

How the Hidden Rules of
Ownership Control Our Lives

Mine!



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&

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Also by Michael Heller

The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives

Also by James Salzman

Drinking Water: A History

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What's Mine Is Yours

To Debora, Ellie, and Jonah
—MH

To Heather, Ben, Eleanor, Elizabeth, Jamie, and Kate
—JS

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Introduction

WHO GETS WHAT AND WHY

Mine! This primal cry is one of the first words children learn. Toddlers in sandboxes shout it out during epic struggles over plastic buckets. For adults, the idea of ownership seems natural and beyond contest. You know what it means to own stuff, whether you're buying a new home or claiming the last slice of pie. *Mine* couldn't be simpler.

But a lot of what you know about ownership is wrong.

Once you understand how the rules actually work, you will see the drama taking place beneath our workaday concept of ownership. Governments, businesses, and ordinary people are constantly changing the rules on who gets what and why. Each of these choices creates winners and losers. And this has always been so. At its core, human society exists to help us deal with competing claims to scarce resources—whether food, water, gold, or sexual partners—so that we don't kill each other too often.

Even the Garden of Eden story turns on ownership. God instructs Adam and Eve that the Tree of Knowledge and its fruit belong to God alone. *It's mine. Don't touch.* But the first people pluck the apple, they are evicted from the Garden, and human history begins. Since then, ownership has been up for grabs.

The Knee Defender

James Beach is a large guy, over six feet tall. On a United Airlines flight from Newark to Denver, after takeoff the businessman lowered his tray table from the middle seat of row twelve and attached his Knee Defender. The Knee Defender is a simple plastic

bracket available for \$21.95 that clamps onto the metal tray table support and locks the seat in front. Its website claims the Knee Defender will “stop reclining seats on airplanes so your knees won’t have to.” Assured of his workspace, Beach opened his laptop.

The Knee Defender claims are real. When the passenger sitting in front of Beach tried to “sit back, relax, and enjoy the flight,” her seat didn’t budge. She complained to the flight attendant, who asked Beach to remove the clamp, but Beach was slow to comply. Outraged, the passenger slammed her seat back, popping out the Knee Defender and jolting Beach’s laptop. He quickly jammed her seat back up and reattached the clamp. That’s when she turned around and threw her drink at Beach. We’ll never know how this might have escalated because the pilot took charge and changed course to Chicago for an emergency landing. Both passengers were removed from the plane, which then continued on to Denver, an hour and thirty-eight minutes late.

The same conflict keeps erupting—most recently with video. On an American Airlines flight from New Orleans to North Carolina, Wendi Williams reclined her seat. The man behind was in the last row, so he could not recline. Instead, he pushed the back of Williams’s seat repeatedly, like an irritating metronome. Her video of this high-altitude fracas quickly went viral.

With each incident, the blogosphere boomed back and forth with hundreds of self-righteous accusations, all equally certain of the correct rule. Talk show host Ellen DeGeneres defended the recliners: “The only time it’s ever okay to punch someone’s seat is if the seat punches you first.” Delta Air Lines chief executive Ed Bastian took an opposing view: “The proper thing to do is, if you’re going to recline into somebody, you ask if it’s OK first.” Williams didn’t ask.

So who’s right?

Williams’s view is simple: her armrest button reclines her seat. The wedge of reclining space therefore belongs to the front seat. This claim of attachment—it’s mine because it’s attached to something that’s mine—is one of the oldest justifications for ownership, dating back thousands of years. Beach was relying on a different attachment story, a maxim coined in medieval England

that “whoever owns the soil, owns up to Heaven and down to Hell.” He claimed dominion over the vertical column of space attached to his seat—straight up to the luggage compartment and down to the crumb-coated carpeting. When the seat in front intrudes into that column, it’s a trespass, a jarring affront to good order.

Attachment is the most pervasive ownership claim you’ve never heard of. It’s why landowners in Texas can extract underground oil and gas, why farmers pumping groundwater are causing California’s Central Valley to sink, and why Alaska can limit overfishing in the Bering Sea. Attachment translates two-dimensional boarding passes, land deeds, and territorial maps into three-dimensional control of scarce resources.

But attachment is not the only ownership claim in play for Beach and Williams. At the beginning of every flight, all seats are “in their full, upright, and locked position,” as the flight attendant commands. At that moment, Beach had exclusive use of the space in front of him. He had first dibs on the wedge. *First come, first served* is another primitive and visceral basis for claiming *mine*. Kids assert it on the playground; adults invoke it up in the air. And recall that Beach actually took physical possession of the wedge when he locked the Knee Defender in place and opened his laptop screen. As we hear so often, *Possession is nine-tenths of the law*.

Air travel brings into sharp focus this clash of conflicting stories about ownership—*attachment, first-in-time*, and *possession*.

When we ask audiences about the Knee Defender conflict, most respond with versions of “It’s obvious,” “There’s nothing to debate here.” But when we press further and ask for a show of hands, generally people are split between Williams and Beach—and both groups look at each other with incredulity. In a 2020 *USA Today* poll with three thousand respondents, about half replied, “If it can recline, I’m reclining,” and the other half said, “No, just don’t do it.” Everyone feels in the right, as did Williams and Beach. That’s why Williams felt justified in posting her video and Beach didn’t hesitate to shove the seat forward. *Don’t mess with what’s mine*.

Why are these conflicts breaking out now? There never used to be such rage around reclining. Until recently, airline seats had greater pitch, or space between seats—enough both for reclining and

for lowering the tray table. No one thought to ask who controlled the wedge of space because it didn't much matter. But airlines have been shrinking the pitch, down from 35 inches not that long ago to about 31 inches today. On some planes, the pitch is just 28 inches.

There's a lot at stake for the airlines: one inch of pitch saved per row can add up to six extra seats per flight to sell. To grow profits, airlines are squeezing ever more passengers inside a fixed steel tube—at the same time that people are growing bigger and tray tables have become precious computer stands. The stakes are high for passengers as well. In a pandemic era, each inch of personal space counts.

Ira Goldman, the inventor of the Knee Defender (whose website traffic increased five-hundred-fold after the Denver flight incident), described the problem simply: “What the airlines are doing is, they're selling me space for my legs, and they're selling you the space—if you're sitting in front of me—they're selling you the same space to recline. So they're selling one space to two people.”

Can the airlines do that?

The law is silent. In 2018 the Federal Aviation Administration declined to regulate airplane seats, leaving seat design to the airlines. In turn, the airlines use a secret weapon that lets them sell the same space twice on every flight. The weapon is *strategic ambiguity*, one of the tools of sophisticated ownership design. Most airlines do have a rule—the passenger with the button can lean back—but they keep it quiet. Flight attendants don't announce or enforce it except in extreme circumstances.

Ambiguity works to the airlines' advantage. When ownership is unclear—and it's unclear more often than you might imagine—people mostly fall back on politeness and good manners. For decades, airlines have counted on high-altitude etiquette to defuse ambiguous claims to the reclining wedge—that's what Delta CEO Bastian was advocating. Airlines offload the conflicts onto passengers who have to work it out between themselves in millions of small, silent daily negotiations, just as they do when they nudge elbows for shared armrests and jostle for space in overhead bins. Money rarely changes hands. (One study, though, suggests about three-quarters of passengers would agree not to recline if the person

behind offered to buy them a drink or snack.)

As airlines continue to shrink the pitch, unspoken rules over the front-to-back squeeze are breaking down. When people don't share an understanding about who owns what, scarcity intensifies their conflicting views, and everyone ends up looking unreasonable. The Knee Defender makes the existing conflicts more visible. Goldman saw ownership ambiguity as a business opportunity and created a technological solution. The problem, though, is that a unilateral move to lock the seat violates customs of politeness. It feels like taking something without asking.

The Knee Defender may seem like a silly novelty item, but it reflects one of the great innovation engines in our society: as valued resources becomes scarcer, people compete more intensely to impose their preferred ownership story, and entrepreneurs find ways to profit.

The same clash profoundly reshaped the American West in the 1800s—but there it was farmers against ranchers. The huge cattle drives we love to watch in westerns existed for only a few decades. The numberless herds being moved to market were often roaming over private land, but homesteaders had no ability to keep them out. Cows couldn't read NO TRESPASSING signs, and fencing was too expensive. So cowboys drove cattle over unfenced miles to railyards in Abilene and Dodge City.

Then in 1874 Joseph Glidden patented his double-strand barbed wire, hailed as “The Greatest Discovery of the Age.” This invention, as simple as the Knee Defender, suddenly provided a cheap, effective tool to exclude cattle, drawing a line where homesteaders could make their stand. The Glidden wire was described as “lighter than air, stronger than whiskey, cheaper than dust.” Ranchers fought back, engaging in fence-cutting wars that led to shootings and deaths. As one trail driver said in 1883, “It makes me sick, when I think of onions and Irish potatoes growing where mustang ponies should be exercising and where four-year-old steers should be getting ripe for market.” But in time, homesteaders won the war.

Glidden’s invention transformed the Great Plains. Arriving homesteaders were able to protect their crops. Small ranchers went out of business as they had no path to get cattle to market. Cowboys

became hired hands on large-scale ranches. For many Native Americans, barbed wire—"the Devil's rope"—effectively ended their nomadic way of life. Barbed wire was essential to creating the NO TRESPASSING version of ownership that defines so much of modern life in America.

Changes in the technology of ownership can be painful, embittering the range wars on the Great Plains and the knee wars at thirty-five thousand feet. Just as barbed wire gave farmers a way to fence out cattle, the Knee Defender gives passengers a cheap tool to exclude recliners. Both technologies offer people an effective way to impose their preferred story of ownership on contested resources, thus hastening the decline of old customs and creating disputes over what the new rules should be.

There is a difference, though: while farmers made barbed wire ubiquitous, many airlines have banned Knee Defenders—they prefer to keep selling that wedge of space twice.

The same ownership wars are playing out today on the Internet, a far more consequential and even less visible arena than airplane seats. Our clickstreams reveal much of our private lives—what we buy, who we follow, where we live, and how we vote. Clickstreams seem like they should belong to us, but in most of the world data ownership remains undefined. Facebook, Google, and other Internet behemoths (along with myriad spy agencies) are racing to stake claims. They earn billions in advertising fees as their trackers recline virtual seats into our private space, assembling uncanny profiles based on our likes and looks.

One of the central questions for our time is choosing the ownership story to govern our online lives. A few places, like the European Union and California, have taken tentative steps toward providing people with the digital equivalent of Knee Defenders. Will these protections make a difference? No one knows. There is as yet no dominant principle for data ownership. The answer is up in the air, not just for clickstreams and reclining seats but for a thousand other invisible battlegrounds where people are currently contesting claims to scarce resources.

Conflicts of *mine* versus *mine* go on, mostly out of view, until something like a cheap plastic Knee Defender makes them painfully

visible. Then the prize goes to those who know how ownership really works.

“A Guy in New Jersey”

Hanging out in a local Manhattan bar, Jenna Wortham and her friends were talking about evening plans when they realized they all were looking forward to watching the season premiere of HBO’s hit show *Game of Thrones*. That should have been a problem. HBO owns the show, and you need to buy a subscription to stream its content. Only one of Wortham’s friends subscribed, but everyone wanted to watch in different places. Turns out, this problem was easy to solve because they streamed the show using login credentials that belonged to other people. Wortham used the login from “a guy in New Jersey that I had once met in a Mexican restaurant.”

Wortham’s story is not unusual. It’s become commonplace for people to use others’ accounts to stream shows from popular media services. Indeed, the only thing uncommon about Wortham’s story is that she is a *New York Times* reporter. She thought so little about the implications of using somebody else’s HBO subscription that she published a breezy (some might say, brazen) account of her night out.

What Wortham (and the *Times*) did not seem to realize was that she was likely admitting guilt to a federal crime under the Computer Fraud and Abuse Act, a crime punishable by up to a year in jail. It may be common to stream shows using a stranger’s password, but HBO’s terms of use expressly forbid it. It’s not “legalish,” as one *Forbes* writer argued in her defense. Under the law, misguided though it might be, Wortham’s act was probably criminal.

But no one seems to care—least of all HBO. Everyone knows someone who’s streaming media content using a not-exactly-legit password. Nearly 100 percent of our (law!) students raise their hands when we ask who’s illegally streaming media content. About half of these students don’t think what they’re doing is illegal (really?). The other half realize it’s illegal and do it anyway. Why do we tolerate such rampant theft?

For starters, streaming shows doesn’t feel like theft. Sharing

passwords feels completely different from stealing a DVD of the same *Game of Thrones* show from a store. It's highly unlikely Wortham or her friends would walk out of a store without paying, and they certainly wouldn't boast in print about it.

Maybe the difference between illegal streaming and shoplifting just boils down to the likelihood of being caught. But that cannot be the whole story. HBO can easily figure out who is stealing its content. That's what the Recording Industry Association of America did when it identified music fans who were downloading music via Napster and sued them each for millions of dollars. HBO can find out who you are, but it's choosing to look the other way.

We are taught from an early age to respect others' physical stuff. That respect is consistent with an instinct rooted in the most primitive parts of our brains. Bulldogs, birds, and bears know to stay off others' territories. But our intuition feels different for something intangible, like an idea. As one study found, if you hear "that's mine" coming from a young preschooler, "you can be fairly sure someone stole their toy or their food, and not their joke, story, or song." Perhaps streaming just doesn't activate the same primitive, territorial part of our brains. And maybe this is why sharing passwords doesn't feel wrong, morally or legally.

Content owners understand this. They have been trying, with limited success, to change how we feel about digital stuff and make it seem more like hard, physical stuff. Hence the scary-looking notices at the start of DVDs from Interpol and the stern warnings at the start of every movie that "piracy is not a victimless crime." Even the term *intellectual property* is part of this battle. Copyright, patent, and trademark lawyers made up the phrase to piggyback their clients' concerns onto our intuitions about physical stuff. They know that for our primitive selves, copyright is not property.

In its most basic form, content owners and users are waging a battle over the story of ownership. Should digital goods be free to share, like passing along a catchy tune you heard at a concert? Or should they be ordinary property, like a mug or a bike, which law, custom, and morality prevent us from taking, even if the opportunity arises? Both stories are available.

What drives the content owner's story? It's not the intuitions

that animate the Knee Defender conflict—attachment, first-in-time, and possession. Instead, HBO’s claims trace back to yet another of our core intuitions, the idea that *labor* justifies ownership—that you and you alone deserve to *reap what you sow*.

Rewarding labor often feels right and just, but it always favors one side of a contested choice. The fashion world provides a powerful counterexample. In fashion, designers build fortunes based on copying each other’s creations. The labor that goes into original dress designs is not protected. Knockoffs are not theft. They are perfectly legal. In many pockets of the modern economy—chefs’ recipes, coaches’ sports plays, stand-up comedians’ routines, and numerous other creative arenas—we have decided that vibrant competition and unfettered innovation matter more than rewarding creative labor with ownership. In other words, the rule is often *I reap what you sow*. Every year fashion designers push Congress to change the rules, so they can reap what they “sew,” but they lose.

The music recording industry, on the other hand, was more effective than the couture houses at lobbying Congress. It secured legislation so that digital music conforms to the industry’s ownership story. Based on that law, the industry has filed, settled, or threatened legal action against at least thirty thousand people. Unfortunately for the big music labels, all that activity hasn’t ended illegal downloading—but it did turn popular opinion against them.

HBO watched and learned. It realized that, as *TechCrunch* wrote, “account sharing is generally a gray area in the world of online streaming.” HBO decided to embrace strategic ambiguity. Though it may sound crazy, the network encourages theft of its product. HBO executives are well aware of your (and your kids’ and our students’) unauthorized streaming. But instead of treating potential customers like criminals, HBO is hooking Wortham and her friends on their shows.

HBO’s CEO Richard Plepler proudly described the company’s pro-piracy strategy as “a terrific marketing vehicle for the next generation of viewers.” Password sharing, Plepler continued, “presents the brand to more and more people, and gives them an opportunity hopefully to become addicted to it.” In a quote that lit up the Internet, Plepler added, “What we’re in the business of doing is building addicts, of building video addicts. The way we do that is

by exposing our product, our brand, our shows, to more and more people.”

Competitors have noticed HBO’s counterintuitive approach to ownership design—and followed suit up to a point. Netflix CEO Reed Hastings said, “We love people sharing Netflix. That’s a positive thing, not a negative thing.” But Netflix allows only one device to use a basic account at a time.

For HBO and Netflix, the strategy depends on Wortham and other young viewers believing they’re stealing, just a little. Plepler and Hastings want lots of viewers to obsess over their shows, whether they currently pay for subscriptions or not. For them, the hope is that when today’s pirates start to earn income, more will start paying and will enjoy the feeling of going legit.

The long-term plan is subtler still. Plepler and Hastings aim to recruit viewers to their side of the ownership story: intellectual property is property, and they are being generous in letting you steal content for now.

The Hidden Rules of Ownership

This is a book about fights over airplane seats and sharing HBO passwords. It’s about whether immigrants can start food truck businesses and why life-saving drugs do not come to market, along with dozens of other challenges and riddles from all walks of life. What it’s really about, though, is how the different ways we own things link all these puzzles—from the rise of America’s new aristocracy to solutions for climate change. By the end of this book, you will see the world around you in a new and surprising way, based on a small number of fundamental insights.

Before we take you on this ride, we want to tell you what’s driving us. Both of us have been teaching for a long time, more than twenty-five years each. We’re not bad at it—our students have voted us both “Professor of the Year.” Between us, we’ve helped train over five thousand lawyers, businesspeople, and environmentalists. What we love most is watching the lightbulbs blink on as students realize that there is nothing preordained about how ownership directs our behavior, and that a few simple principles drive a complex world.

Mine! distills the essence of our work as teachers and scholars so you can get the insights without the big tuition bills. As a taste of what's to come, we want to circle back to the stories we've already told—Beach's Knee Defender and Wortham's password sharing—and highlight the three principles of ownership they embody:

1. Our Core Ownership Stories Are Wrong

Consider, for a moment, how many common maxims there are about what's *mine*. They are the lens through which we learn, from childhood onward, what ownership means. Here are six such maxims that—as it turns out—stand for *all* the ways scarce resources initially come to be owned:

- First come, first served.
- Possession is nine-tenths of the law.
- You reap what you sow.
- My home is my castle.
- Our bodies, our selves.
- The meek shall inherit the earth.

Regardless of whether you fly drones or insist on privacy in your home, support or oppose allowing the sale of kidneys, happily wait your turn in line or push to the front, you may reach for one of these ownership maxims to press your claim.

What is striking about all these maxims is that, despite their ubiquity, none of them are quite true. They go astray because, at root, they share an underlying commitment to a binary view of ownership. Like a light switch that goes on or off, we feel something is either *mine* or *not mine*. This simple conception is as appealing as it is misleading. Today, in an increasing array of ownership conflicts, it is becoming more accurate to say *First come, last served, Possession is one-tenth of the law, I reap what you sow*, and so on down the list.

In early America, the on-off idea described many ownership conflicts reasonably well. In a mostly agrarian economy, people fought over tangible property: farmland, cattle—and, most