CHAPTER 3: REGULATORY PROPERTY

TRIBUNE CO. V. OAK LEAVES BROADCASTING STATION

68 Cong. Rec. 216 (Cook Cty. Cir. Ct. Ill. Nov. 17, 1926)

Wilson, Judge:

[The complainant was the publisher of the *Chicago Daily Tribune,* with a daily paid circulation of several hundred thousand subscribers. Starting on March 29, 1924, it operated a radio station with the call sign WGN (short for "World's Greatest Newspaper"). WGN broadcast "daily programs of information, amusement, and entertainment" from the Drake Hotel in Chicago and from a location in Elgin (about 35 miles to the west). WGN programs were announced in the daily editions of the *Tribune*; and the complainant alleged that WGN broadcasts had an audience "in excess of 500,000" and "built up a good will with the public, which is of great value to the complainant, in that it has enhanced the value of the newspaper and increased the profits." Starting on December 14, 1925, WGN broadcast using the frequency 990 kilocycles per second ("990 kHz" in modern notation, or "990 on your AM dial" in the language of radio announcers), i.e. it broadcast using radio waves that oscillated 990,000 times per second. At that frequency, radio waves have a "wave length" of 302.8 meters.

The defendant ran the Paradise Ball Room in Chicago. It operated a radio station, WGES, that originaly broadcast at 1350 kHz, and then at 1200 kHz. On September 7, 1926, it switched to a new frequency: 950 kHz, i.e. one 40 kHz away from WGN.]

The bill further charges that, when two stations are broadcasting on the same or nearly the same wave length, the result will be that the users of the radio will either hear one of the stations to the exclusion of the other or hear both of the stations at the same time, which will cause confusion to the listener, or will hear one to the exclusion of the other but accompanied by a series of noises, such as whistles and roars, which render the program practically useless. ...

The bill also charges that knowledge of this particular wave length by a broadcaster is of great value to the broadcaster because the person receiving through the radio has been educated to know when to place his dials or indicators in order to receive a particular station and that the public generally in the locality of the complainant line become familiar with the wave length of the complainant and that its loss by interference would work great damage to the complainant. ...

The bill prays for an order restraining the defendants from broadcasting from said station in such a manner as to interfere with the broadcasting of the complainant, and more particularly from using any wave length within 100 miles of the city of Chicago having a frequency of less than 1,040 kilocycles per second, or more than 940 kilocycles per second. charging, in effect, that any wave length within that designated number of kilocycles would necessarily cause an interference with the broadcasting of the complainant.

The answer [argues] that where two broadcasting stations in the same locality are properly constructed and operated and the wave length employed sharply defined and the power of sold stations substantially equal there will be no appreciable interference by the stations if they are separated by 40 kilocycles. ...

The answer ... denies that they are drowning out the hearers of WGN, and state that, if such is the fact, it is because said complainant's broadcasting station is improperly constructed and operated.

The answer further admits that on or about September 7, 1926, there was available to them a wave length of 249.9 meters with a frequency of 1,200 kilocycles, but state that said wave length is not desirable for the purpose of broadcasting and that its use would render WGES of little or no value as a broadcasting station.

And further sets forth that there are other wave lengths which would be usable by the defendants, but states that their use would cause greater interference to other broadcasters than the interference now caused to WGN by the use of the present wave length now employed by them. ...

It is a matter of general knowledge that in the last few years there has grown up in the United States, as well as abroad, a well recognized calling or business known as broadcasting which consists in sending from a central station, electrically equipped, programs of music and amusement, speeches by men of prominence, news of the day and items of interest taking plaice in the world, and that these various programs are received by the public over radio receiving sets which have been installed in homes, hotels, and various other places, and that a large industry has grown up and developed in the making and manufacturing of radio sets, so that in the United States, at this time, there are millions of dollars invested by the public at large, which has made the investment for the purpose of and with the knowledge that they could receive these programs, speeches, and items of interest from various broadcasting stations located in various parts of the United States and in other countries.

It might also be stated that, so far as broadcasting stations are concerned, there has almost grown up a custom which recognizes the rights of the various broadcasters, particularly in that certain broadcasters use certain hours of the day, while the other broadcasters remain silent during that particular period of time. Again, in this particular locality, a certain night is set aside as silent night, when all local broadcasters cease broadcasting in order that the radio receivers may be able to tune in on outside distant stations.

Wave lengths have been bought and sold and broadcasting stations have changed hands for a consideration. Broadcasting stations have contracted with each other so as to broadcast without conflicting and in this manner be able to present their different programs to the waiting public. The public itself has become educated to the use of its receiving sets so as to be able to obtain certain particular items of news, speeches. or programs over its own particular sets.

The theory of the bill in this case is based upon the proposition that by usage of a particular wave length for a considerable length of time and by reason of the expenditure of a considerable amount of money in developing its broadcasting station and by usage of a particular wave length educating the public to know that that particular wave length is the wave length of the complainant and by furnishing programs which have been attractive and thereby cause a great number of people to listen in to their particular programs that the said complainant has created and carved out for itself a particular right or easement in and to the use of said wave length which should he recognized in a court of equity and that outsiders should not be allowed thereafter, except for good cause shown, to deprive them of that right and to make use of a field which had been built up by the complainant at a considerable cost in money and a considerable time in pioneering. ...

In the first place, it is argued that there are no rights in the air and that the law has no right or authority to restrict the using of wave lengths or to exclude others from their use. In answer to this it might be said that Congress has already attempted to regulate the use of the air in its enactment of August 13, 1912, by providing that only certain strata of the air or ether may be used for broadcasting purposes and, further, requiring persons to take out a license before they are permitted to exercise the use of the air or ether. Moreover, it appears to this court that the situation is such from the past development of the industry of broadcasting and radio receiving and from the apparent future, as indicated by the past, that, unless some regulatory measures are provided for by Congress or rights recognized by State courts, the situation will result in chaos and a great detriment to the advancement of an industry which is only in its infancy.

While it is true that the case in question is novel in its newness, the situation is not devoid, however, of legal equitable support. The same answer might be made, as was made in the beginning, that there was no property right, or could be, in a name or sign, but there has developed a long line of cases, both in the Federal and State courts, which has recognized, under the law known as the law of unfair competition, the right to obtain a property right in a name or word or collection of names or words [*Ed*: i.e., a trademark] which gives the person who first made use of the same a property right therein, provided that by reason of their use, he has succeeded in building up a business and created a good will which has become known to the public and to the trade and which has served as a designation of some particular output so that it has become generally recognized as the property of such person. The courts have held that persons who attempt to imitate or to make use of such trade name or names or words evidently do so for the purpose of enriching themselves through the efforts of some other person who by the investment of money and time has created something of value. Equity has invariably protected the rights of such persons in the use of said names.

It is also true that the courts have recognized, particularly in the west, the right to the use of running water for the purposes of mining and other uses. *Atchison v. Peterson*, 87 U.S. 507 (1874); *Cache La Poudre Reservoir v. Water Supply & Storage Co.*, 25 Colo. 161 (1898).

Some of the States have also recognized the rights of telephone and telegraph companies in the operation of their lines free from interference by lines of other companies placed in such close proximity as to create confusion by reason of electrical interference. *Western Union Telegraph Co. v. Los Angeles Electric Co.*, 70 F. 178 (C.C. S.D. Cal. 1896); *Northwestern Telephone Exchange Co. v. Twin City Telephone Co.*, 89 Minn, 495 (1903). ...

[W]e believe that the equities of the situation are in favor of the complainant on the facts as heretofore shown, particularly in that the complainant has been using said wave length for a considerable length of time and has built up a large clientage, whereas the defendants are but newly in the field and will not suffer as a result of in injunction in proportion to the damage that would be sustained by the complainant after having spent a much greater length of time in the education of the general radio-receiving public to the wave length in question.

We are of the opinion further that, under the circumstances in this case, priority of time creates a superiority in right, and the fact of priority having been conceded by the answer it would seem to this court that it would lie only just that the situation should be preserved in the status in which it was prior to the time that

the defendants undertook to operate over or near the wave length of the complainant. ...

It is difficult to determine at this time how a radio station should be properly run, but it is, also, true that the science of broadcasting and receiving is being subject every day to change and it is possible that within it short time this may be accomplished, although it is the opinion of the court from an examination of the affidavits and exhibits in the cause that 40 kilocycles is not at this time recognized as a safe limitation for the prevention of interference between stations located in the same locality. It is true that stations sufficiently removed from each other can broadcast even over the same wave length, but it necessarily follows that they must be so far apart that the wave lengths do not reach or come in contact with each other to the extent of creating interference.

In the case at bar the contestants are so located with reference to each other that the court does not feel that 40 kilocycles is sufficient. The court is of the opinion, however, that until there has been a final hearing of this cause no order prohibiting the defendants from the use of any particular wave length should be entered and to that extent the order heretofore entered will be modified so that it will read that the defendants are restrained and enjoined from broadcasting over a wave length sufficiently near to the one used by the complainant so as to cause any material interference with the programs or announcements of the complainant over and from its broadcasting station to the radio public within a radius of 100 miles, and in order that the defendants may be apprised of the feeling of the court in this regard, while the order is not expressly one of exact limitation, nevertheless the court feels that a distance removed 50 kilocycles front the wave length of the complainant would be a safe distance and that if the defendants use a wave length in closer proximity than the one stated it must be at the risk of the defendants in this cause.

NOTES

1. *Oak Leaves* is a road not taken. This report of the case comes from the *Congressional Record*. Senator Clarence Dill (D-WA) had it read into the record on December 10, 1926 (i.e. the month after it was decided) because of its bearing on a radio regulation bill he co-sponsored.* That bill became the Radio Act of 1927, which established the licensing system whose essentials are still in force today. Broadcasters require a license from the Federal Communications Commission; those licenses specify, in some detail, the frequency on which they can broadcast, the locations of their transmitters, and the power they can use. The licenses started out being heavily regulated to ensure that each broadcaster's programs served the public interest, but over time the licensing process has become far more ministerial. Subject to some concentrated-ownership restrictions and a few miscellaneous content rules (e.g. compliance with the Emergency Broadcasting System and some rules on children's programming), a broadcaster is free to transmit whatever programming it wants as long as it complies with the FCC's technical requirements. The result is a system that divides the airwaves into geographic and frequency blocks, and gives each of these blocks an exclusive licensee. Anyone else broadcasting on these frequencies in these places is violating the

*. Being read into the record is not necessarily a sign of importance. Five pages later, Senator Byron Harrison (D-MS) had one of Aesop's fables read into the record to make a point about Republican political maneuvering.

law. Similar systems hand out the right to use other frequencies for other purposes (e.g. mobile phone towers, police radios, satellite communications, etc.). In effect, any unauthorized use of someone else's assigned spectrum is illegal. There is no private right of action against an unauthorized use of spectrum as such, only FCC enforcement.

2. Here's another alternative: no licenses at all, and let anyone use the spectrum however they see fit. Before you scoff at this "commons" approach to spectrum allocation, consider that this is how WiFi works. You don't need an FCC license to plug in a home wireless router. The frequency range from 2.4 gigahertz (i.e. 2.4 billion cycles per second) to 2.5 gigahertz is "unlicensed"; the FCC regulates the maximum power that a device can emit, but otherwise, anyone is basically free to use any device they want however they want. How well does your WiFi connection typically work? What about the chaos of interference *Oak Leaves* feared? Would this approach work on a wider scale?
3. *Oak Leaves* presents its holding as an almost inevitable consequence of the nature of spectrum. But what is spectrum? Radio broadcasting works by running an electric current through the right kind of circuit, which results in electromagnetic radiation spreading in certain ways that people with the right kinds of devices can detect. Why isn't the relevant "property" here the transmitter and the receiver (both tangible personal property), or the land over which the radiation passes (real property)? So why not handle broadcasting cases using personal property torts ("You damaged my radio tower by interfering with its transmissions") or real property torts ("You trespassed by sending electromagnetic radiation over my land")? Consider this passage from Ronald Coase, *The Federal Communications Commission*, 2 J. L. ECON. 1 (1959):

> What does not seem to have been understood is that what is being allocated by the Federal Communications Commission, or, if there were a market, what would be sold, is the right to use a piece of equipment to transmit signals in a particular way. Once the question is looked at in this way, it is unnecessary to think in terms of ownership of frequencies or the ether. Earlier we discussed a case in which it had to be decided whether a confectioner had the right to use machinery which caused noise and vibrations in a neighboring house. It would not have facilitated our analysis of the case if it had been discussed in terms of who owned sound waves or vibrations or the medium (whatever it is) through which sound waves or vibrations travel. Yet this is essentially what is done in the radio industry. The reason why this way of thinking has become so dominant in discussions of radio law is that it seemed to have developed by using the analogy of the law of airspace. In fact, the law of radio and television has been commonly treated as part of the law of the air. It is not suggested that this approach need lead to the wrong answers, but it tends to obscure the question that is being decided. Thus, whether we have the right to shoot over another man's land has been thought of as depending on who owns the airspace over the land. It would be simpler to discuss what we should be allowed to do with a gun. ... The problem confronting the radio industry is that signals transmitted by one person may interfere

> with those transmitted by another. It can be solved by delimiting the rights which various persons possess.

Is this any more helpful than *Oak Leaves*'s analogies to trademarks and water rights?

4. In another famous article, *The Problem of Social Cost*, 3 J.L. & ECON. 44 (1960), Coase argued that nuisance is a problem of reciprocal causation:

> The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm. I instanced in my previous article [*The Federal Communications Commission*] the case of a confectioner the noise and vibrations from whose machinery disturbed a doctor in his work. To avoid harming the doctor would inflict harm on the confectioner. The problem posed by this case was essentially whether it was worth while, as a result of restricting the methods of production which could be used by the confectioner, to secure more doctoring at the cost of a reduced supply of confectionery products. Another example is afforded by the problem of straying cattle which destroy crops on neighbouring land. If it is inevitable that some cattle will stray, an increase in the supply of meat can only be obtained at the expense of a decrease in the supply of crops. The nature of the choice is clear: meat or crops.

Much the same could be said about spectrum and interference! In *Ligado Networks v. United States*, No. No. 23-1797L (Ct. Fed. Cl. Nov. 18, 2024), Ligado held FCC licenses allowing it to provide wireless 5G Internet services within its licensed spectrum. The Department of Defense objected, however, that Ligado's use would interfere with GPS devices on neighboring blocks of spectrum. Ligado argued that any interference would arise not because it was operating its transmitters incorrectly but because the GPS receivers had been designed and manufactured to be inappropriately sensitive, based on the allegedly unjustified assumption that no one would broadcast on the spectrum assigned to Ligado. How should a court deal with such a dispute?

5. A related argument is that "spectrum" is the wrong abstraction for regulating multiple people's simultaneous broadcasting. It is true that given the amplitude-modulating radio technology of 1926, WGN's and WGES's broadcasts on nearby frequencies from nearby locations were likely to cause frustrating interference for listeners. But technology changes, and more broadcast technologies don't depend on exclusive assignments of slices of spectrum. One approach is "spread-spectrum," in which a device transmits at a given frequency only for a very short burst and then "hops" to a different frequency for the next bit of its transmission, and so on. This is basically how modern cell phones communicate with towers; the system allows many devices to "share" the same nominal slice of spectrum. Another emerging technology is "ultra-wideband," in which a device transmits on an immensely wide range of frequencies but with very low power—so low that it interferes only minimally

with other spectrum users. There are also techniques that involve shaping the geometry of a transmission so it travels only in desired directions. What would *Oak Leaves* have to say about these new technologies? Is it more or less accommodating of them than the FCC's regulatory system?

6. Does spectrum regulation affect how courts should deal with nuisance and trespass claims due to electromagnetic radiation? Consider the English case of *Network Rail Infrastructure Ltd. v. Morris (t/a Soundstar Studio)*, [2004] EWCA Civ. 172, where radiation from a railway signaling system was picked up by electric guitars used in a recording studio 80 meters away, resulting in unusable recordings. *Held*, no nuisance, the interference was not unreasonable. In particular, legislation now established the standards for emitting and receiving electromagnetic radiation with which electronic equipment must comply, and modern guitars built to these standards would not suffer this problem.

UNITED STATES V. TUROFF

701 F. Supp. 981 (E.D.N.Y. 1988)

Glasser, District Judge:

Defendants have moved to dismiss the indictment in this case on the ground that ... it fails to allege a violation of the mail fraud statute, 18 U.S.C. § 1341.

For the reasons stated below, defendants' motion is denied.

FACTS ...

According to the indictment, in late 1978, the [Taxi and Limousine Commission, or TLC], which regulates [New York] City's medallion taxicabs, authorized the issuance of 100 temporary taxi medallions to a corporation ("Research Cab Corporation") to be formed by defendant Donald Sherman. The purpose of the temporary medallions was to test the feasibility of diesel engines in New York City taxicabs.

The indictment alleges that in late 1980, the TLC's chairman, defendant Turoff, caused an additional 23 unauthorized medallions to be diverted to his codefendants and placed on gasoline- and diesel-powered taxicabs registered to Research Cab and to Tulip Cab Corporation. These taxicabs allegedly operated in the City from late 1980 to early 1985. Defendants Donald and Ronald Sherman allegedly deposited the proceeds from those taxicabs, which exceeded $500,000, in the bank account of a shell corporation ("Exdie Cab Corporation").

Allegedly, defendants never paid the TLC the annual license renewal fees for the unauthorized medallions. In connection with the conspiracy, the defendant Turoff allegedly gave false and misleading information to the TLC Commissioners and the Mayor's office, and destroyed TLC records on the Tulip Cab Corporation and all the defendants allegedly gave false and misleading information to the New York State Commission of Investigation. The indictment alleges fourteen instances in which the mails were used to effectuate the scheme.

DISCUSSION

I.

The mail fraud statute under which defendants have been indicted was first enacted in 1872. In its present form, it now reads:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose

> of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Defendants move to dismiss the indictment on the ground that it does not state a cognizable violation of the mail fraud statute as interpreted in *McNally v. United States*, 483 U.S. 350 (1987). In *McNally*, the Supreme Court reversed the mail fraud convictions of Charles J. McNally and James E. Gray on the ground that the mail fraud statute does not reach schemes which violate "the intangible right of the citizenry to good government." ...[2] ...

Most significantly for this case, the Court in *McNally* held that, because the mail fraud statute "had its origin in the desire to protect individual property rights, ... any benefit which the Government derives from the [mail fraud] statute must be limited to the Government's interest as property-holder." Accordingly, in the present case, the government's failure to demonstrate the City's interest "as property-holder" in the medallions would be fatal to that charge in the indictment that is based upon the fraudulent procurement of the medallions.

However, even if the court accepted this argument, the indictment would still stand insofar as it is based on the scheme to avoid payment of license renewal fees. Money is the most concrete and tangible of property. In *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), the Court stated: "In its dictionary definitions and in common usage 'property' comprehends anything of material value owned or possessed... . Money, of course, is a form of property." On this basis alone, defendant's motion to dismiss the indictment must be denied.

As regards the medallions, the court concludes that the fraudulent misappropriation of them deprived the City of a property interest cognizable under the mail fraud statute.

Defendants cite *United States v. Evans*, 844 F.2d 36, 42 (2d Cir. 1988) for the proposition that the City's interest in the medallions "is ancillary to a regulation, not to property." Evans concerned a scheme to transfer arms regulated by the federal government from various foreign nations to Iran. The scheme required defendants to deceive the government about the true identity of the purchasing country in order to obtain the necessary approval for the transaction. The government's right to regulate such transfers arose either from a statutorily-required clause in the contract between the United States and the original foreign buyer, or by regulation.

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2. The narrowness of *McNally*'s holding was underscored in *Carpenter v. United States*, 484 U.S. 19, (1987), which held that a newspaper had a property right under § 1341 in the exclusive pre-publication use of confidential business information, and noted that "McNally did not limit the scope of § 1341 to tangible as distinguished from intangible property rights."

The Second Circuit, affirming the district court's dismissal of the mail and wire fraud counts against defendants, held that the government had not shown that it had some property interest in the arms. Furthermore, the court rejected the government's contention that "the right of the United States Government to prevent the resale or retransfer of U.S. military weaponry from foreign nations to other, unacceptable foreign powers" constituted "an interest in, and a right to exercise control over, property" for purposes of the mail fraud statute. *Id.*, 844 F.2d at 40

In addressing the latter argument, the court rejected the government's analogies to common law property rights. The court reasoned that, while a right to control the future alienation and use of a thing can be a traditional property right (e.g., the fee simple determinable, the fee simple subject to a condition subsequent, the possibility of reverter, and the power of termination), that does not mean that every such right is cognizable under the mail and wire fraud statutes. Specifically, the court noted that the government's right to control arms transfers between foreign powers would never permit the United States to possess the weapons in question, and had no effect on the purchaser's title to the arms or the seller's right to profits from the sale. Rather, the regulatory scheme governing such transfers "substitutes for the traditional property remedies of replevin, damages or specific performance, a substitution that is further proof that the right is not property." *Id.*, 844 F.2d at 41. Moreover, the court expressed its reluctance to apply common law property rules in the fundamentally different context of weapons transfers, which are governed by foreign policy and human rights considerations in addition to the usual economic laws of supply and demand.

The court summed up by finding that the government's interest in the weapons was essentially regulatory:

> All of these distinctions suggest to us that the government's interest here is ancillary to a regulation, not to property. A law prohibiting a particular use of a commodity that the government does not use or possess ordinarily does not create a property right. If it did, many government regulations would create property rights. For example, laws preventing the sale of heroin or the dumping of toxic waste would create government property rights in the drugs or chemicals. Admittedly, the line between regulation and property is difficult to draw with scientific precision ... and we do not mean to imply that the government never has a property interest in the limits it imposes on property use. *Id.*, 844 F.2d at 42.

Evans is distinguishable. As discussed above, in *Evans* the United States had no possessory interest in the weapons, nor did the deception practiced by the defendants affect the purchaser's title to the weapons or the seller's right to profit from the sale of the weapons. Here, defendants are accused of taking 23 items of tangible personal property from the City's possession. Title to those medallions in the hands of third persons would be affected. Citation of authority is not required for the principle that a thief cannot transfer title even to a bona fide purchaser for value. While the government in *Evans* had no possessory interest in the weapons, the TLC in this case did have a possessory interest in the medallions. It maintained them under lock and key at its offices. It had title to them. An action for conversion of those medallions would lie and either replevin or damages would be an available and appropriate remedy. ... Given the impetus to return to the arcane learning of the law of property prompted by *McNally*, a quotation from Book III of

Blackstone's Commentaries on the Laws of England (Lewis' Ed.1902) seems appropriate. At pages 145–46 that venerable author wrote:

> The wrongful taking of goods being thus most clearly an injury, the next consideration is, what remedy the Law of England has given for it. And this is, in the first place, the restitution of the goods themselves so wrongfully taken, with damages for the loss sustained by such unjust invasion; which is effected by action of replevin; ...

That the medallions themselves are a valuable, marketable commodity was adverted to years ago by Professor Charles A. Reich in his seminal article entitled *The New Property*, 73 YALE L.J. 733 (1964). He wrote, at page 735:

> A New York City taxi medallion, which costs very little when originally obtained from the city, can be sold for over twenty thousand dollars.

In a footnote at that point, the author observed:

> 7. A New York Taxi Medallion is a piece of tin worth 300 times its weight in gold. No new transferable medallions have been issued since 1937. Their value in 1961 was estimated at $21,000 to $23,000; banks will lend up to $13,000 on one. The cabbie pays the City only $200 a year for his medallion. There is a brisk trade in them: out of 11,800, about 600 changed hands in 1961. One company, National Transportation Co., sold 100 medallions at $21,000 each, a transaction totaling $2,100,000. A non-transferable license, of which there are a few, has no market value.

The government also contends that the medallion is, in essence, the equivalent of an easement to use the city streets. At the risk of dwelling too long on the esoterica of property, the medallions could not properly be equated with easements. An easement is generally appurtenant, which is to say that it is a right which the owner of one parcel of land (the dominant tenement) may exercise in or over the land of another (the servient tenement) for the benefit of the former. An easement in gross is a right created in a person to use the land of another, which the owner of that easement may enjoy even though he does not own or possess a dominant estate. Although the concept of an easement in gross has been recognized, such an easement is rare. The government's contention would have been more technically correct had it characterized the medallion as a "special franchise" which confers a right to do something in the public highway which, except for the grant, would be a trespass.

A franchise is property. It is assignable, taxable and transmissible. *Hatfield v. Straus*, 82 N.E. 172 (1907). A mere license, on the other hand, is nothing more than a personal, revocable privilege. See, e.g., *Brooklyn Heights R.R. Co. v. Steers*, 106 N.E. 919 (1914). It would not be seriously disputed that a taxicab "license" is, accurately speaking, a special franchise which is not revocable at will and may not be taken away except by due process. *Hecht v. Monaghan*, 121 N.E.2d 421 (1954). *See also Wignall v. Fletcher*, 303 N.Y. 435 (1952). The resolution of this motion will not be dependent, however, upon the technically correct characterization of the matter in issue as being either a franchise, license, or easement.

The government also contends that the physical medallions themselves are "property" for purposes of the mail fraud statute. The defendants ridicule that contention by deprecatingly referring to the medallions as nothing more than "23 pieces of tin." Thus, the defendants impliedly, but never explicitly, assert a *de min-*

imis qualification to the tort of conversion or the crime of larceny. No authority is cited to support that oblique assertion, nor is the court aware of any. ...

The medallion is a tangible, physical object. The Administrative Code of the City of New York § 19–502(h) provides as follows:

> "Medallion" means the metal plate issued by the commission for displaying the license number of a licensed taxicab on the outside of the vehicle.

By charging the defendants with obtaining by false and fraudulent representations and promises 23 unauthorized taxi medallions, the government is seeking to prosecute these defendants by attempting to prove they caused some loss of property as alleged.

In *Evans*, upon which the defendants so heavily rely, the defendants were charged with making false statements to United States agencies to obtain approval to export arms. Here, the defendants are accused of *taking* 23 items of tangible personal property (the metal plates) from the City of New York in which the City did have a possessory interest. This is not a case where it is alleged that the citizenry is merely deprived of the honest services of a public official. This is a case where the public official is accused of conspiring with others to misappropriate tangible personal property. To view this case otherwise would be to hold, in effect, that a City cashier who embezzled money merely deprived the City of her honest and faithful services to which the embezzled money is an inconsequential appurtenance. ...

Whether the medallions are tangible property or not to support a charge of mail fraud may also be discerned by asking whether the wrongful taking of the medallions from the offices of the TLC would be larceny. Defendants advise that a state prosecution has been commenced on that ground. See N.Y. PENAL L. § 155.00(1) (McKinney 1988), defining property for purpose of state larceny statute as "any article, substance or thing of value." Thus, the reluctance of the *McNally* Court to read the mail fraud statute as criminalizing conduct on the part of a state official which is not otherwise prohibited by state law need not deter here. ...

To view the sovereign's power to grant licenses, or franchises, or easements as being something other than money or property is to equate, erroneously in my view, the sovereign with an individual or corporation. What the latter sells, buys, creates or manufactures and the proceeds derived from those activities is money or property in the traditional sense. The sovereign can buy and sell and manufacture and derive proceeds from those activities only by virtue of the power it possesses as sovereign – namely its police power, its power to tax, etc. It is only through the exercise of those powers that the sovereign obtains the revenues which enable it to function at all and acquire, if it chooses, "property" in the traditional sense. To rob the sovereign of the due exercise of that power by schemes or artifices to defraud, is to rob it of "property" as surely as the goods or chattels or money obtained from a private person by similar schemes or artifices.

The view of cases that licenses are only property in the hands of the licensee, but never in the hands of the government represents an inversion of historical fact. In the seminal article to which reference has already been made, which urged that various important government benefits (including licenses) be accorded a status akin to "property," Professor Charles Reich noted that traditionally, just the opposite was true – licenses, and all other forms of government largess were considered government property long before the property rights of the licensee or recipient were accorded legal recognition:

> The chief obstacle to the creation of private rights in [government] largess [e.g., licenses, welfare benefits, services, contracts and franchises] has been the fact that *it is originally public property, comes from the state, and may be withheld completely*. But this need not be an obstacle. *Traditional property also comes from the state, and in much the same way.* Land, for example, traces back to grants from the sovereign. In the United States, some was the gift of the King of England, some that of the King of Spain. The sovereign extinguished Indian title by conquest, became the new owner, and then granted title to a private individual or group. Some land was the gift of the sovereign under laws such as the Homestead and Preemption Acts. Many other natural resources – water, minerals and timber, passed into private ownership under similar grants. In America, land and resources all were originally government largess. In a less obvious sense, personal property also stems from government. Personal property is created by law; it owes its origin and continuance to laws supported by the people as a whole. These laws "give" the property to one who performs certain actions. Even the man who catches a wild animal "owns" the animal only as a gift from the sovereign, having fulfilled the terms of an offer to transfer ownership.

Reich, *The New Property,* 73 YALE L.J. 733, 778 (1964) (footnotes omitted; emphasis added).

The salutary fact that, in modern times, courts have recognized the property rights of licensees[5] need not blind us to the equally compelling fact that licenses, like other forms of public largess, originate in the state and are "public property," in the first instance. ...

NOTES AND QUESTIONS

1. Reich's article is closely linked with *Goldberg v. Kelly*, 397 U.S. 254 (1970), which held that welfare benefits could not be terminated without notice and a hearing. In a footnote, the Court quoted *The New Property* and added, "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property." *Id.* at 262 n.8. Two years later, in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), the Court held that a state college professor on a renewable one-year contract did not have a "property" interest in continued employment, so he had no Fourteenth Amendment right to a statement of reasons for the nonrenewal of his contract.The court had this to say about the nature of "property":

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the an-

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5. *See, e.g.*, *Bell v. Burson*, 402 U.S. 535 (1971) (driver's license); *Dixon v. Love*, 431 U.S. 105 (1977) (same); *Mackey v. Montrym*, 443 U.S. 1 (1979) (same); *Gibson v. Berryhill*, 411 U.S. 564 (1973) (license to practice optometry); *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963) (license to practice law); *Barry v. Barchi*, 443 U.S. 55 (1979) (horse trainers' harness racing license).

> cient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577. Does this formulation work for all property, all intangible property, or just for government benefits? What do you make of its thoughts about where property comes from?

2. Not all government action to confer benefits on people creates "property" rights protected under the Due Process Clause. In *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), for example, Jessica Gonzales obtained a restraining order from a state trial court against her estranged husband. He kidnapped their three daughters in violation of the order; she called the town police but they failed to respond for eight hours, during which he murdered the daughters. The Supreme Court held that even though the judicial restraining order directed the police to enforce it and a state statute required the police to "use every reasonable means" to do so, a "well established tradition of police discretion" meant that Gonzales lacked a "legitimate claim of entitlement" to its enforcement under *Roth*, and so could not bring a § 1983 claim against the town. If *Castle Rock* is a case about police discretion, why not evaluate their actions against the scope of permissible discretion rather than cutting off Gonzales's claim at the threshold by saying that the restraining order did not create a "property" right? Does the property frame help or hurt the analysis?
3. Money is property because it is "concrete and tangible," says the court in *Turoff*. Really? What if medallion owners pay their license renewal fees by check? By credit card? Is money more or less tangible than the "piece of tin" that is a taxicab medallion, the public's right to honest services, or the franchise of operating a taxicab?
4. The Springfield Athletic Commission regulates boxing in the sense that boxing for money or charging admission to a boxing match within the state of Springfield is prohibited unless the match takes place under regulations promulgated by the Commission. Some of the Commission's rules establish a system of weight classes and determine who is the "World" champion within each of those classes. Vinnie Watson is the current World Heavyweight Boxing Champion, as determined by the Commission, whose rules allow it to revoke his title unless he "defends his title against a suitable challenger" at least once per year. Watson was been challenged to a match by Drederick Tatum, but declined the challenge. The Commission then voted to revoke Watson's title and award it to Tatum instead; Watson has sued the Commission, claiming that Tatum's poor won-loss record makes him not a "suitable" challenger, and alleging that the Commission's actions deny him "property, without due process of law" within the meaning of the Fourteenth Amend-

ment. Is his title property? Does it matter whether the Commission has demanded that he return the ceremonial belt that new champions hold over their heads?

5. Taxicab medallions typically can be sold on the open market. Liquor licenses typically require a hearing before a local alcoholic beverages commission before they can be transferred. A license to practice law is personal and cannot be transferred at all. Does this mean that liquor licenses and law licenses are not "property?"
6. Is a franchise excludable? If someone steals the medallion off your taxicab, can you sue for replevin or conversion? What are the damages? Does possession of the medallion give them the right to operate a taxicab on the streets of New York City? What are you to do in the meantime—in fact, what if you never find the thief? Is your franchise gone? Now suppose that instead of stealing your medallion, a fraudster forges one, using your medallion number. Presumably this is an offense under state law, but does it invade your property rights in your franchise? What if the fraudster forges a medallion using an unassigned number?
7. If you have a taxi franchise and Uber starts operating in your city without the approval of the TLC, does that violate your property rights in your franchise? If the TLC doesn't take action, can you sue the city for failing to enforce its franchise laws? Does it matter whether you have an exclusive franchise—e.g., to be the only operator of shuttle van service at an airport – or a nonexclusive franchise—e.g., to be one of a number of operators of shuttle van service at the airport? Or, from the other side, can the *denial* of a franchise invade property rights? Is there a "property" interest in being allowed to operate a taxicab for hire, such that a city government triggers the Fourteenth Amendment when it refuses to allow Uber-dispatched cars to pick up passengers within city limits?

G.S. RASMUSSEN & ASSOCIATES, INC. V. KALITTA FLYING SERVICE, INC.

958 F.2d 896 (1992)

Kozinski, Circuit Judge:[*]

We shuttle back and forth between federal and state law in determining what legal protections—if any—are available to the holder of certain aircraft design permits issued by the Federal Aviation Administration.

FACTS

A.

The FAA is charged by Congress with promoting air safety, *see* 49 U.S.C.App. § 1421(a), and pursues this mission vigorously and effectively in cooperation with the private aviation industry. One of the FAA's most important functions is to prescribe standards and to measure compliance with a multistep certification process

*. [Ed: In 2009, Judge Kozinski was admonished by a judicial disciplinary panel for maintaining a publicly accessible server that included sexually explicit material. In 2017, he abruptly resigned after being accused of sexual misconduct by numerous women, including former law clerks.]

for airplane design and production. *See generally United States v. Varig Airlines,* 467 U.S. 797, 804-07 (1984).

Because the certification procedure is complex and expensive, the FAA certifies airplane types rather than individual planes. Aircraft manufacturers are required to test and analyze new airplane designs themselves; the FAA then determines the airworthiness of the design based on the manufacturer-generated engineering data and test results. Once a manufacturer has demonstrated the safety of its design, the FAA issues it a Type Certificate. *See* 49 U.S.C.App. § 1423(a)(2); 14 CFR § 21.21(b). The manufacturer can then obtain a production certificate by proving to the FAA that each duplicate airplane will comply with the Type Certificate. *See* 49 U.S.C.App. § 1423(b); 14 CFR §§ 21.133-21.143. Finally, the manufacturer can obtain airworthiness certification for subsequent aircraft, without undergoing independent testing, by demonstrating that they conform to the Type Certificate. *See* 49 U.S.C.App. § 1423(c); 14 CFR § 21.183.

This case involves a closely related FAA certification scheme: Supplemental Type Certificates (STCs)—which, as the name implies, certify changes to planes already type-certificated. Anyone who wishes to make a major alteration to an airplane must obtain an STC. 14 CFR § 21.113. The STC serves the same function for alterations as the Type Certificate does for initial manufacture: It allows the FAA inspector to shortcut the airworthiness certification process by incorporating an approved design. STCs are obtained through the same arduous process as Type Certificates: The applicant must present engineering and test data sufficient to prove to the FAA the airworthiness of the proposed modification. See 14 CFR §§ 21.115-21.117.

B.

George Rasmussen is an aeronautical engineer. He calculated safe airspeed parameters for DC-8 cargo planes carrying significantly more weight than they were designed for, and developed an aircraft modification that allows DC-8s to carry tens of thousands more pounds than permitted under their original Type Certificate. Based on hundreds of hours of engineering work, Rasmussen submitted volumes of technical data to the FAA. Having thus proved that it was safe for heavily loaded DC-8s to fly within his calculated speed range, he was granted an STC.

For a DC-8 owner to obtain airworthiness certification to operate a plane with the increased cargo capacity, he must meet three requirements: First, he must modify the aircraft by installing three instruments—two airspeed indicators and a maximum speed warning gauge; second, the plane must carry a supplement to the flight manual instructing the pilot how to fly the heavily loaded plane safely; third, Rasmussen's STC must be shown to the FAA inspector so he can verify that the modifications conform to a design that has been approved by the FAA as airworthy. Without Rasmussen's STC, the plane owner would have to obtain his own STC by independently proving to the FAA that the modification was safe.

Kalitta owns and operates cargo aircraft. In 1985, it bought a used DC-8 passenger airplane. It proceeded to convert the plane to cargo use, a use that would be uneconomical without the modification described in Rasmussen's STC. Rasmussen offered to license the STC to Kalitta for $95,000, but Kalitta declined. Instead, in the district court's words, "Kalitta decided to 'pirate' the Rasmussen STC." Kalitta copied the supplemental flight manual from a Rasmussen STC-equipped DC-8 it already owned, and obtained the three necessary instruments from sources other than Rasmussen. It installed them on the airplane and applied to the FAA for an airworthiness certificate; it typed the number of Rasmussen's

STC on the appropriate line of the application, and included a photocopy of the certificate itself.[4] Kalitta's modification conformed with Rasmussen's validly issued STC. The FAA certified Kalitta's modified DC-8 as airworthy.

Taking the position that Kalitta was freeriding on his effort, Rasmussen sued for conversion of his STC and for unjust enrichment. The district court granted summary judgment for Kalitta, holding that Rasmussen had no protectable property interest in the STC and, in any event, that his action was preempted by the federal copyright and patent laws.

DISCUSSION

A. Is There a Property Right?

How property rights in new goods and services are established and defined is a question of considerable significance in a society, such as ours, where private ownership is the principal incentive for the creation and maintenance of commodities, and for their efficient allocation. The failure or inability to recognize private property rights in certain types of goods often leads to a variety of adverse effects. One phenomenon, known as the tragedy of the commons, is the over-use of public goods because individual users do not suffer the full cost of their consumption. A related phenomenon is the free-rider problem, where third parties enjoy the benefits of a good without having invested the time, money and effort of creating it. While the tragedy of the commons results in the over-consumption of existing goods, the free-rider problem discourages the creation of new goods. In order to avoid such inefficiencies, the law generally favors the establishment of property rights. See, for example, *International News Service v. Associated Press,* 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211 (1918).

Giving innovators the exclusive right to reap the benefits of their efforts compensates them for the costs of innovation, the risk of failure and the potential liability that can arise if the product proves defective.[6] If successful entrepreneurs are denied such exclusive rights, they will be less likely to invest the necessary time, money and energy into innovation. It is with these considerations in mind that we turn to the unusual facts before us.

Rasmussen's interest is of a most interesting and peculiar sort, one that may become more prevalent as we continue to witness the expansion of the regulatory state: It has value *only* because it helps secure a government privilege to do something that would otherwise be forbidden. The time, money and effort Rasmussen devoted to obtaining his STC would largely be wasted but for the fact that they generated the data necessary to satisfy the requirements of the Federal Aviation Act and the Code of Federal Regulations.

Under the applicable FAA regulations, an STC is granted upon the presentation of certain documentation, which normally can be obtained only through expensive and time-consuming design, experimentation and testing. 14 CFR §§

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4. It appears that the FAA does not require an original STC as part of the application process; indeed, because there is only a single original of any particular STC, airworthiness applications necessarily include only a copy of the certificate.

6. Rasmussen, for example, could be held liable for huge damage awards if a plane modified pursuant to his STC crashes. *Cf. Elsworth v. Beech Aircraft Corp.,* 37 Cal. 3d 540 (1984) (affirming damages award against airplane manufacturer despite FAA approval under Type Certificate). This type of risk can be a substantial barrier to the production of new and useful products. *See* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 153-71 (1988).

21.115-21.117. Moreover, an STC is issued to a particular individual and entitles the holder to specific privileges. Id § 21.119. The STC is transferable and it may be licensed, in accordance with FAA procedures. Id § 21.47.[8]

That this enumeration of rights and privileges is insufficient, of itself, to establish property rights is clear from the facts of this case: Kalitta had no trouble obtaining the airworthiness certificate by filling in the number of Rasmussen's STC and providing a photocopy thereof.[9] Whatever rights the regulations may provide, therefore, are not self-executing, and it is unclear whether Rasmussen could have challenged the FAA's action in issuing the airworthiness certificate to Kalitta.[10]

There are many reasons why a federal agency would choose not to police property rights that might be created incidental to its regulatory scheme. Here, for example, the purpose of the federal aviation statutes and regulations is to assure air safety. The FAA may well have contemplated that holders of STCs would have the exclusive right to obtain airworthiness certificates, but the agency may deem it too burdensome to keep track of the hundreds, perhaps thousands, of STCs outstanding; it may lack the facilities and the expertise to adjudicate questions of joint ownership, transfer, license and the multitude of other issues that routinely arise when property rights are involved. The FAA may have decided it could best pursue its mission by granting airworthiness certificates to whoever can show compliance with a validly issued STC, leaving questions of property law to the courts.

[The court held that there was no implied private right of action under the Federal Aviation Act.]

Because federal law plays a significant role in defining the right but provides no mechanism of private enforcement, we must turn to state law in determining whether Rasmussen's interest amounts to a property right. Cf. *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972) ("Property interests ... are created and their dimen-

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8. The district court concluded that STCs are not transferable because section 21.47 refers only to Type Certificates. Rasmussen's STC states on its face, however, that it can be transferred "in accordance with" the Type Certificate regulation. CR 48 exhibit Q. Furthermore, the second page of the STC is titled "transfer endorsement" and states that when completed and returned "the FAA will reissue the certificate in the name of the transferee and forward it to him." *Id.* The parties do not dispute that STCs are transferable.

9. Why this is so is a mystery. A straightforward reading of the regulations would suggest that only a holder of an STC is entitled to an airworthiness certificate. *See* 14 CFR § 21.119(a). Kalitta did not hold the certificate either originally or as a transferee or licensee. Because the FAA did not participate in this case as a party or amicus, we have no authoritative way of determining whether issuance of the airworthiness certificate to Kalitta was a mistake, or whether the privilege granted by section 21.119 is narrower than it appears.

10. Rasmussen might have been entitled to bring an APA action challenging the issuance of the STC, had he acted in a timely fashion. *See Oregon Environmental Council v. Kunzman,* 714 F.2d 901, 903 n.2 (9th Cir. 1983). We need not decide this issue because Rasmussen's failure to bring such an action is no bar to his bringing the current action under state law. The APA action would, in effect, be seeking to cancel what Rasmussen claims is an infringement of his exclusive privilege granted by the FAA regulations. The current action seeks a different remedy: compensation for the benefit bestowed upon Kalitta by use of the right Rasmussen claims was granted exclusively to him. Rasmussen was entitled to choose which of these remedies to pursue. See *Koratron Co. v. Deering Milliken Inc.,* 418 F.2d 1314, 1317-18 (9th Cir. 1969).

sions are defined by existing rules or understandings that stem from an independent source such as state law ... ."). The parties agree that the appropriate state law is that of California, which defines property very broadly: "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. ... The thing of which there may be ownership is called property." CAL. CIVIL CODE § 654. This somewhat tautological definition leaves unanswered the key question: How does one determine whether someone is entitled to exclusive use or possession of the thing in question?

Another provision of California law, giving examples of intangible property interests, is more helpful. The list includes the following: "The composition of an author, the good-will of a business, trade-marks and signs, and ... rights created or granted by statute." *Id.* § 655. Also helpful are decisions of the California courts determining whether various interests amount to property. A state liquor license, for example, is property under California law. *Golden v. State,* 133 Cal. App. 2d 640, 643-45 (1955). The *Golden* court found dispositive that the license was issued to a specific person and was transferable from one person to another. It is thus relevant that the STC involved in this case states on its face that "This certificate [is] issued to G.S. Rasmussen" and that "This certificate may be transferred."

That the interest in question is limited to obtaining a governmental privilege, and a federal one at that, does nothing to diminish its status as a property interest for purposes of state law. As the California Supreme Court has stated, "[a]lthough a ... license is merely a privilege so far as the relations between the licensee and the state are concerned, *it is property in any relationship between the licensee and third persons,* because the license has value and may be sold." *Roehm v. County of Orange,* 32 Cal.2d 280, 282-83 (1948) (emphasis added). The interest need not be one that was considered property at common law and, of course, need not be tangible. *City of Oakland v. Oakland Raiders,* 32 Cal.3d 60 (1982) (property right in professional football franchise); see also *Terrace Water Co. v. San Antonio Light and Power Co.,* 1 Cal.App. 511, 513 (1905) (electricity); *Johnston v. Twentieth Century-Fox Film Corp.,* 82 Cal. App.2d 796, 807-13 (1947) (book title).

To the extent we can distill a principle on the basis of this somewhat amorphous body of law, three criteria must be met before the law will recognize a property right: First, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control;[12] and third, the putative owner must have established a legitimate claim to exclusivity.[13] The interest Rasmussen asserts here easily meets these criteria.

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12. As the saying goes, some of the best things in life are free, and the reason may be that they cannot be reduced to possession: The air we breathe, scenic views, the night sky, the theory of relativity and the friendship of others cannot be reduced to possession and therefore cannot be the basis of property rights.

13. Opinions defining property for takings purposes often use the phrase "reasonable investment-backed expectations" to describe such claims. See, for example, *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1005 (1984); *Long Beach Equities, Inc. v. County of Ventura,* 231 Cal.App.3d 1016, 1038 (1991). The phrase aptly describes the nature of the interest needed to establish property rights for purposes of California law. The degree of investment—monetary or otherwise—is relevant, especially when dealing with intangibles, in determining whether the purported owner has developed a stake in the thing sufficient to warrant invoking the protections of the law of property.

The nature and extent of the rights afforded by an STC are capable of precise definition: It enables an airplane owner to obtain an airworthiness certificate for a particular design modification without the delay, burden and expense of proving to the FAA that a plane so modified will be safe. Federal law also limits the interest in a significant way: The rights created by an STC are only applicable to airplanes within the safety jurisdiction of the FAA—"civil aircraft in air commerce." 49 U.S.C.App. § 1421(a). Thus, Kalitta is free to make Rasmussen's modification on airplanes it flies entirely outside the United States. *Id* § 1301(23) (defining "air commerce").

Nor are there any conceptual or practical difficulties in restricting the right to the holder of the STC, or to someone who is a transferee or licensee. In fact, the federal regulations contemplate exactly that. Rasmussen's interest is thus precisely defined and capable of exclusive possession.

The final requirement—that Rasmussen have established a legitimate claim to exclusivity—is also amply met here. Rasmussen expended considerable time and effort in research and design; he conducted the appropriate tests and compiled the necessary data; he prepared an operations manual and lined up an instrument manufacturer; he convinced the FAA that the modification is safe; and he obtained a certificate which results in preferential rights in the issuance of airworthiness certificates by the FAA. Without Rasmussen's efforts, the STC Kalitta relied on simply would not exist. Rasmussen has the type of reasonable investment-backed expectations that give rise to a legitimate claim of exclusive control over the STC.

We therefore hold that Rasmussen has a property interest in his STC under California law,[14] unless such an interest conflicts with federal law. We turn to that question now. [The court held that neither patent law nor copyright law preempted California property law.]

3. Federal Aviation Act Preemption

Finally, we must consider whether recognizing a property right in STCs would impermissibly conflict with the federal aviation regulatory scheme. At the outset, neither the Federal Aviation Act nor its accompanying regulations explicitly preclude recognition of a property right in STCs. The statute does contain a provision which preempts state law "relating to rates, routes, or services," 49 U.S.C.App. § 1305, but this provision is inapplicable to the question before us.

Nor do any of the substantive provisions create a conflict, as was the case in *In re Holiday Airlines, Inc.,* 620 F.2d 731 (9th Cir. 1980). In *Holiday Airlines,* we held that the statutory federal recording system for aircraft liens preempts state recording requirements; the decision was based largely on "the predominant purpose of the statute," which was "to provide one central place for the filing of such

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14. The district court's unwillingness to recognize a property interest here because it could not fit it into an intellectual property pigeonhole elevates nomenclature over substance. While we occasionally find it useful to refer to certain types of property as real, personal, intellectual or intangible, these labels have little substantive significance in determining whether a property right exists. The key question is not whether we can find a category of property into which the right fits, but whether there is any reason, in public policy or otherwise, we should deny a party the full benefit of its efforts where exclusive rights are reasonably easy to define and protect. Defendant has pointed to no such reason and we can think of none.

liens ... ." *Id.* at 735. Allowing individual state recording requirements to control would have impermissibly conflicted with this goal of uniformity.

Here, by contrast, the purpose of the statute and regulations governing STCs is "to promote the safety of flight of civil aircraft in air commerce by establishing minimum standards for aircraft design, materials, workmanship, construction, and performance." *Varig Airlines,* 467 U.S. at 804. Recognizing a property right in STCs would not conflict with this guiding purpose. In fact, to the extent innovators like Rasmussen retain control over the certificated modifications, safety will likely be enhanced: The Supreme Court has noted that "the duty to ensure that an aircraft conforms to FAA safety regulations lies with the *manufacturer and operator,*" *id.* at 816, 104 S.Ct. at 2766 (emphasis added), but Rasmussen can hardly monitor compliance if he does not know who has run off a copy of his STC on an office copier and used it to obtain airworthiness certification for an unsafe modification. Recognizing Rasmussen's property interest enables him to maintain closer control over the alteration process, and to notify licensees of problems or improvements in the modification.

We note also that without the exclusive right to capture the benefits of the time, money and expertise invested in obtaining an STC, entrepreneurs like Rasmussen will be less likely to devote their resources and energies toward aeronautical innovation. Many modifications undoubtedly increase safety or otherwise benefit the field of aviation; because recognizing a property right in STCs encourages such developments, the purposes of the federal scheme are actually advanced. ...

C. State-Law Claims

1. The Pirated STC

In California, conversion has three elements: ownership or right to possession of property, wrongful disposition of the property right and damages. *Tyrone Pacific Int'l, Inc. v. MV Eurychili,* 658 F.2d 664, 666 (9th Cir. 1981). Our earlier discussion establishes the first element: Rasmussen has an ownership interest in the use of his STC, which is property under California law. The second requirement is also satisfied: Kalitta photocopied the certificate, presented it to the FAA, and thereby obtained a valuable benefit as a consequence of using Rasmussen's STC without authorization or permission. Rasmussen has also suffered damages by being denied a return on his investment as a condition for granting Kalitta the right to use his STC. Thus, under California law, Kalitta tortiously converted Rasmussen's STC when it used the STC to obtain airworthiness certification for the modified DC-8. [15] See *Lone Ranger Television, Inc. v. Program Radio Corp.,* 740 F.2d 718, 726 (9th Cir. 1984) (affirming judgment for conversion of intangible rights under California law); *A & M Records, Inc. v. Heilman,* 75 Cal.App.3d 554, 570, 142 Cal.Rptr. 390 (1977) ("misappropriation and sale of the intangible property of another without authority from the owner is conversion").

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15. Kalitta concedes that if it had "entered Rasmussen's premises" and taken the STC documents, then it would have converted them and, furthermore, there would be no preemption. We fail to see any legal distinction between Kalitta's hypothetical and the facts before us: Kalitta's use of the photocopied STC deprived Rasmussen of his property right as surely as if Kalitta had purloined the original STC from Rasmussen's desk drawer and presented it to the FAA. The property right is in the *use* of the STC to obtain a governmental privilege, not in the physical possession of the STC form.

Rasmussen also alleges that Kalitta has been unjustly enriched. Under California law, a contract will be implied when one party has something which "in equity and good conscience" it ought not. *Philpott v. Superior Court,* 1 Cal.2d 512, 522 (1934) (quoting 3 PAGE ON CONTRACTS § 1473). Kalitta has materially benefited from the pirated STC: Its DC-8 can now carry substantially more cargo, and the parties agree that use as a cargo plane would be economically infeasible without the modification. Conversely, Kalitta has been spared the delay and expense it would have had to incur in obtaining its own STC. This benefit is due solely to Rasmussen's STC, for which Kalitta has paid nothing. Confronted with such facts, the California courts would imply a contract between Rasmussen and Kalitta. On remand, the district court shall fix its terms based on further evidence.

2. The Other Planes

In addition to the converted DC-8 with the pirated STC, Kalitta owns two other planes that had been modified with Rasmussen STCs by their prior owners.

One, a DC-8-21 freighter, was previously owned by Jet Way, to which Rasmussen had licensed an STC. The Jet Way contract is a "license agreement" to install a Rasmussen STC upon payment of $25,000 plus $200 per month, and under which Jet Way agreed to maintain $10,000,000 of accident insurance on Rasmussen's behalf. Kalitta purchased Jet Way's assets, including the DC-8-21; Rasmussen asked Kalitta for monthly payments in accordance with the license, but Kalitta claimed it bought the plane "unencumbered."

The other, a DC-8-51 freighter, was previously owned by Lockheed, to which Rasmussen had licensed an STC. Lockheed sold the plane to Maldives, which in turn sold it to Kalitta. Kalitta claims no knowledge of the license agreement between Rasmussen and Lockheed, which is styled a "purchase agreement" whereby Lockheed is granted an "irrevocable license" to use the STC for the operating life of the aircraft. This license, for which Lockheed paid $58,000, also requires the licensee to maintain $10,000,000 of accident insurance on Rasmussen's behalf.

Both contracts provide that all rights under them are transferable and assignable, and that all obligations are binding on successors; both identify specifically the airplanes to which they apply. Whatever rights Rasmussen has against Kalitta must be in the latter's capacity as an assignee or third-party beneficiary of the license agreements:[16] As to these two planes, Kalitta has not infringed Rasmussen's property right in his STC, because it did not use the STC to obtain airworthiness certificates from the FAA.

Any contracts between the original licensees and Kalitta, however, do not appear in the record. Furthermore, Rasmussen sued only for conversion and unjust enrichment—not breach of contract. We therefore leave resolution of the claims relating to these two planes, if any, to the district court on remand.

CONCLUSION

The use of an STC to obtain a governmental privilege is a property right under California law, and the protection of that property interest is not preempted by federal law; Rasmussen has stated valid claims for conversion and unjust enrichment.

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16. Rasmussen might also have an action against the original licensees.

NOTES

1. There is a lot going on here, and not all of it is as breezy as the opinion suggests. First of all, be precise about what Rasmussen has a property right in: the right to "use the STC to obtain [DC-8] airworthiness certificates from the FAA." This is closely related to the right to operate a DC-8 that has been modified in accordance with the STC, but it is not quite the same. Be sure you can explain how Rasmussen's property right does not prohibit anyone from (a) photocopying the STC, (b) modifying a DC-8 in accordance with the STC, (c) operating a DC-8 modified in accordance with the STC, or (d) obtaining its own STC for identical modifications.
2. Does Rasmussen have a *tangible* property right, an *intangible* property right, an *intellectual* property right, or something else?
3. Where is the FAA in all of this? Do you think that it approves or disapproves of what Kalitta is doing?