in the name; and (3) it has suffered damages as a result of that disposition.⁶³ Thus, inherent in the first question is whether the domain name is personal property.⁶⁴ Some courts employ a three-part test for determining the existence of a property interest, such that there must be: (1) the presence of a precisely defined interest, (2) that is capable of exclusive control or

59. See *supra* note 24.

60. *Kremen v. Cohen*, 337 F.3d 1024, 1036 (9th Cir. 2003) (reversing a decision rejecting plaintiff's claim for conversion of a domain name).

61. *Universal Tube & Rollform Equip. Corp. v. YouTube, Inc.*, 504 F. Supp. 2d 260, 268 (N.D. Ohio 2007) (comparing a domain name to "a street address or a telephone number," and noting that a domain name is "without physical substance, and it is therefore impossible to make 'physical contact' with it"). A person may provide a website, however, without independently registering a domain name by using a free hosting service. See Linda Roeder, *Name Your Domain and Register It Too*, http://personalweb.about.com/od/registeradomain/name/a/00domain_name.htm (last visited Mar. 3, 2010). The entity providing the free hosting service would thus be the property owner with the right to use, dispose of, and control its webpage.

62. See, e.g., *Network Solutions, Inc. v. Umbro Int'l, Inc.*, 529 S.E.2d 80, 86–87 (Va. 2000).

63. *Kremen*, 337 F.3d at 1029 (citing *G.S. Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 906 (9th Cir. 1992)).

64. *Id.*

possession, and (3) in which the alleged owner has a “legitimate claim to exclusivity.”⁶⁵

Domain names meet the test for determining the existence of a property right.⁶⁶ First, they are precisely defined because they are linked to a particular point on the Internet and direct Internet users to that point to view the corresponding webpage.⁶⁷ Second, domain names are capable of exclusive control because the website provider makes the determination of where the particular virtual point on the Internet the webpage should exist.⁶⁸ With respect to exclusive control, moreover, domain names are capable of assignment or sale by the website provider.⁶⁹ Last, website providers have legitimate claims of exclusivity over domain names because they are highly valuable, such that many providers will pay top-dollar to obtain the most recognizable names.⁷⁰ Indeed, it is the customary practice of Internet actors to recognize the claim to exclusivity of the domain name registrant.⁷¹

Based on the foregoing analysis, it would seem that domain names are the private property of the registrant; however, some courts appear to reject that theory.⁷² In *Network Solutions*, the Supreme Court of Virginia addressed whether the contractual right to use a domain name registered to a judgment-debtor may be garnished.⁷³ The lower court found that domain names are a form of intellectual property and are capable of exclusive possession.⁷⁴ The appeals court, however, determined that “a domain name registration is the product of a contract for services between the registrar and registrant” because of the dependency that

65. *Id.* at 1030 (internal quotation marks omitted) (quoting *Rasmussen*, 958 F.2d at 903).

66. *Id.*

67. *Id.*; see also *Margae, Inc. v. Clear Link Techs., LLC*, 620 F. Supp. 2d 1284, 1288 (D. Utah 2009) (stating, in dicta, that a webpage is tangible property that is capable of being converted).

68. *Kremen*, 337 F.3d at 1030; see also *Zurakov v. Register.Com, Inc.*, 304 A.D.2d 176, 179 (N.Y. App. Div. 2003).

[T]he benefit to plaintiff of his contract with defendant would be rendered illusory if the effect of registering the domain name in his name were merely to have the domain name placed next to his name in some official record . . . and not to grant him exclusive use and control of it.

Zurakov, 304 A.D.2d at 179.

69. Ned Snow, *The Constitutional Failing of the Anticybersquatting Act*, 41 WILLAMETTE L. REV. 1, 48 (2005).

70. See *Kremen*, 337 F.3d at 1030; see also Ki Mae Heussner, *The Top 10 Most Expensive Domain Names*, ABCNEWS.COM, <http://abcnews.go.com/Technology/AheadoftheCurve/story?id=7014819&page=1> (last visited Apr. 4, 2010) (reporting that Toys ‘R’ Us purchased the domain name toys.com for \$5.1 million).

71. See generally *Zurakov*, 304 A.D.2d at 179 (“With respect to whether the contract conferred upon plaintiff the exclusive right to control his newly registered domain name, the custom and usage of [the] ‘registration’ of a domain name in the Internet context is certainly more relevant than the literal definition of ‘registration’ found in the dictionary.”). In fact, domain names are even subject to in rem jurisdiction. *Kremen*, 337 F.3d at 1030.

72. See *supra* note 23.

73. *Network Solutions, Inc. v. Umbro Int’l, Inc.*, 529 S.E.2d 80, 81 (Va. 2000).

74. *Id.* at 86.

“operational Internet addresses” have on the registrar’s services.⁷⁵ Because the higher court found that the registration of a domain name was a service, it refused to extend garnishment proceedings to a contract for that service to avoid a slippery slope where other services would become subject to such proceedings.⁷⁶

Despite the interconnection of a domain name and a webpage, the holding of *Network Solutions* might not be inconsistent with the notion that an Internet webpage is private property. Some scholars lament that the holding in *Network Solutions* forecloses the idea of recognition of a property right in the domain name itself.⁷⁷ The counterargument to the holding in *Network Solutions* is based on the idea that the ultimate value of the domain name is determined from the marketability of the name, which is independent from the value of the service of registering a domain name.⁷⁸ Because some domain names are worth more than others, but the price for the registrar’s service of assigning the name to the purchaser stays the same for everyone, the registrar basically “sells more than just the rights to the registrar’s services.”⁷⁹ While domain names certainly are valuable virtual locations, the registrant’s economic interest in the domain name really develops when a website provider creates a webpage at the location.⁸⁰ Under this theory, the webpage is likewise consistent with personal private property because the website provider pays top-dollar for its virtual location and then invests more time and finances to develop the webpage itself.

The proprietary characteristic of a webpage under the *Kremen* factors is based around its marketability and manipulability. Like domain names,⁸¹ webpages are precise virtual locations on the Internet,⁸² the confines of which are capable of visual definition. Also, webpages are exclusively controlled by the website provider.⁸³ Website providers, such as AOL, Yahoo, and even colleges and universities, have the capability of removing objectionable content, prohibiting users from making vulgar

75. *Id.* at 86 (internal quotation marks omitted) (quoting *Dorer v. Arel*, 60 F. Supp. 2d 558, 561 (E.D. Va. 1999)).

76. *Id.* at 86–87.

77. *See, e.g.,* Snow, *supra* note 69, at 49 (“By ruling that property rights to a domain name only represent the registrant’s rights to the registrar’s services, the *Umbro* court foreclosed the possibility that a domain name could represent a property interest in a thing itself.”).

78. *Id.* at 50–51.

79. *Id.* at 51.

80. *See generally* Jefferson Graham, *Google’s AdSense a Bonanza for Some Web Sites*, USA TODAY, Mar. 11, 2005, at 1B (explaining how Google’s AdSense program works and reporting that some website owners make thousands of dollars from AdSense alone); Google AdSense, What’s AdSense, http://www.google.com/services/adsense_tour/index.html (last visited Mar. 2 2010) (boasting to website providers: “[g]et paid for displaying targeted Google ads on your site”).

81. *See Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2003).

82. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 890 (1997) (“Cyberspace undeniably reflects some form of geography . . . Web sites, for example, exist at fixed ‘locations’ on the Internet.”).

83. Nunziato, *supra* note 4, at 1121 (discussing Internet Service Providers’ (ISP) authority to remove content that it deems “objectionable” or “inaccurate” (quoting AOL, Community Guidelines, <http://legal.web.aol.com/aol/aolpol/comguide.html> (last visited Apr. 4, 2010))).

content available, and contracting with customers for acceptable use.⁸⁴ Indeed, these website providers seek to enhance the value of their webpages through such exclusive control. In addition to exclusive control, website providers have a legitimate claim to exclusivity of the contents of their webpages because webpages may contain copyrighted information and are directly linked to a domain name (i.e., valuable gateways to desirable virtual locations).⁸⁵

Because webpages are inherently connected to domain names, a website provider invests substantial sums of money and effort in its webpage to maximize its profitability or otherwise implement its desired use.⁸⁶ Due to those efforts, the website provider “has a right to enjoy the fruits of . . . [its] labors.”⁸⁷ Courts such as the Ninth Circuit in *Kremen* recognized the policies surrounding the marketability of a domain name;⁸⁸ such policies lend themselves to the recognition of property interest in cyberspace. As a result, website providers should have a property interest that protects its investments and efforts when they create webpages.⁸⁹

Because webpages fit into the various common law definitions of property, government regulation of the content on a webpage would burden the website provider’s utilization of its property and its right to exclude. Not only do courts take great measures to implement policies protecting property rights on the Internet in actions such as trespass to chattels, they also recognize that the website providers’ investments should be protected in actions such as conversion. With these policy considerations in mind, webpages should likewise be recognized as private property.

III. WEIGHING PROPERTY RIGHTS AGAINST GOVERNMENT REGULATION IN THE CONTEXT OF THE INTERNET WEBSITE

Government regulation of webpages could overburden a website provider’s property rights in its webpages. Notwithstanding those property rights, a state could attempt to exercise its police powers to regulate the content of webpages pursuant

84. *Id.* at 1121–22.

85. *See Kremen*, 337 F.3d at 1030.

86. *See id.*

87. Mossoff, *supra* note 49, at 41.

88. *Kremen*, 337 F.3d at 1030.

Registering a domain name is like staking a claim to a plot of land at the title office. It informs others that the domain name is the registrant’s and no one else’s. Many registrants also invest substantial time and money to develop and promote websites that depend on their domain names. Ensuring that they reap the benefits of their investments reduces uncertainty and thus encourages investment in the first place, promoting the growth of the Internet overall.

Id.

89. *See* Mossoff, *supra* note 49, at 41 (quoting James Madison’s explanation that the term property “embraces everything to which a man may attach a value and have a right”).

to *PruneYard*.⁹⁰ Such an application is unjustifiable. Not only is *PruneYard* a limited holding,⁹¹ traditional physical space doctrines, such as that of the public forum, are also not conducive to the context of a webpage due to the difference between physical space and cyberspace.⁹² Because *PruneYard* should not be extended to allow states to freely regulate webpage content under their police powers, the Fifth Amendment still provides a viable avenue for a website provider to protect his or her property interests in a webpage.⁹³

A. *PruneYard Shopping Center v. Robins: Factual Background and Analysis*

Fred Sahadi privately owned the PruneYard Shopping Center, which was a mall open to the public for attracting patrons to the commercial enterprises within its confines.⁹⁴ PruneYard had a nondiscriminatory—yet strict—policy against the public expressive activities of any lessee or patron.⁹⁵ The policy specifically prohibited the distribution of petitions, unless they were directly related to the commercial purposes of the mall.⁹⁶

One weekend, several students from a nearby high school set up a table in the mall’s courtyard where they intended to solicit support for their opposition of an international resolution against “Zionism.”⁹⁷ As mall patrons walked by, the students distributed informational pamphlets and requested their signatures on petitions.⁹⁸ Despite the peacefulness of their activities and a lack of objection from mall patrons, a mall security guard demanded that they leave the premises, suggesting that they move to the public sidewalk near the mall.⁹⁹

The students sued to enjoin the mall and Sahadi from excluding them from the business premises while they distributed the pamphlets and circulated the petitions.¹⁰⁰ The trial court refused to issue the injunction based upon the fact that there were other “channels of communication” aside from soliciting at PruneYard Shopping Center, which was the private property of Sahadi.¹⁰¹ The court of appeals affirmed, but the California Supreme Court reversed on the grounds that the mall, while privately owned, saw the arrival of 25,000 patrons each day and that the

90. See Nunziato, *supra* note 4, at 1165–66 (arguing that the Supreme Court’s holding in *PruneYard* is illustrative of the positive effect state action to regulate private property would have on freedom of speech).

91. See *infra* notes 140–44 and accompanying text.

92. See *infra* Part III.B.1.

93. See *infra* Part III.C.2.

94. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 77 (1980).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 77–78.

students' activities did not disrupt the normal commercial relations of the mall.¹⁰² The United States Supreme Court granted certiorari to address whether a state, through its constitution, could negate a private property owner's right to exclude when the property at issue has a uniquely public character.¹⁰³

PruneYard and Sahadi argued that Supreme Court precedent¹⁰⁴ prevented a state from requiring a public shopping center to provide access to citizens exercising their First Amendment rights.¹⁰⁵ The Court noted that property can certainly maintain its private character, even though the owner invites the public onto it for commercial purposes.¹⁰⁶ According to the Court, that recognition does not limit the authority of a state to exercise its police powers to expand the individual liberties afforded by the state's constitution to include freedom of speech in privately owned spaces with public characteristics.¹⁰⁷ Moreover, PruneYard and Sahadi argued that their First Amendment rights had been violated because they were forced to accommodate the speech of others.¹⁰⁸ The Court determined, however, that PruneYard and Sahadi were not compelled by the state or the court to accept the view of the high school students; the mall and its owner were free to openly disassociate themselves from the students' political message.¹⁰⁹

PruneYard and Sahadi also argued that their right to exclude was protected by the Takings Clause of the Fifth Amendment and Fourteenth Amendment right to due process before deprivation of property.¹¹⁰ The Court recognized that "one of the essential sticks in the bundle of property rights is the right to exclude others," acknowledging that there had been a literal taking when the California Supreme Court interpreted their State Constitution to entitle the students to freedom of speech on the private premises of the mall.¹¹¹ The Court noted that the determination of whether a state law infringes upon a property owner's property interest necessitates a consideration of the state action's impact on the property owner's reasonable business interests.¹¹² The Court held that PruneYard and Sahadi could easily adopt management regulations to minimize the economic impact of the students' activities and that the mall was so physically large that the minor use

102. *Id.* at 78.

103. *Id.* at 79.

104. PruneYard relied on *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). In *Lloyd*, the Supreme Court vacated an injunction issued by the Court of Appeals for the Ninth Circuit, which prohibited Lloyd Corp. from preventing citizens' right to distribute handbills on Lloyd's property, a public mall. *Id.* at 552–53; 570.

105. *Pruneyard*, 447 U.S. at 80.

106. *Id.* at 81.

107. *Id.* The Court distinguished *Pruneyard* from *Lloyd* by noting that in *Lloyd*, there was no state statutory or constitutional provision that affirmatively created rights for citizens to use private property. *Id.* at 81. By contrast, in *Pruneyard*, the California Constitution affirmatively creates a right for its citizens to exercise "their state rights of free expression and petition." *Id.* at 80.

108. *Id.* at 85.

109. *Id.* at 87–88.

110. *Id.* at 82.

111. *Id.* at 83.

112. *Id.* at 82–83.

of the courtyard by the students would not interfere with its commercial purposes.¹¹³ Accordingly, the United States Supreme Court affirmed the state supreme court's decision to grant the injunction to the students.¹¹⁴

B. Application of PruneYard in the Context of Webpages

A government's application of *PruneYard* to regulate the content of Internet webpages is unjustifiable. First and foremost, the Internet should not be lightly analogized to physical space due to the realities of its technological architecture, meaning that doctrines related to physical space, such as the public forum doctrine, are inconsistent with webpages. *PruneYard* is a limited holding, moreover, which expressly states that a government's regulation of private property should not amount to a taking, requiring just compensation under the Takings Clause. An extension of the Court's holding would thus lead to a multitude of suits against the government for violations of website provider's private property interests.

1. The Cyberspace Metaphor: The Public Policies of Addressing Internet Property Rights in Terms of Physical Space

Despite the property interest a website provider has in its webpage, some would argue that the Internet serves as a gigantic public forum,¹¹⁵ such that the government should protect it as part of the public good. As the argument goes, the Internet is a marketplace of ideas, much like a shopping mall is a marketplace of goods.¹¹⁶ One of the most attractive characteristics of the Internet is the ease and efficiency with which information and ideas are disseminated to millions of people at once.¹¹⁷ In essence, the Internet is the ultimate medium for public access to speech.¹¹⁸ Government regulations could include not only the removal of content, but also the mandated addition of content on a webpage.¹¹⁹ The latter situation intrudes on the rights of the website provider due to the public policies in favor of recognition of the provider's rights to use, dispose of, and exclude others from their virtual space. While some scholars continue to make the public forum argument,

113. *Id.* at 83–84.

114. *Id.* at 88.

115. See Nunziato, *supra* note 4, at 1120–21.

116. See generally Todd G. Hartman, *The Marketplace Vs. the Ideas: The First Amendment Challenges to Internet Commerce*, 12 HARV. J.L. & TECH. 420 (1999) (discussing the Internet and its impact on the marketplace of ideas theory).

117. See *A Transcript Featuring the 1999-2000 Oliver Wendell Holmes Lecturer—Floyd Abrams*, 51 MERCER L. REV. 833, 845 (2000) [hereinafter *Abrams Transcript*]. Indeed, that is presumably the reason why private businesses buy domain names and post privately owned webpages on them.

118. See Nunziato, *supra* note 4, at 1121. Please note that this Article does not address the “public forum” aspect of the First Amendment due to its focus on private property concepts.

119. See *supra* notes 2–3 and accompanying text.

that doctrine was created with physical space in mind and, as such, is not necessarily conducive to the concept of an Internet website, which is intangible.¹²⁰

While the Internet must be intimately connected to physical objects to function,¹²¹ it is also an abstract embodiment of electrical transmissions rather than a structured physical shape like a house or a car. It is essentially nothing more than the exchange of information,¹²² amounting to an electrical diffusion of data between two or more pieces of computerized hardware, which is then made viewable to the user in the form of a webpage.¹²³ Accordingly, analyzing the property problems associated with webpages through analogies to real property or physical space is not the best process for determining the rights of individuals as they relate to webpages. Instead, the argument for a government's regulation of content on a webpage should be weighed against the technological realities and public policies surrounding the issue.¹²⁴

At least two key differences exist between physical space and cyberspace.¹²⁵ First, real property is, by definition, unique land that cannot be copied, whereas data transmitted over the Internet must be copied.¹²⁶ By way of explanation, each time someone accesses a webpage, that individual's computer requests information from the website provider's server.¹²⁷ The website provider's data is then sent to the individual's computer and reproduced to form the contents of a webpage.¹²⁸ While a website provider may virtually refuse to accommodate a request under this architecture, exclusion in the physical sense does not occur.

Second, with physical space, individuals can observe through the senses of sight, hearing, and smell what is happening around them.¹²⁹ Indeed, many individuals make a hobby of spying on their next-door neighbors. On the other hand, Internet websites have no "next door."¹³⁰ Cyberspace contains no physical public rest-areas such as park benches, sidewalks, or bus stations, where individuals may observe the

120. See Nunziato, *supra* note 4, at 1144–48 (describing the development of the public forum doctrine). Essentially, the public forum doctrine posits that "government actors are substantially restrained in their ability to regulate speech within their 'property' when that property constitutes a public forum." *Id.* at 1147. Professor Nunziato advocates for "[r]estoring the [v]alues of the [g]eneral [p]ublic [f]orum [w]ithin [c]yberspace" in order to guarantee the dissemination of speech protected by the First Amendment. *Id.* at 1160–61.

121. See Shih Ray Ku, *supra* note 27, at 93–94.

122. Lemley, *supra* note 14, at 523.

123. *Id.*; see also Brain, *supra* note 19 (defining a webpage).

124. See generally *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) ("The Court . . . has identified several factors that should be taken into account when determining whether a governmental action has gone beyond 'regulation' and effects a 'taking.'"). Specifically, a court should consider the character of the government action, the action's economic impact on the property owner, and the action's interference with the reasonable business expectations of the property owner. *Id.*

125. See Lemley, *supra* note 14, at 525–26.

126. See *id.* at 526.

127. *Id.* at 524.

128. *Id.*

129. *Id.* at 526.

130. *Id.*

behavior of others in the physical sense.¹³¹ Even those who argue for the recognition of the Internet as a “public forum” for free speech purposes agree that the common assumption that there is a cyber “town square” is incorrect.¹³² For this reason, the extension of physical space legal doctrines is not conducive to the Internet because of the lack of traditional public areas in cyberspace.

Conversely, by its very nature, the Internet is the product of a public effort. No one would pay for the Internet if there was only one website to visit. In fact, one could compare the Internet’s appeal to that of a shopping mall. A person enters the mall for the wide range of stores in which to purchase an even wider array of items and services. Similarly, millions of websites offer a wide range of options to Internet users, which is part of the attraction.¹³³ That appeal brings millions of people together on a series of networks, in which they can chat, shop, surf, and learn. Against this backdrop, one could readily argue that states should regulate the Internet, like other places of a public character, to protect it as a mode of the free transfer of ideas across the nation and globe.

To address that argument, however, one must consider the consequences behind its implications. The faults of believing the Internet has a wholly public character may be conceptualized by addressing an often-used analogy. Some courts compare a domain name to a telephone number or address.¹³⁴ In the virtual sense, this appears to be a worthy metaphor; however, in the practical sense, it is wrong because a telephone number or an address connects you to a physical location. A domain name transports you only to a virtual location, not a geological physicality—even if it is connected to a physical object.¹³⁵ For instance, a person may visit eBay.com, but that person is not in a physical auction house. From a practical standpoint, that person is only in his or her own home, seeing only a collection of data and information that appears in the form of a webpage.¹³⁶

While this criticism of the analogy simply states the obvious, the obvious is often overlooked. The website provider is not like a store owner who can physically remove unruly customers. Businesses that exist solely on the Internet should not be forced to accommodate the free speech of customers with political, religious, or social motivations for speaking because that privilege may inhibit an otherwise

131. *Id. But see* Margae, Inc. v. Clear Link Techs., LLC, 620 F. Supp. 2d 1284, 1288 (D. Utah 2009) (stating that a webpage is a type of tangible property, capable of conversion, and which “has a physical presence on [a] computer drive, causes tangible effects on computers, and can be perceived by the senses”).

132. *See* Nunziato, *supra* note 4, at 1139.

133. Private and public entities alike have registered over 102.5 million domain names worldwide. Webhosting.info, Domain Names, <http://www.webhosting.info/domains> (last visited Mar. 5, 2010). Each of these domain names may serve as the virtual location of another privately owned webpage.

134. *E.g.*, Universal Tube & Rollform Equip. Corp. v. YouTube, Inc., 504 F. Supp. 2d 260, 268 (N.D. Ohio 2007).

135. *See* Lemley, *supra* note 14, at 524 (“People may speak of ‘visiting’ websites, but of course they don’t actually do any such thing. They send a request for information to the provider of the website, and the provider sends back data: the web page itself.”).

136. *See supra* note 19.

legitimate business from operating to its maximized profitability.¹³⁷ Unlike the students in *PruneYard* who passively administered pamphlets to interested passersby,¹³⁸ Internet users who post information on webpages force other innocent Internet users to view the content. These innocent users should be protected from information that is potentially harmful or unwanted to the viewer. Because they are a captive audience, they should not be subjected to information that did not originally attract them to the webpage, especially in the context of commercial sites.¹³⁹

2. Legal Realities of PruneYard

A state seeking to exercise its police power to regulate Internet content under an extension of *PruneYard* should also remember that it is a limited holding. Specifically, the Court only addressed the situation where an individual state expanded the civil liberties of its citizens through the use of its police powers.¹⁴⁰ In fact, the United States Supreme Court earlier held in *Lloyd Corp. v. Tanner*¹⁴¹ that the “essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center.”¹⁴² The Court in *PruneYard* expressly distinguished its previous holding in *Lloyd* on the grounds that the Court in *Lloyd* was not faced with a state action to extend the constitutional rights of its citizens.¹⁴³ The *PruneYard* Court specifically noted, however, that regulations of the state must not amount to a taking requiring just compensation under the Takings Clause.¹⁴⁴ Accordingly, *PruneYard* is simply not broad enough to apply in the context of the Internet, especially because a webpage is privately owned property virtually clustered closely together with other pages.

Where a government acts to regulate privately owned webpages, judicial economy also becomes an issue. Because the Internet contains millions of webpages,¹⁴⁵ numerous situations would be created similar to the one presented in *PruneYard* where a state regulates private property rights of website providers.¹⁴⁶ If a state were to regulate the content of privately owned webpages, it would have such a universal effect that scores of regulated website providers could seek relief based upon a violation of their property rights under the Takings Clause. Due to the

137. See *infra* Part III.C.2.

138. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 77 (1980).

139. See *infra* Part III.C.2.

140. *PruneYard*, 447 U.S. at 81.

141. 407 U.S. 551 (1972).

142. *Id.* at 569.

143. *PruneYard*, 447 U.S. at 81.

144. *Id.*

145. See *supra* note 133.

146. *PruneYard*, 447 U.S. at 78. Again, this Article does not address the website provider’s freedom of speech or the Internet user’s right to receive speech.

simple observation that Internet webpages are so numerous, courts would likely have to expend substantial time and resources to address the multitude of suits by website providers seeking to receive compensation for a regulation of the content of their webpages. In short, states should not over-regulate webpages because doing so would constitute a taking under the Fifth Amendment Takings Clause.

C. Privately Owned Websites and the Fifth Amendment

Because there is a structural lack of a “town square” on a webpage,¹⁴⁷ and considering *PruneYard* is a limited holding, the Fifth Amendment Takings Clause protects a website provider’s property interests in its webpage. Some courts do not recognize a taking when a private property owner loses a property right merely by any act of the government that affects the website provider.¹⁴⁸ Thus, website owners still have the burden to show a taking has occurred that requires just compensation. This section addresses several key public policies favoring recognition of a Fifth Amendment taking in the context of regulations of an Internet webpage.

1. The Argument Against Recognizing Property Rights in Webpages Under the Fifth Amendment

The government could argue that the Takings Clause provides no protection to the website provider. In order to show that a government action is an unlawful taking of private property, the property owner must show that it would be unfair and unjust for it to bear the burden when the public should bear it.¹⁴⁹ This analysis requires a consideration of “such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.”¹⁵⁰ Further, when the property owner operates in a highly regulated industry like telecommunications, it should expect to be affected by government action.¹⁵¹ Based upon these factors, a government could argue that the website provider is not deprived of its private property by regulation of a webpage.

The argument would be based upon many of the same principles used by the Court in *PruneYard*. Specifically, a website provider might implement personal restrictions on the “time, place, and manner” with which a regulation is complied

147. See *supra* Part III.B.1.

148. See, e.g., *Prometheus Radio Project v. FCC*, 373 F.3d 372, 428 (3d Cir. 2004) (“[B]roadcast licenses, which are the subject of the Commission’s restriction on transferability, are not protected property interests under the Fifth Amendment.”).

149. *PruneYard*, 447 U.S. at 82–83.

150. *PruneYard*, 447 U.S. at 83; see also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *E. Spire Commc’ns, Inc. v. Baca*, 269 F. Supp. 2d 1310, 1325–26 (D.N.M. 2003) (using the same three factors to consider whether a taking occurred in the context of the telecommunications industry involving “right to payment” under an Interconnection Agreement), *aff’d*, *E. Spire Commc’ns, Inc. v. N.M. Pub. Regulation Comm’n*, 392 F.3d 1204 (10th Cir. 2004).

151. *E. Spire*, 269 F. Supp. 2d at 1325.

to “minimize any interference with its commercial functions.”¹⁵² Under those circumstances, a virtual invasion of the website provider’s private property is not determinative.¹⁵³ Similarly, the right to exclude in the Internet website context may not be completely essential to the webpage’s business expectation.¹⁵⁴ To the contrary, the website providers—especially those operating a business—likely want as many visitors and as much of their input as possible to maximize their profits, which is best effectuated by narrow regulations. Under the foregoing analysis, one could certainly posit that the Fifth Amendment provides little protection to website providers, even those conducting online businesses.

2. *The Argument for Recognizing Property Rights in Webpages Under the Fifth Amendment*

Despite the argument against recognizing property rights in webpages under the Fifth Amendment, which is supported by *PruneYard*¹⁵⁵ and other cases,¹⁵⁶ states should consider public policies favoring recognition of property rights when analyzing the Takings Clause in the context of webpages. The following two public policies are most important: (1) the possibility of harm to the website provider’s personal and business interests; and (2) the high value of Internet webpages to the website provider.¹⁵⁷ A website provider may have a claim for just compensation for a taking in contravention to the Fifth Amendment if a state fails to recognize these policies by implementing regulations that mandate modification of webpage content.¹⁵⁸

From a business expectation standpoint, website providers may suffer economic harm from a decrease in their business reputation if a state forces them to modify their content. This could occur in two alternative scenarios. First, website providers could lose business goodwill if potential customers or users cease visiting the webpage due to unsavory material or information displayed on the computer screen.¹⁵⁹ Uninhibited exposure to potentially volatile or indecent information has serious results for both website providers¹⁶⁰ and innocent Internet users.¹⁶¹ Unlike

152. *PruneYard*, 447 U.S. at 83.

153. *Id.* at 84.

154. *Id.*

155. *Id.*

156. *See, e.g.*, *Prometheus Radio Project v. FCC*, 373 F.3d 372, 428 (3d Cir. 2004).

157. *See Ruckelshaus v. Monsanto, Co.*, 467 U.S. 985, 1005 (1984).

158. *Cf. id.*

159. *See, e.g.*, *America Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444, 452–53 (E.D. Va. 1998) (affirming a grant of summary judgment for trespass to chattels where the plaintiff alleged that its business goodwill was injured when the defendant sent large amounts of spam to the plaintiff’s subscribers using the plaintiff’s computer equipment and network).

160. *See, e.g., id.* (finding that injury to business goodwill was sufficient harm to state a claim for trespass to chattels).

161. *Cf., e.g., FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978) (noting that a broadcast is intrusive and “uniquely accessible to children, even those too young to read”).

patrons at the mall in *PruneYard* who can perceive the presence of the students and take actions to avoid them, an Internet user cannot as easily avoid being exposed to content on a webpage. In other words, Internet users make up a captive audience. Where a state mandates addition of content to a webpage, the Internet user cannot avoid seeing the information on the page. If the website provider is not allowed to control that information and perhaps censure it, Internet users wishing to avoid vulgar, obscene, or politically charged material could not do so because they would immediately be exposed to it upon visiting the website.

Second, certain Internet users may wish to view particular information, even if it is politically charged or vulgar. Where a state mandates removal of such content, the website provider is deprived of potential financial gains from purchases of its products and services or advertisers wishing to capitalize on a higher volume of viewers with specific interests. Website providers—especially those offering services or selling goods—should be allowed to control material or information in order to protect their business reputations. Indeed, too much regulation could stifle Internet commerce if a user quits visiting a particular webpage due to state-mandated modification, transforming the webpage from an unconventional webpage into a more mainstream webpage.

Moreover, a website provider has a substantial financial investment in his webpage.¹⁶² Domain names, for example, are often worth millions of dollars.¹⁶³ For example, “business.com” sold for well over \$7 million.¹⁶⁴ Domain names, however, would be worthless without their connections to webpages. When a website provider registers a domain name and creates a webpage, the provider reasonably expects profits to stem from the content of that webpage based on its initial investment.¹⁶⁵ Where a website provider is deprived of the full use of that investment, a taking should be recognized, much like the Court recognized a literal taking in *PruneYard*.¹⁶⁶ This deprivation should not be tolerated in light of the oftentimes large investments website providers make to acquire their domain names and then to create a webpage that corresponds to the valuable virtual location.¹⁶⁷ Recognition of a website provider’s private property interest in his or her Internet website would allow the provider to control the information on its webpage and fully capitalize on its investment. Basic recognition of these market principles will maximize the investment potential of Internet webpages, and this recognition eliminates the need for a state to regulate webpage content.

162. See generally Heussner, *supra* note 70; Snow, *supra* note 69, at 50–51 (discussing the values of domain names).

163. Heussner, *supra* note 70.

164. Snow, *supra* note 69, at 50.

165. See generally *supra* notes 77–89 and accompanying text (discussing the relationship between the domain name and the webpage).

166. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 (1980).

167. Cf. Mossoff, *supra* note 49, at 41.

IV. CONCLUSION

While courts have yet to decide whether a webpage itself is property,¹⁶⁸ they have determined that website servers and domain names are property.¹⁶⁹ Accordingly, the public policies behind the common law actions of trespass to chattels and conversion necessitate a finding that webpages are the private personal property of the website providers.¹⁷⁰ Courts often go to great lengths to make these causes of action fit within the realm of cyberspace, even where all the elements of the actions are only marginally met.¹⁷¹ Against the backdrop of these policies and analyses, a website provider should be able to use and dispose of its webpage content as it sees fit.¹⁷² Moreover, the high value of a webpage and substantial investment a website provider makes in that webpage inherently serve as the financial policies behind recognition of property interests in the webpage.¹⁷³

These private property interests would be unduly burdened by government regulation. The Supreme Court in *PruneYard* held that a state government could exercise its police powers to regulate private property with a public character, and some scholars argue that such regulations should be implemented in the context of the Internet to protect free speech.¹⁷⁴ Doctrines created with physical space in mind, however, should not be lightly applied in the context of the Internet due to the technological realities surrounding a webpage.¹⁷⁵ Moreover, the *PruneYard* Court limited its holding, expressly saying that regulations should not amount to a taking under the Fifth Amendment Takings Clause.¹⁷⁶ With this principle in mind, government regulation of Internet webpage content would amount to a taking under the Takings Clause.¹⁷⁷ Government action to regulate webpage content has a direct economic impact on a website provider due to the interference with the website provider's reasonable business expectations.¹⁷⁸ Similarly, website providers should be able to protect their financial investments through property principles by controlling the content of their webpages to maximize profitability.¹⁷⁹

168. *But see* Margae, Inc. v. Clear Link Techs., LLC, 620 F. Supp. 2d 1284, 1287–88 (D. Utah 2009) (finding, in dicta, that a webpage is tangible property capable of conversion).

169. *See supra* Part II.B.

170. *See supra* Part II.

171. *See supra* notes 28–29 and accompanying text.

172. *See supra* Part II.

173. *See supra* notes 79–86.

174. *See supra* Part III.B.1.

175. *See supra* Part III.B.1.

176. *See supra* notes 140–44 and accompanying text.

177. *See supra* Part III.B.2.

178. *See supra* Part III.C.2.

179. *See supra* Part III.C.2.