

TRUTH IN INTELLECTUAL PROPERTY REVISITED: EMBRACING EBAY AT THE EDGE *

Thomas C. Folsom **

Patents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle [sic] and refined, and sometimes, almost evanescent.¹

[W]e cannot always rely on past solutions as we approach current or developing problems. Nor can we assume that methods which were entirely proper, even praiseworthy at an earlier time are necessarily beneficial in a changed environment.²

ABSTRACT

In addition to whatever else it might do to serve the public interest, intellectual property diminishes the commons. To that extent, any particular intellectual property claim intersects the public interest and affects more than just the immediate parties. Not only does intellectual property diminish the commons, but also each of its disciplines contains an almost casually incoherent metaphysic. There is incoherence, if not at the core, at least at the critical edges of intellectual property law that is

* © Thomas C. Folsom 2007. "eBay" is a registered trademark of eBay, Inc.

** Associate Professor, Regent University School of Law; J.D., Georgetown University Law Center; B.S., United States Air Force Academy. I thank especially the University of Akron for its Fall, 2007 forum on "The Changing Landscape of IP Remedies after eBay" and each of the organizers, moderator, and participants for their valuable insights, comments and suggestions. Of course, those errors that remain are mine alone. My Graduate Assistants this year have been Timothy Creed, Toni Duncan, Joshua Jewitt, Ryan McPherson and Leo Lestino.

1. Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4,901) (Story, J.).

2. Milton H. Cohen, *Truth in Securities Revisited*, 79 HARV. L. REV. 1340 (1966) (quoting SEC Chairman Manuel F. Cohen).