

# Promoting Corporate Irresponsibility? Delaware as the Intellectual Property Holding State

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*This article is about Delaware corporate irresponsibility. Delaware has stealthily become the center of all things intellectual property. As the leader of onshore tax havens since the early 1980s, Delaware attracts multistate corporations to engage in aggressive tax avoidance schemes. Specifically, Delaware has legislatively and methodically attracted the creation of Intellectual Property Holding Companies (IPHCs), enabling companies to avoid paying their share of taxes to sister states on the income generated from the use of Intellectual Property assets. This article traces the rise of Delaware as the intellectual property state and concludes that the benefits Delaware enjoys promote corporate irresponsibility and are at the expense of both Delaware’s citizens and its sister states.*

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## I. INTRODUCTION

Intellectual property assets are valuable corporate assets. Enforcement of intellectual property rights through litigation is costly. Patent litigation in particular proves expensive, yet very attractive, in boosting the local economy where cases are filed.<sup>1</sup> Competition will be the next forum as patent litigation unfolds fiercely among states.<sup>2</sup> Understandably, Delaware basked in excitement after the Supreme Court handed the state a bonanza ruling making it the hot new patent litigation venue.<sup>3</sup> Delaware judges, law firms, and lawyers praise their own expertise and readiness in capturing their District as the new “favored forum for the resolution of patent disputes.”<sup>4</sup> They show eagerness to supplant the once famous rocket docket of the U.S. District Court for the Eastern District of Texas for patent cases.<sup>5</sup> This is not the first time Delaware has experienced fame with patents and other types of intellectual property. The State of Delaware’s long and unsavory association with intellectual property, however, seems something the state prefers to keep from public scrutiny.

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1. See generally Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241 (2016) (discussing strategies employed by different jurisdictions to attract patent cases to be filed in their districts).

2. See J. Jonas Anderson, *Reining in a “Renegade” Court: TC Heartland and the Eastern District of Texas*, 39 CARDOZO L. REV. 1569, 1574 (2018) (tracing the competition among jurisdictions to become the venue for patent cases); J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631 (2015) (explaining the rise of court competition for patent cases and proposing methods to reduce the competition).

3. *TC Heartland v. Kraft Foods Grp. Brands, LLC*, 137 S.Ct. 1514 (2017). The Delaware bench and bar immediately “felt the effect” of the Supreme Court decision in *TC Heartland v. Kraft Foods Grp. Brands, LLC* as they witnessed a rise in patent cases filed in Delaware. ANN. REP. OF THE U.S. DIST. CT. FOR THE DIST. OF DEL. TO THE FED. BAR ASS’N (2018), <https://www.ded.uscourts.gov/sites/ded/files/news/Annual%20Report%202018.pdf> [<https://perma.cc/Z6WP-7FHV>] (summarizing annual news and court statistics for the jurisdiction of United States District Court for the District of Delaware).

4. *Intellectual Property Litigation*, MORRIS, NICHOLS, ARSHT & TUNNELL LLP, <https://www.morrisnichols.com/practices-intellectual-property-litigation> [<https://perma.cc/G59A-ATK7>]. The Morris Nichols law firm claims that it is the premier patent litigation firm in Delaware (“Morris Nichols is the premier patent litigation firm in Delaware.”). *Id.* Some lawyers seized the opportunity to advertise themselves to serve as local counsel for out-of-town patent litigators, while others position their law firms as the authority on Delaware patent infringement litigations. See DEL. IP L. BLOG, <https://delawareiplawblog.wordpress.com/> [<https://perma.cc/46SA-SB3Y>] (providing updates on patent infringement litigation cases in the District of Delaware). Others assert that Delaware’s expertise in patent litigation began in 1924. See generally William J. Marsden, Jr. & Robert M. Oakes, *To Promote the Progress of Science and Useful Arts*, 29 DEL. LAW. 18 (2011) (praising Delaware judges in patent cases); see also Donald F. Parsons, Jr. et al., *Solving the Mystery of Patentees’ “Collective Enthusiasm” for Delaware*, 7 DEL. L. REV. 145, 145–46 (2004) (identifying factors that contribute to Delaware’s expertise in patent litigation).

5. Chief Judge Leonard P. Stark, U.S. District Court for the District of Delaware, reported in 2019 that in the one year after the Supreme Court’s *TC Heartland* ruling, Delaware witnessed “947 new patent cases . . . including 232 ANDA (Hatch-Waxman Act) pharmaceutical patent cases,” representing an “overall increase of 64% in new patent cases” and in particular “an 88% increase in non-ANDA cases and an 18% increase in ANDA cases.” ANN. REP. OF THE U. S. DIST. COURT FOR DIST. OF DEL., *supra* note 3, at 2. In addition, for a list of the latest patent litigation cases filed in Delaware, see *US District Court for the District of Delaware Intellectual Property Cases*, JUSTIA, <https://dockets.justia.com/browse/state-delaware/court-dedce/noscat-10/nos-830> [<https://perma.cc/8UWR-FDFJ>]. See also Ryan Davis, *Delaware Outstrips Texas as Top Patent Hotspot of 2018*, LAW360 (Jan. 31, 2019, 10:05 PM), <https://www.law360.com/articles/1121979/delaware-outstrips-texas-as-top-patent-hotspot-of-2018> [<https://perma.cc/QW4A-2L82>] (explaining how Delaware ousted the Eastern District of Texas as the premiere venue for patent litigation).

Historically, as the “First State,” Delaware was never known as the center of technological innovation and creation. Delaware exists as a small state and has a modest-sized university with some research capabilities.<sup>6</sup> For years, the only major chemical company headquartered there was DuPont.<sup>7</sup> Delaware then attracted two biopharma companies, AstraZeneca US and Incyte Pharmaceutical, to settle within the state by spending more than \$100 million on incentives and infrastructural improvements.<sup>8</sup> Companies with high-paying jobs shrunk in numbers, and their uncertain future in Delaware is an open secret.<sup>9</sup> Overall, Delaware’s efforts in attracting life science companies appear unfruitful.<sup>10</sup>

Despite the failure to be known for intellectual property creation associated with chemicals and biopharma, Delaware is achieving a different status in connection with intellectual property holdings.<sup>11</sup> Delaware exists as a tax haven for intellectual property assets. Instead of creating intellectual property, Delaware *holds* intellectual property assets for corporations across the nation. As a tax haven, Delaware provides a zero tax rate on the vast income generated from the licensing, commercialization, and exploitation of intellectual property assets by intellectual property holding companies.<sup>12</sup> Delaware’s zero tax rate facilitates an aggressive corporate tax avoidance scheme allowing multistate corporations to avoid paying their taxes in Delaware’s sister states. The following illustrates how it works.

The parent company invents and generates intellectual property assets in State A but does not keep the intellectual property assets in that state.<sup>13</sup> The parent company instead creates wholly-owned subsidiaries in Delaware, assigns the intellectual property assets to these subsidiaries, and immediately receives the license back from the subsidiaries to use the intellectual property in the operation of business in State A and other states. The parent company pays royalty fees to the subsidiaries and takes deduction of the payments as necessary business expenses. The subsidiaries receive the royalty payments and pay no tax under Delaware’s zero tax rate for the intellectual property income. In addition, the subsidiaries pay no tax to sister states because the subsidiaries are neither incorporated in, nor do they pose payroll or facilities in, those states. The parent essentially parks its income

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6. The University of Delaware enrolls 24,000 students who primarily come from the State of Delaware. *Facts & Figures*, UNIV. OF DEL., <https://www.udel.edu/about/facts-figures/> [<https://perma.cc/GGL8-P23Z>]; *UD and the State of Delaware*, UNIV. OF DEL., <https://www.udel.edu/about/ud-state-delaware/> [<https://perma.cc/XN4E-A4N9>].

7. Michael P. Kelly, *Delaware—From Hub to Hotbed: Emergence as Life Sciences Player Augments Traditional Role as Incorporation Capital*, CORP. COUNS. BUS. J. (Mar. 18, 2015), <https://ccbjournal.com/articles/delaware—hub-hotbed-emergence-life-sciences-player-augments-traditional-role-incorp> [<https://perma.cc/EKL9-YEF8>] (recounting Delaware’s one chemical company).

8. *Id.* (noting Delaware’s two life science companies with headquarters in the state); James L. Butkiewicz, *The Root Causes of Delaware’s Fiscal Challenges*, 35 DEL. LAW. 8, 12–13 (2018) (observing that Delaware’s campaign to target specific firms to move to Delaware has been problematic. Delaware “spent over \$100 million in incentives and infrastructure improvements to attract AstraZeneca to Delaware. Initially many well-paying employees moved to Delaware, but the number of workers has declined significantly and AstraZeneca’s future in Delaware is uncertain.”).

9. *See* Butkiewicz, *supra* note 8 (illustrating these issues).

10. *Id.*

11. *Infra* Part III.

12. DEL. CODE ANN. tit. 30, § 1902(b)(8) (2020).

13. *Infra* Section III.A.

within the subsidiaries in Delaware, free from other states' taxation. Whenever the parents need access to the parked monies, they can obtain "loans" or "dividend payments" from the subsidiaries.<sup>14</sup> Often the parents don't pay back the loans.<sup>15</sup> Overall, the scheme is likened to a game of basketball without the shot clock where players constantly pass the ball without playing solely for the purpose of depriving the other team from having possession.<sup>16</sup>

Ultimately, Delaware's tax haven for intellectual property deprives sister states of needed revenue.<sup>17</sup> In addition to its zero tax rate, Delaware's strict secrecy law shields corporations from disclosing all documents, including the one-page form applications for the zero tax exemption.<sup>18</sup> In other words, Delaware utilizes legal means to enable corporations to cloak themselves in secrecy and avoid their responsibility as corporate citizens by aggressively engaging in tax avoidance schemes.<sup>19</sup> Moreover, Delaware permits the intellectual property holding companies to exist like phantoms.<sup>20</sup>

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14. Illustratively, in *Comptroller v. Syl, Inc.*, the parent company Syms Corporation assigned the trademarks to its subsidiary SYL and received a license back from SYL. 825 A.2d 399, 404 (Md. 2003), *cert. denied*, 540 U.S. 984 (2003). The royalty was paid from Syms to SYL, "which SYL was to keep temporarily before the funds were sent back to Syms as a dividend payment." *Id.* at 403. Holding the royalty payments for a couple weeks was for the purpose to "avoid any variances on the financial statements which may alert a state auditor to this transaction." *Id.* Similar transactions involving a Delaware intellectual property holding company tax avoidance scheme are seen in *Classics Chicago, Inc. v. Comptroller*, 985 A.2d 593, 599 (Md. Ct. Spec. App. 2010) ("The transactions generating the income and deductions in question were all inter-company. Classics royalty income resulted from transactions by its parent Talbots and there was no other income generated. Classics relied entirely on its parent for performance of ordinary business operations. The transactions at issue were simply the payment of a significant royalty by a parent to its wholly owned subsidiary, followed by a substantial repayment by the subsidiary to the parent in the form of a dividend.").

15. The Maryland Court of Appeals in *Comptroller v. Syl, Inc.* also addressed the Delaware holding company tax avoidance scheme utilized by Crown Cork & Seal Company, Inc., the parent company, and its intellectual property subsidiary. *Syl, Inc.*, 825 A.2d at 410. In that case, the parent company borrowed loans for the same amount the parent had paid for the royalty to use the trademarks, but the parent never paid back the loans. *Id.* ("From 1989 to 1993, the debt owed by the parent company to Crown Delaware increased each year by the same amount as the royalty that the parent owed to Crown Delaware. As of 1993, there was no evidence in the record of the debt being paid. Nor does any loan agreement, stipulating to the terms of repayment or the sanctions in the event of default, appear in the record.").

16. See *NIHC, Inc. v. Comptroller of the Treasury*, 439 Md. 668, 669–70 (Md. 2014) (analogizing the intercompany transactions in an intellectual property tax avoidance scheme to a basketball game played without a shot clock).

17. *Infra* Part IV; see also INST. ON TAX'N & ECON. POL'Y, DELAWARE: AN ONSHORE TAX HAVEN I (Dec. 2015), <https://itep.sfo2.digitaloceanspaces.com/delawarereport1210.pdf>. [<https://perma.cc/4ASB-592U>] ("Delaware's tax code is responsible for the loss of billions of dollars in revenue in other U.S. states.").

18. See Re: FOIA Request to the Delaware Division of Revenue Dated Nov. 3, 2015, Del. Op. Att'y Gen. 16-IB04, 2016 WL 1072890 (Mar. 10, 2016) (declining to allow public access to application filings for corporate tax exempt status).

19. Alana Goodman, *This Delaware Address Is Home to 200,000 Shell Companies—Including Hillary Clinton's*, WASH. FREE BEACON (Apr. 11, 2019, 5:00 AM), <https://freebeacon.com/issues/delaware-address-home-200000-shell-companies-including-hillary-clintons/> (quoting Richard Phillips, a senior policy analyst with Citizens for Tax Justice, who states that though the tax avoidance is legal, it is "immoral, or not the best thing for the country"); see generally Kayal Munisami, *The Role of Corporate Social Responsibility in Solving the Great Corporate Tax Dodge*, 17 FLA. ST. U. BUS. REV. 55 (2018) (exploring how Corporate Social Responsibility should shape corporate tax behavior).

20. See *Syl, Inc.*, 825 A.2d at 401 (noting that the Delaware intellectual property corporation SYL "was a phantom entity").

In the early 1980s, intellectual property assets provided the reason why Delaware lured companies to the state for incorporation.<sup>21</sup> This Article traces the root of Delaware's transformation as an onshore tax haven for intellectual property assets. By exposing the origin and consequences of Delaware as a tax haven for intellectual property assets, this Article asserts that Delaware facilitated corporate irresponsibility with respect to intellectual property assets, the crown jewel of many corporations in the knowledge-based economy.

The Article proceeds as follows. Part II explains how the rise of intellectual property as important corporate assets caught Delaware's attention in early 1980s.<sup>22</sup> As intellectual property assets are both intangible in form and are created in innovation centers outside Delaware, the state government timely passed legislation to attract corporations to transfer their intellectual property assets to wholly-owned subsidiaries incorporated in Delaware.

Part III traces the 1984 legislation encouraging multistate corporations to form their intellectual property holding subsidiaries in Delaware by providing a zero tax rate for income generated from the licensing and exploitation of intellectual property assets. Part III also exposes how the 1984 legislation is part of a larger scheme that Delaware initiated in 1957, enlarging the number of companies to incorporate in Delaware with tax exemption.<sup>23</sup> Since then, Delaware quietly cemented its new status as an onshore tax haven with respect to intellectual property assets.

Part IV demonstrates how Delaware's legislations situate the state as the tax haven, especially for multistate corporations with intellectual property assets. What benefits does Delaware capture from its position as the onshore tax haven? As explained in Part IV, Delaware derives layers of benefits expanding from economic employment to environment stemming from intellectual property holding companies.<sup>24</sup>

Part V argues that Delaware's legislation and benefits promote harm. Delaware encourages corporations to devise aggressive tax avoidance tactics in order to enjoy the zero tax rate provided by Delaware. Corporations abandon their corporate social responsibility in their tax avoidance scheme. Moreover, the strict secrecy law shields the corporations, allowing them to continue their irresponsible conduct. Corporate irresponsibility associated with this tax avoidance context harms other states, as Delaware raced to the bottom, depriving the sister states of their needed revenue. Likewise, the conduct shifts a significant burden to the workers to make up for the meager state budget.<sup>25</sup>

The Article concludes that Delaware should rethink about staining its reputation of all things corporate. The race to the bottom in which Delaware has outrun itself since 1984 should be evaluated. Delaware should be the leader in policy and law pertaining to corporations by first ending the zero tax rate and secrecy law for intellectual property holding companies.

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21. Kelly, *supra* note 7 ("IP rights are for the most part litigated in federal court, and many companies choose the District of Delaware . . . [I]f you're incorporated there, that's a basis for jurisdiction.").

22. *Infra* Part II.

23. *Infra* Part III.

24. *Infra* Part IV.

25. *Infra* Part V.

## II. CATCHING DELAWARE'S ATTENTION: THE RISE OF INTELLECTUAL PROPERTY CORPORATE ASSETS

As the epicenter for businesses to incorporate and enjoy the benefits of sophisticated corporate law, the state of Delaware strives to maintain its enviable status.<sup>26</sup> The prominent rise of intellectual property as the new and important corporate asset in the early 1980s captured Delaware's attention, prompting the state to pass legislation to lure the assets to be held in Delaware. Two key features of the new corporate assets are their intangibility and their creation outside Delaware.<sup>27</sup> Appreciating these features, Delaware was poised to timely leverage its position.<sup>28</sup>

### A. Patent and Copyright Assets in the 1980s

By the early 1980s, there emerged a new and creative valley of tech developers and entrepreneurs, but geographically Silicon Valley is on the other side of the country from Delaware.<sup>29</sup> Indeed, in Silicon Valley then, a new breed of investors called Venture

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26. See DEL. DIV. OF CORPS., <https://corp.delaware.gov/> [<https://perma.cc/J889-6LZ7>] (“More than one million business entities take advantage of Delaware’s complete package of incorporation services, including modern and flexible corporate laws, our highly-respected Judiciary and legal community, a business-friendly government, and the customer-service-oriented staff of the Division of Corporations.”); *Wilmington*, REED SMITH LLP, <https://www.reedsmith.com/en/offices/wilmington> [<https://perma.cc/7E7W-LVHJ>] (touting that “[m]ore than 60 percent of Fortune 500 companies are chartered in Delaware, making Wilmington the national epicenter of corporate legal activity”); Alison Frankel, *Delaware Asks Supreme Court to Review Its Bipartisan Judge-Picking Process*, REUTERS (Sept. 5, 2019, 3:19 PM), <https://www.reuters.com/article/us-otc-delaware/delaware-asks-supreme-court-to-review-its-bipartisan-judge-picking-process-idUSKCN1VQ2MH> (reporting Delaware’s petition to the Supreme Court to protect “Delaware’s reputation as the epicenter of corporate law . . .”).

27. When the United States Patent and Trademark Office considered where to establish four regional offices, Delaware was not considered as it lacked patent activities, talents, capital, and infrastructure. See U.S. PAT. & TRADEMARK OFF., REPORT ON THE SATELLITE OFFICES: REPORT TO CONGRESS 3–6 (2014), [https://www.uspto.gov/sites/default/files/aia\\_implementation/USPTO\\_AIASatelliteOfficesReport\\_2014Sept30\\_Online.pdf](https://www.uspto.gov/sites/default/files/aia_implementation/USPTO_AIASatelliteOfficesReport_2014Sept30_Online.pdf) [<https://perma.cc/F6MT-KNY8>] [hereinafter USPTO Report] (describing the selection of the satellite offices). Moreover, the explosion of the tech industries was in Silicon Valley and Route 128, not in Delaware. See Terrance P. McGuire, *A Blueprint for Growth or a Recipe for Disaster? State Sponsored Venture Capital Funds for High Technology Ventures*, 7 HARV. J.L. & TECH. 419, 419 (1994) (“The powerful alliance between venture capitalists and high technology entrepreneurs has contributed substantially to the dramatic growth of technology-based industries over the last four decades. The majority of this growth, however, has been confined to several highly concentrated geographic areas, most notably California’s Silicon Valley and Massachusetts’ Route 128.”).

28. *Infra* Part III.

29. See USPTO Report, *supra* note 27, at 6 (concluding that Silicon Valley is now home to “many of the USPTO’s high volume patent application filers as well as a considerable number of start-up and small tech companies that depend on the USPTO . . . . Silicon Valley also has a large and experienced population of engineers, scientists, and intellectual property practitioners . . .”).

Capitalists (VCs)<sup>30</sup> work in concentrated areas and operate in a close-knit ecosystem,<sup>31</sup> assisting and grooming the most promising companies on the cutting-edge of the tech industry.<sup>32</sup> That means, with its limitations due to geography, population, and a singular research university, Delaware is neither within VCs' radar nor a hub of VCs' ecosystem. This demonstrates why technology creation activities before and during the 1980s did not come to Delaware. Nevertheless, Delaware was fully aware of the tech activities outside its boundaries.<sup>33</sup>

Unlike companies outside the tech industry, the new startups and late-growth stage companies in the tech industry do not own hard physical assets; they own intangible assets in the forms of patents, copyrights, trade secrets, and trademarks.<sup>34</sup> Their products are often

30. There are numerous articles on Venture Capital (VC) structure and its ecosystem. See Ronald J. Gilson, *Engineering a Venture Capital Market: Lessons from the American Experience*, 55 STAN. L. REV. 1067, 1073 (2003) ("The initial venture capital investment usually will be insufficient to fund the portfolio company's entire business plan. Accordingly, investment will be 'staged.' A particular investment round will provide only the capital the business plan projects as necessary to achieve specified milestones set out in the business plan."); D. Gordon Smith, *The Exit Structure of Venture Capital*, 53 UCLA L. REV. 315, 323–24 (2005) ("[the VC's] threat of abandonment, coupled with the prospect of dilution to the entrepreneur from repeated outside investments, mitigates the entrepreneur's holdup incentive . . .").

31. Venture capitalists built a close-knit ecosystem in geographical proximity that "almost half" of the Silicon Valley's venture capitalists maintained their "offices in a single office building in Menlo Park" during the 1980s. John C. Coates IV, *Explaining Variation in Takeover Defenses: Blame the Lawyers*, 89 CALIF. L. REV. 1301, 1338 (2001). Additionally, Stanford University was "a venture capital hotbed in the early 1980s, in part because Silicon Valley was right next door and the administrators were enlightened enough to see a new world coming." Larry Smith, *Something from Nothing. . . Institutionalizing a Legendary Venture Capital Practice*, 16 OF COUNSEL 1, 9 (1997); see also Mark C. Suchman & Mia L. Cahill, *The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley*, 21 L. & SOC. INQUIRY 679, 706 (1996) (noting that the "dramatic economic growth of Silicon Valley in the 1970s and 1980s brought the region's distinctive capital market to national attention"). For a history of Silicon Valley in the early days, see ANNALIEE SAXENIAN, *REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 29* (Harv. Univ. Press 1994).

32. Stephen Waite & Douglas Jamison, *Assessing Shifts in U.S. Capital Markets on the Venture Capital Business, Innovation and Nanotechnology*, 10 NANOTECHNOLOGY L. & BUS. 30, 31 (2013) (stating that venture capitalists "fund early- and mid-stage companies" and "[m]any of the companies that venture capitalists (VCs) invest in require large sums of additional growth capital"); Darian M. Ibrahim, *Financing the Next Silicon Valley*, 87 WASH. U. L. REV. 717, 733, 749–51 (2010) ("Private venture capital backed the Internet revolution of the 1990s and is now a driving force behind innovation in clear technology alternatives to fossil fuels."); see McGuire, *supra* note 27, at 419 ("Since the development of the first venture capital funds over four decades ago, high technology entrepreneurs and the venture capital community have enjoyed a symbiotic relationship, one in which venture capitalists provide funding in return for the opportunity to realize substantial gains on their investment if the venture is successful."); Christopher Gulinello, *Engineering a Venture Capital Market and the Effects of Government Control on Private Ordering: Lessons from the Taiwan Experience*, 37 GEO. WASH. INT'L L. REV. 845, 846 (2005) (noting the successful contributions of venture capital in Silicon Valley to "the economy and, in particular, to the growth and development of innovation and high technology").

33. See *infra* Part IV (detailing Delaware's awareness).

34. See, e.g., McGuire, *supra* note 27, at 419 (stating that the VC-startup ecosystem "relationship has developed in part because large start-up costs, uncertain technology, and negative cash flows during research and development make technology-based start-up companies unlikely candidates for commercial bank loans and other forms of traditional debt financing."); see also Yochai Benkler, *Law, Innovation, and Collaboration in Networked Economy and Society*, 13 ANN. REV. L. & SOC. SCI. 231, 234 (2017) (surveying social science literature on innovation). Professor Benkler observes:

In foundational work in economic geography, Saxenian (1996) explored the success of Silicon Valley

related to computers and software.<sup>35</sup> Notable established tech companies in the late 1970s included IBM,<sup>36</sup> Xerox,<sup>37</sup> Hewlett-Packard,<sup>38</sup> and Intel,<sup>39</sup> among others. The younger companies at the beginning of the 1980s included Sun Microsystems,<sup>40</sup> Apple,<sup>41</sup> Microsoft,<sup>42</sup> Oracle,<sup>43</sup> and many similar entities in the new tech sector. With their uniquely innovative and disruptive offerings, these tech companies quickly captured market share

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relative to Route 128 in the 1980s, arguing that Silicon Valley thrived because individuals circulated among firms, forming new startups and new connections among individuals with complementary insights across firm boundaries through social interactions. Later studies support the claim that mobility of knowledge workers across firms is a major vector for knowledge diffusion and an accelerator of innovation (Samila & Sorenson 2011). Azoulay et al. (2011) study 9,483 movements of elite academic life scientists between institutions. Using patent and article citations, they show that article-to-article citations at origin institutions are unaffected by major scientists' movements. Article-to-patent and patent-to-patent citations, however, decline in the region the superstar scientists leave and increase in the region to which scientists move. Their data suggest that in the bridge between academia and industrial innovation, personal relations matter significantly, and that knowledge diffusion in networks is carried by individuals and seems to be tacit and communicated in person.

*Id.*

35. David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981–1994*, 86 *FORDHAM L. REV.* 1785, 1835–36 (2018) (noting that “the software industry took off in the 1980s, with Silicon Valley industries exploding in number and size. Silicon Valley firms tended to place a premium on rapid innovation by the 1980s, while older competitors stagnated with more traditional emphases on risk aversion and quality control.”) (citations omitted).

36. *Chronological History of IBM 1970s*, IBM, [https://www.ibm.com/ibm/history/history/decade\\_1970.html](https://www.ibm.com/ibm/history/history/decade_1970.html) [<https://perma.cc/9NR5-S8UC>].

37. Xerox was among the first companies to create a handheld phone called the Alto. Jason Perlow, *GUIs: The Computing Revolution that Turned Us into Cranky Idiots*, *ZDNET* (June 28, 2013), <https://www.zdnet.com/article/guis-the-computing-revolution-that-turned-us-into-cranky-idiots/> [<https://perma.cc/4QA4-DHDZ>]. The Alto was in fact used to place the first cell phone call in 1973. David Gewirtz, *Technology that Changed Us: The 1970s, from Pong to Apollo*, *ZDNET* (June 28, 2019), <https://www.zdnet.com/article/technology-that-changed-us-the-1970s/> [<https://perma.cc/B9UD-KWV6>].

38. *Timeline of Our History*, HP, <https://www8.hp.com/us/en/hp-information/about-hp/history/hp-timeline/timeline.html> (last visited Feb. 2, 2021).

39. *Intel's First Microprocessor*, INTEL, <https://www.intel.com/content/www/us/en/history/museum-story-of-intel-4004.html> [<https://perma.cc/FF2R-JWVN>].

40. *Timeline: Major Events at Sun Microsystems*, *REUTERS* (Apr. 20, 2009), <https://www.reuters.com/article/us-sunmicro-timeline-sb/timeline-major-events-at-sun-microsystems-idUSTRE53J3YY20090420> [<https://perma.cc/ZS8W-8663>]; *Remember This? The Rise and Fall of Sun Microsystems*, *ARN*, <https://www.arnnet.com.au/slideshow/334210/pictures-remember-rise-fall-sun-microsystems/> [<https://perma.cc/QY6A-MAQX>]; Lee Gomes, *Sun Microsystems' Rise and Fall*, *FORBES* (Mar. 19, 2009, 5:00 AM), <https://www.forbes.com/2009/03/18/sun-microsystems-internet-technology-enterprise-tech-sun-microsystems.html#1e8589ce419e> [<https://perma.cc/2S93-8KLN>].

41. Matt Wienberger & Avery Hartmans, *Apple Just Became a \$2 Trillion Company. Here's How It Came to Rule the World, From Its Early Struggles to Beat Microsoft to the Launch of the iPhone.*, *BUS. INSIDER* (Aug. 19, 2020, 11:12 AM), <https://www.businessinsider.com/history-of-apple-in-photos-2015-8> [<https://perma.cc/T8VA-SD47>].

42. Mark Hall & Gregg Pascal Zachary, *Microsoft Corporation*, *BRITANNICA*, (Nov. 12, 2020), <https://www.britannica.com/topic/Microsoft-Corporation> [<https://perma.cc/DZS6-F6ZA>]; Eric Reed, *History of Microsoft: Timeline and Facts*, *THE STREET* (Sept. 2, 2019, 1:21 AM), <https://www.thestreet.com/technology/history-of-microsoft-15073246> [<https://perma.cc/CV7J-HWRX>].

43. *A History of Possibilities*, *ORACLE*, <https://www.oracle.com/corporate/> [<https://perma.cc/226R-UQNP>].



and expanded.<sup>44</sup> Today, their products and bundled services are on the desks of most businesses and inside homes across the nation.<sup>45</sup> Significantly, their products and services are based on the intellectual property assets that they either created in-house or purchased through acquisitions of other startup companies.<sup>46</sup> Intellectual property assets and associated rights provided the companies the exclusivity to ensure their market competitiveness.<sup>47</sup> Accordingly, tech companies zealously created and protected their intellectual property assets vigorously and continue to do so today.<sup>48</sup>

44. For example, Microsoft had its IPO on March 13, 1986. A \$1,000 investment in Microsoft in 1986 would be worth \$1.6 million on November 19, 2018. Emmie Martin, *If You Had Invested \$1,000 in Microsoft at Its IPO, Here's How Much Money You'd Have Now*, CNBC (Nov. 19, 2018, 1:06 PM), <https://www.cnbc.com/2018/11/19/how-much-a-1000-dollar-investment-in-microsoft-at-its-ipo-is-worth-now.html> [https://perma.cc/RT6Y-W4CB]. The day before, March 12, 1986, Oracle pressed ahead with its IPO. In the same month and year, March 1986, Sun Microsystems also went public after only four short years of existence since it was founded in 1982. See John Letzing, *In 1986, Sun Led the Way for Future Tech Giants*, MARKETWATCH (Oct. 19, 2009), <https://www.marketwatch.com/story/sun-was-first-to-go-public-is-first-to-disappear-2009-10-19> (noting that Sun, Oracle, and Microsoft had their IPOs within days of each other); see also Michael Rogers, *IPO Fever Is Back After Two Cool Years, Initial Public Offerings Are Hot*, FORTUNE (Mar. 31, 1986), [https://archive.fortune.com/magazines/fortune/fortune\\_archive/1986/03/31/67324/index.htm](https://archive.fortune.com/magazines/fortune/fortune_archive/1986/03/31/67324/index.htm) [https://perma.cc/R3Y2-WVAM] (reporting on the IPOs of Sun, Oracle and Microsoft).

45. Tech companies fiercely compete against each other to dominate niche, platform, and industries. See generally Tom Macaulay, *NetSuite and Oracle Unveil Combined Plans for Global Cloud Domination*, ARN (Apr. 27, 2017, 8:37 AM), <https://www.arnnet.com.au/article/618305/NetSuite-oracle-unveil-combined-plans-global-cloud-domination/> [https://perma.cc/QA8N-UXTK] (describing this competition).

46. Rogers, *supra* note 44 (noting the new IPO companies were heavily concentrated in the computer and software industries); Letzing, *supra* note 44 (observing that Sun was known as one of the two innovative tech giants during its halcyon years). Successful tech companies in the 1980s soon engaged in aggressive acquisitions of other companies for their technologies and talents. For example, Intel made 96 acquisitions. See *Acquisitions*, CRUNCHBASE, [https://www.crunchbase.com/organization/intel/acquisitions/acquisitions\\_list#section-acquisitions](https://www.crunchbase.com/organization/intel/acquisitions/acquisitions_list#section-acquisitions) [https://perma.cc/5Kfy-Y2NF]; see also *Acquisition History*, MICROSOFT, <https://www.microsoft.com/en-us/Investor/acquisition-history.aspx> [https://perma.cc/RDS7-6E6M]; see also *Acquisitions*, HEWLETT PACKARD ENTER., <https://investors.hpe.com/financial/acquisitions> [https://perma.cc/KV7P-EQ34].

47. While companies enjoy the exclusivity emanated from their intellectual property assets, the exclusivity itself is not anticompetitive. See U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *ANTITRUST GUIDELINES FOR LICENSING OF INTELLECTUAL PROPERTY* 4 (2017), <https://www.justice.gov/atr/IPguidelines/download> [https://perma.cc/X56Y-MLZG] (“The Agencies will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner. Although the intellectual property right confers the power to exclude with respect to the specific product, process, or work in question, there will often be sufficient actual or potential close substitutes for such product, process, or work to prevent the exercise of market power. If an intellectual property right does confer market power, that market power does not by itself offend the antitrust laws.”).

48. In the late 1980s, among the notable intellectual property litigations in the tech industries is Apple's suit against Hewlett-Packard and Microsoft for copyright infringement in 1988. The lawsuit between Apple and Microsoft lasted for six years. *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435 (9th Cir. 1994). Later, Apple and Samsung locked into a seven-year-long patent litigation. Jacob Kastrenakes, *Apple and Samsung Settle Seven-Year-Long Patent Fight over Copying the iPhone*, THEVERGE (June 27, 2018, 2:59 PM), <https://www.theverge.com/2018/6/27/17510908/apple-samsung-settle-patent-battle-over-copying-iphone>. Recently, Oracle has brought actions against other tech companies. See generally Lisa Morgan, *Oracle v. Rimini Street Lawsuit: A Guide*, FORBES (Dec. 6, 2018, 6:00 AM), <https://www.forbes.com/sites/oracle/2018/12/06/oracle-v-rimini-street-lawsuit-a-guide/#4b287ba8d407> [https://perma.cc/E4CT-U45H] (reporting on Oracle's eight-year legal battle with Rimini over alleged infringement of Oracle's copyrighted software programs); Dennis Howlett, *Memo from Oracle: Let's Sue Our*

Federal efforts paved the way for the creation and growth of tech companies on several fronts. In the copyright law area, Congress overhauled and modernized copyright law in 1976 in response to the then-new communication technologies, such as, radio, television, satellites, cable television, computers, photocopying machines, and videotape recorders that were unknown when the old copyright law passed in 1909.<sup>49</sup> With the arrival of computer software, Congress amended copyright law by recognizing computer software eligible for copyright protection in 1980.<sup>50</sup> Moreover, Congress enabled software developers to maximize their business model of licensing software by limiting the first sale doctrine.<sup>51</sup> This means buyers of software are prohibited from reselling the software copies because, under the law, these buyers only acquired the right to use the software along with restrictions pursuant to the license agreement.<sup>52</sup> Consequently, tech companies can

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*Way to World Domination*, ZDNET (Aug. 13, 2010, 7:02 AM), <https://www.zdnet.com/article/memo-from-oracle-lets-sue-our-way-to-world-domination/> [<https://perma.cc/8824-MEWZ>] (noting the litigation battle waged by Oracle against other tech companies to protect Oracle's patents related to its software programs). The long battle between Oracle and Google provided the Supreme Court an opportunity to determine the scope of copyright protection for software and fair use. Sue Ghosh Stricklett, *Oracle v. Google: The High Court Holds the Future of IP in Its Hands*, IPWATCHDOG (Oct. 31, 2020), <https://www.ipwatchdog.com/2020/10/31/google-v-oracle-high-court-holds-future-ip-hands/id=126937/>.

49. See U.S. COPYRIGHT OFF., GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976 1:1–1:3 (1977), <https://www.copyright.gov/reports/guide-to-copyright.pdf> [<https://perma.cc/MR93-GFD2>] (expanding copyright law). Given the new array of technologies and industries related to copyrights by 1970s, the revision of copyright law in 1976, understandably, is a product of compromises among different stakeholders. See *id.* (detailing the historical backgrounds of the 1976 Copyright Act); see also Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 870 (1987) (“The legislative history of the 1976 Copyright Act is, at the very least, a troublesome aid in determining the statute’s meaning. One can choose a statutory provision almost at random; a review of the provision’s legislative history will show that credit for its substance belongs more to the representatives of interested parties negotiating among themselves than to the members of Congress who sponsored, reported, or debated the bill. The congressional sponsors may have given almost no thought to the meaning of the provision.”).

50. Peter S. Mennell, *Economic Analysis of Network Effects and Intellectual Property*, 34 BERKELEY TECH. L.J. 219, 246–47 (2019) (explaining software copyright legislation and the 1980 amendments to the copyright statute). The expansion of legal protection for software under copyright law regime later led to international efforts to protect computer software. See generally *Copyright Protection of Computer Software*, WIPO, <https://www.wipo.int/copyright/en/activities/software.html> (last visited Feb. 4, 2021) (“Copyright protection of computer software is established in most countries and harmonized by international treaties to that effect.”); World Intellectual Property Organization Copyright Treaty and the World Intellectual Property Organization Performances and Phonograms Treaty, art. 4, Dec. 20, 1996, S. TREATY DOC. NO. 105-17 (1997) (“Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.”).

51. See 17 U.S.C. § 117(b) (“Any exact copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner.”). See *Vernor v. Autodesk*, 621 F.3d 1102, 1116 (9th Cir. 2010) (holding the computer software customer was a mere licensee of the software and therefore could not invoke first sale doctrine as an affirmative defense); *Brilliance Audio, Inc. v. Haight Cross Commc’ns, Inc.*, 474 F.3d 365, 374 (6th Cir. 2007) (“When evidence surfaced of a new class of works in need of § 109(b) protection—computer software—Congress amended the statute to explicitly exempt the works from the first sale doctrine.”).

52. *Wall Data Inc. v. L.A. Cnty. Sheriff’s Dept.*, 447 F.3d 769, 785 n.9 (9th Cir. 2006) (recognizing “the first sale doctrine rarely applies in the software world because software is rarely ‘sold’”); *ProCD v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996) (holding the licensee’s right to use the software is subject to restrictions specified in the license agreement).

maximize their exploits and commercialize their intellectual property assets through the licensing business model.<sup>53</sup>

In the patent law area, Congress brought patent law into a new era through comprehensive reform as seen through the notable Patent Act of 1952.<sup>54</sup> Significantly, Congress codified areas related to patentability, clarifying the standard of patentability for both the Patent Office and the courts.<sup>55</sup> Subsequently, Congress continued its acknowledgement of the importance of patents in the economy by creating a new federal appellate court with exclusive jurisdiction to preside over appeals of patent cases earlier rendered by district courts and administrative decisions issued by the Patent Office.<sup>56</sup> The creation of the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) fortified the harmonization of patent law nationwide, reducing forum shopping and associated costs.<sup>57</sup>

In addition, federal efforts as seen in the landmark Bayh-Dole Act of 1980, extend federal subsidies to universities, institutions, and small businesses in their invention activities.<sup>58</sup> Notably, the legislation authorizes federal agencies to fund research to

53. See ROBERT GOMULKIEWICZ ET AL., *LICENSING INTELLECTUAL PROPERTY: LAW AND APPLICATION* 3–5 (Wolters Kluwer, 4th ed. 2018) (providing an overview of licensing as a business model).

54. Xuan-Thao Nguyen & Jeffrey A. Maine, *Attacking Innovation*, 99 B.U. L. REV. 1687, 1697–98 (2019) (describing the patent system under 1952 revision for innovation).

55. Donald S. Chisum, *Weeds and Seeds in the Supreme Court’s Business Method Patents Decision: New Directions for Regulating Patent Scope*, 15 LEWIS & CLARK L. REV. 11, 31 (2011) (observing “neatness in addressing patentability in numerical order: Section 101 (eligibility subject matter and utility), Section 102 (novelty), Section 103 (nonobviousness), and so on” as “three doors” of patentability requirements); Erwin J. Basinski, *Some Comments on Contributory and Induced Patent Infringement; Implications for Software Developers*, 81 J. PAT. & TRADEMARK OFF. SOC’Y 777, 777–78 (1999) (noting that “prior to 1952, the courts had confused the old equity maxim of ‘unclean hands’ and its application to patent law called ‘the misuse doctrine’ with the common law doctrine of ‘contributory infringement.’ . . . This had the effect of making the contributory infringement claim totally ineffective . . . As a result, The Patent Act of 1952 added the revised Article 271 to clarify these issues”) (footnotes omitted).

56. Richard H. Saylor, *The Case for Arbitrating Intellectual Property Licensing Disputes*, 60 DISP. RESOL. J. 62, 67 (2005) (“Since its creation, the U.S. Court of Appeals for the Federal Circuit has in fact fulfilled one of its purposes—to speak with a single voice on important issues of patent law so that the rules governing the validity, enforceability, and infringement of patents do not vary from circuit to circuit as they sometimes did.”); Michael J. Burstein, *Rules for Patents*, 52 WM. & MARY L. REV. 1747, 1757 (2011) (“[T]he Federal Circuit has become the most important expositor of the substantive law of patents in the United States.”); Gerald Sobel, *The Court of Appeals for the Federal Circuit: A Fifth Anniversary Look at Its Impact on Patent Law and Litigation*, 37 AM. U. L. REV. 1087, 1091 (1988) (recognizing Congressional creation of a unified patent appellate court “brought about a philosophical change which strengthens the patent system” during a time when the United States’ “basic manufacturing industries suffer from competition with foreign suppliers, our ability to innovate new products and processes has become of utmost economic importance. The relative value of intangible technical knowledge has grown as basic manufacturing has moved to lower-cost areas abroad.”).

57. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 7 (2003) (observing that creation of the Federal Circuit is “perhaps the single most significant institutional innovation in the field of intellectual property in the last quarter-century”); *Christianson v. Colt Indus. Operating Corp.*, 798 F.2d 1051, 1058 (7th Cir. 1986) (“The primary purposes for the creation of the Federal Circuit were to provide greater uniformity in the substantive law of patents and to prevent the inevitable forum shopping that results from conflicting patent decisions in the regional circuits.”). In recent years, however, there is a debate whether the creation of the Federal Circuit is good for the development of patent law. See Paul R. Gugliuzza, *The Federal Circuit as a Federal Court*, 54 WM. & MARY L. REV. 1791, 1795 (2013) (stating that the Federal Circuit has consolidated its power to shape patent law).

58. Sanjesh Sharma, *The Bayh-Dole Act and Allocation of Ownership Rights in Inventions Arising out of*

universities while permitting the universities to retain title to the inventions, restricting the federal government from asserting ownership in the inventions.<sup>59</sup> In other words, the federal government subsidizes private research.<sup>60</sup> The government, therefore, enables universities to own and exploit their inventions through collaboration and commercialization efforts with industries.<sup>61</sup> This indicates the legislation directs taxpayer money to universities so they can conduct research for private industries.<sup>62</sup> The complex government-university-industry relationship encourages and increases the production of patents.<sup>63</sup>

In summary, by the 1980s, the revised laws, the newly created court, and the new public policy on publicly-funded inventions work in concert, facilitating private corporations and public institutions to produce and license intellectual property assets. As corporations spend resources to create their copyright and patent assets, corporations will

*Federally Funded Research*, 23 INTELL. PROP. & TECH. L.J. 23, 24 (2011) (“The Bayh-Dole Act gives the government several rights in federally funded inventions and provides a framework for allocating ownership in such inventions. Among other things, the agency that provides the federal research funding receives ‘a nonexclusive, nontransferable, irrevocable, paid-up license to practice . . . the subject invention’ from the contracting institution or university. The Bayh-Dole Act also provides that nonprofit organizations and universities may, after making certain disclosures required by the statute, elect to retain title to inventions arising out of federally sponsored research and development.”).

59. *Id.*; see also *Landmark Law Helped Universities Lead the Way*, ASS’N OF UNIV. TECH. MANAGERS (AUTM), <https://autm.net/about-tech-transfer/advocacy/legislation/bayh-dole-act> [https://perma.cc/HL7V-AEEU] (describing the Bayh-Dole Act).

60. See Brian Cummings, *The Changing Landscape of Intellectual Property Management as a Revenue-Generating Asset for U.S. Research Universities*, 21 GEO. MASON L. REV. 1027, 1027 (2014) (noting that American universities manage intellectual property “generated from almost \$50 billion in federal funding that they receive for research. . . . [F]ederal and state governments rely on top-tier research universities to improve our economy by providing the next generation of inventors and entrepreneurs who create groundbreaking inventions, high-growth start-ups, thousands of new jobs, and, ultimately, new revenue streams and wealth.”).

61. David C. Mowery et al., *The Growth of Patenting and Licensing by U.S. Universities: An Assessment of the Effects of the Bayh-Dole Act of 1980*, 30 RSCH. POL’Y 99, 103–04 (2001) (providing an assessment and identifying factors that contribute to the increase in patents holding by universities); Ian Ayres & Lisa Larrimore Ouellette, *A Market Test for Bayh-Dole Patents*, 102 CORNELL L. REV. 271, 279 (2017) (proposing a new measuring system to evaluate the impact of patents acquired through federally funded inventions).

62. See DEREK BOK, *UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION* 66–71 (2003) (identifying conflicts of interest caused by the presence of private firms and their partnership with research universities).

63. Liza Vertinsky, *Universities as Guardians of Their Inventions*, 2012 UTAH L. REV. 1949, 1963–64 (2012).

Universities began to move away from purely nonproprietary institutional modes for transferring knowledge only as patenting became viewed both as an appropriate university activity and as an effective way of moving university inventions into the marketplace for commercialization. Over time, patenting activity by universities continued to grow and university technology transfer activities became increasingly patent focused. Patents have now become a dominant part of the accepted strategy for bridging the move from university lab to market.

*Id.*

Universities have in recent years embroiled themselves in many patent litigations over licensing, royalties, inventorship, ownership, and immunity disputes. See generally *Univ. of Fla. Rsch. Found. v. Gen. Elec. Co.*, 916 F.3d 1363 (Fed. Cir. 2019) (state sovereign immunity); *Bd. of Trs. of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 563 U.S. 776 (2011) (patent ownership, standing dispute); *Wis. Alumni Rsch. Found. v. Xenon Pharma, Inc.*, 591 F.3d 876 (7th Cir. 2010) (licensing dispute); *Chou v. Univ. of Chi.*, 254 F.3d 1347 (Fed. Cir. 2001) (inventorship dispute).

look for ways to maximize their assets.

In addition, geographically, the patent-intensive industries are not located in Delaware. The innovation centers related to tech are concentrated in California, Texas, Massachusetts, North Carolina, Colorado, and Washington.<sup>64</sup> Innovation centers are often situated near major research universities.<sup>65</sup> Also, in the biopharma industry, drug companies are in California, New Jersey, New York, Indiana, and Washington state.<sup>66</sup>

### B. The Rise in Consumption and Trademarks as Corporate Assets

Brands, names, and logos are protected as trademarks under the law. Congress modernized trademark law one year after World War II ended. The Lanham Act of 1946 empowers corporations to relish nationwide protection for their names, phrases, and logos. The new law provided trademark owners a federal cause of action against free riders and infringers who used trademarks likely to cause consumer confusion. In other words, the new law ushered trademarks as corporate assets by providing federal-level recognition and protection.

With the elevation of trademarks under federal law, corporations began to appeal to consumer personal consumption as seen through the creation and proliferation of specialty stores in shopping malls nationwide.<sup>67</sup> For example, today shoes and clothes are no longer confined to shelves in department stores.<sup>68</sup> Specialty stores for athletic, walking, and hiking shoes proliferate.<sup>69</sup> Apparel specialty stores with a focus on different tastes, leisure, activities, and demographics dominate.<sup>70</sup> Furniture stores appealing to different aesthetic,

64. Xuan-Thao Nguyen, *Lending Innovation*, 85 BROOK. L. REV. (forthcoming 2020) (on file with author) (mapping innovation centers based on financing services provided to early and late growth companies by Silicon Valley bank); see also *CompTIA Tech Town Index 2020*, COMPTIA (2020), [https://comptiacdn.azureedge.net/webcontent/docs/default-source/research-reports/08204-2020-us-tech-town-report-final.pdf?sfvrsn=693f4a88\\_2](https://comptiacdn.azureedge.net/webcontent/docs/default-source/research-reports/08204-2020-us-tech-town-report-final.pdf?sfvrsn=693f4a88_2) [<https://perma.cc/WDC8-BN97>] (discussing the top geographic locations for tech work).

65. See USPTO Report, *supra* note 27, at 4–6 (providing a table of tech cities and selection of the USPTO regional offices to serve areas with high concentrations of patent activities and tech talents).

66. See Alex Philippidis, *Top 10 U.S. Biopharma Clusters*, GENETIC ENG'G & BIOTECHNOLOGY NEWS (Sept. 23, 2018),

<https://www.genengnews.com/a-lists/top-10-u-s-biopharma-clusters-6/> [<https://perma.cc/T8SX-8K7V>] (listing 10 biopharma regions in the United States); Renee Morad, *Top 12 HotBioPharma Regions for Growth and Expansion*, BIOSPACE.COM (Sept. 25, 2014), <https://www.biospace.com/article/top-12-hot-biopharma-regions-for-growth-and-expansion/> [<https://perma.cc/WM2B-LUT3>] (listing the top regions for growth in the biotech industry); *Leading Life Science Clusters: The Bio-Boom Intensifies*, CBRE (Oct. 2020), <https://www.cbre.us/research-and-reports/US-Life-Sciences-Report-2020> [<https://perma.cc/TN5L-W76B>] (listing ten cities for the life sciences industry).

67. Susan Meyer, *The History and Evolution of Retail Stores: From Mom and Pop to Online Shops*, BIGCOMMERCE, <https://www.bigcommerce.com/blog/retail/> [<https://perma.cc/22Y2-UGGB>]; Scott Allen, *The Origins of 11 Big Box Stores*, MENTAL FLOSS (Nov. 25, 2011), <https://www.mentalfloss.com/article/29336/origins-11-big-box-stores> [<https://perma.cc/WT4X-PYU8>].

68. Harrison Jacobs, *These Photos Show Even the Oldest Mall in America Isn't Immune to the 'Retail Apocalypse'*, BUS. INSIDER (Dec. 28, 2017, 8:14 AM), <https://www.businessinsider.com/shopping-mall-northgate-retail-apocalypse-photos-2017-12> [<https://perma.cc/E9T3-FXEV>] (noting that for the first seventy years the malls like Northgate Mall in Seattle were the commerce hub with many specialty stores).

69. Foot Locker stores for men, Foot Locker stores for women, The Walking Company, Ecco, Timberland, REI, Sketchers, and Niketown are immediate examples of specialty stores for shoes.

70. Talbot, Ann Taylor's, Gap, Aldo, Express, H & M, Victoria's Secret, among others, are common sights

sensibility, utility, and purpose anchor shopping malls and retail areas.<sup>71</sup> Toy stores are abundant.<sup>72</sup> Even paint stores, from Sherwin-Williams to Benjamin Moore, seem to appear within reach.<sup>73</sup>

In the postwar U.S. economy, consumers vastly increased their spending. By 1969, personal consumption reached 59% of the national gross domestic product.<sup>74</sup> The number continued to climb to the current astounding level of 69% of the gross domestic product.<sup>75</sup> In encouraging consumer consumption with many available choices, corporations carefully embed emotional attachment to brands, names, and logos to ensure customer loyalty, sales volume, and market share.<sup>76</sup>

Consumers learn to define themselves through the brands they use. The identity, connection, status, and emotion are channeled through the cars they drive,<sup>77</sup> the computers

at shopping malls. See *Center Directory*, SIMON PROP. GRP., <https://www.simon.com/mall/castleton-square/stores> [<https://perma.cc/Z766-9LAY>] (listing various stores found in the Castleton Square Mall in Indianapolis).

71. See *We Scored 207 Furniture Stores in Indianapolis, IN and Picked the Top 15*, EXPERTISE, <https://www.expertise.com/in/indianapolis/furniture-stores> [<https://perma.cc/2Z7V-39AW>] (listing furniture stores for traditional, modern, Scandinavian style, business, conference, outdoor, and luxury residence furniture).

72. See *Center Directory*, *supra* note 70 (listing Lego, GameStop, and Build-A-Bear Workshop, among others).

73. *The Best 10 Paint Stores in Indianapolis, IN*, YELP, [https://www.yelp.com/search?cflt=paintstores&find\\_loc=Indianapolis%2C+IN](https://www.yelp.com/search?cflt=paintstores&find_loc=Indianapolis%2C+IN) [<https://perma.cc/RJG7-RGQW>]. Sherwin-Williams embraces a model that a paint store is available within a 50 mile radius in its efforts to control and saturate the paint market. *Sherwin-Williams Company (SHW)*, SIMPLY SAFE DIVIDENDS (June 11, 2008), <https://www.simplysafedividends.com/intelligent-income/posts/202-sherwin-williams-company-shw> [<https://perma.cc/Q7LE-8SXC>] (stating “90% of the U.S. population lives within 50 miles of a Sherwin-Williams location . . .”).

74. R. Henry Weaver, *Is Consumer Activism Economic Democracy?*, 22 U. PA. J.L. & SOC. CHANGE 241, 243 (2019) (noting the increase in personal consumption in postwar United States). See generally LIZABETH COHEN, *A CONSUMERS’ REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA* (2003) (positing that the GI Bill is partly responsible for the gendered-based consumption in postwar America).

75. Weaver, *supra* note 74, at 243.

76. *Branding*, ENTREPRENEUR, <https://www.entrepreneur.com/encyclopedia/branding> [<https://perma.cc/7BPB-SU9L>] (“The foundation of your brand is your logo . . . Your brand strategy is how, what, where, when and to whom you plan on communicating and delivering on your brand messages . . . Consistent, strategic branding leads to a strong brand equity, which means the added value brought to your company’s products or services that allows you to charge more for your brand than what identical, unbranded products command . . . The added value intrinsic to brand equity frequently comes in the form of perceived quality or emotional attachment.”). See also KC Karnes, *What Is Emotional Branding and How to Use It Effectively*, CLEVERTAP (Dec. 4, 2020), <https://clevertap.com/blog/emotional-branding/> [<https://perma.cc/8VLF-WYUL>] (“Emotional branding is the process of forming a relationship between a consumer and a product or brand by provoking their emotions. Marketers achieve this by creating content that appeals to the consumer’s emotional state, ego, needs, and aspirations.”).

77. Each branded car has different emotional appeal to the consumer. BMW is the “Ultimate Driving Machine” performance car. *The Ultimate Driving Campaign*, BMW STYLE, <http://www.bmwstyle.tv/the-ultimate-driving-campaign/> (last visited Feb. 4, 2021). Jaguar cars are “seductive,” “sophisticated[,] and daring,” *Jaguar Asks ‘How Alive Are You?’*, AUTO REMARKETING (Feb. 28, 2012, 1:56 AM), <https://www.autoremarketing.com/trends/jaguar-asks-%E2%80%98how-alive-are-you%E2%80%99> [<https://perma.cc/MWC3-HRTH>]. Tesla cars are disruptive of the old-fashion cars and the automobile industry. See Tamara Rutter, *Why Tesla Has the Most Loyal Customers*, USA TODAY (Sept. 6, 2014), <https://www.usatoday.com/story/money/cars/2014/09/06/why-tesla-has-the-most-loyal-customers/15139377/> [<https://perma.cc/XFJ9-STJL>] (“Tesla’s enemies, on the other hand, are vehicles with internal combustion engines and big automakers. Many EV drivers today derive an emotional attachment from driving something that isn’t

they own,<sup>78</sup> the watches they sport,<sup>79</sup> the handbags they carry,<sup>80</sup> the designer clothes they wear,<sup>81</sup> the shoes they run in,<sup>82</sup> the drinks they enjoy,<sup>83</sup> the bars and clubs they

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your typical gas-powered car. Another advantage for Tesla is the fact that it offers customers something different: new tech from a new company.”).

78. For example, Apple computers appeal to users who are anti-PC, anti-IBM, and who dare to see, invent, create, imagine, and think “different.” Marianna Renesi, *Think Different*, MEDIUM (Mar. 25, 2018), <https://medium.com/ad-discovery-and-creativity-lab/think-different-b566c2e6117f> [https://perma.cc/2G36-L7xz]; Rob Siltanen, *The Real Story Behind Apple’s ‘Think Different’ Campaign*, FORBES (Dec. 14, 2011, 12:20 PM), <https://www.forbes.com/sites/onmarketing/2011/12/14/the-real-story-behind-apples-think-different-campaign/#2b4a99c462ab> [https://perma.cc/84CT-JQAR].

79. For luxury watches, some makers appeal to heritage and success in capturing its market. For example, Patek Philippe’s Generations campaigns in the last two decades target consumers to not just own a watch but to “begin your own tradition” for the benefits of the next generation. See *Luxury Watch Maker Patek Philippe and Leagas Delaney Launch New Generations Campaign*, MKTG. COMMC’N NEWS (Sept. 20, 2019), <https://marcommnews.com/luxury-watch-maker-patek-philippe-and-leagas-delaney-launch-new-generations-campaign/> [https://perma.cc/3NT7-XZ3J]. Breitling, on the other hand, carves its niche as watches for aviators who travel around the world and in space. See Dania Lucero Ortiz & Cassandra Hogan, *The Top 25 Watch Brands to Know Now*, TOWN & COUNTRY (Oct. 30, 2020), <https://www.townandcountrymag.com/style/jewelry-and-watches/g21968637/best-watch-brands/> [https://perma.cc/W5X3-XHR8] (discussing Breitling’s past brand partnerships with Scott and Mark Kelly).

80. See Alexandra Shulman, *The Psychology of Designer Handbags*, BUS. FASHION (Oct. 31, 2017, 5:25 PM), <https://www.businessoffashion.com/articles/opinion/the-psychology-of-the-designer-handbag> [https://perma.cc/7MYT-XL89] (reflecting on why shoppers invest both emotion and financial resources in designer handbags).

81. See Robin Givhan, *‘Clothing Is Emotion’: Maria Cornejo Wants Her Designs to Be Enduring—Not Gimmicks*, WASH. POST (Feb. 12, 2019, 8:29 AM), <https://www.washingtonpost.com/lifestyle/2019/02/12/clothing-is-emotion-maria-cornejo-wants-her-designs-be-enduring-not-gimmicks/> [https://perma.cc/268C-Z2FV] (covering Designer Maria Cornejo’s thorough process when creating clothing); Robert Passikoff, *Emotion Is Always in Fashion*, FORBES (June 9, 2011, 8:24 AM), <https://www.forbes.com/sites/marketshare/2011/06/09/emotion-is-always-in-fashion/#249087b822ba> [https://perma.cc/Y3D2-8HRM] (“Fashion, like automobiles, is one of those social avatars we use to present ourselves to the world and, importantly, create the self we want to be. Even those who claim to ignore it make a statement in that choice—reinforcing a personal self-image and a public persona that is value-laden. That’s why, when we look at fashion brands or any other category, our metrics are based on the emotion that drives decision-making, and not strictly demographic partitioning.”).

82. Ailsa Sherrington, *Nike VP: The Key to Selling Sneakers Is Emotion, and Enhancing It with Tech*, NEXT WEB, <https://thenextweb.com/events/2019/08/08/nike-ron-faris-tnw2020/amp/> [https://perma.cc/LQ8J-XSKM]; Rebecca Hinds, *What Your Shoes Really Say About Your Personality, According to Science*, INC. (Nov. 21, 2017), <https://www.inc.com/rebecca-hinds/want-to-read-your-coworkers-personalities-look-at-their-shoes-science-says.html> (“Sneakers have become a status symbol among Silicon Valley ‘techies.’ Many techies have never seen the insides of a black cap-toe Oxford shoe. The black cap Oxford gains more attention on the East Coast, where Wall Street investment bankers see it as a wardrobe staple. Many of these folks wouldn’t be caught dead in sneakers. For them, even brown cap Oxfords constitute a fashion faux-pas.”).

83. Coca-Cola represents feeling “happiness” through delicious and refreshing drinks. See Natalia Raben, *Coca-Cola’s Timeless Brand Identity*, IBRANDSTUDIO, <https://ibrandstudio.com/articles/coca-cola-timeless-brand-identity> [https://perma.cc/ZY77-FZH8]; Stewart Hodgson, *Born in the USA: Coca-Cola, the Brand that Turned Christmas Red*, FABRIK BRANDS (Dec. 5, 2017), <https://fabrikbrands.com/coca-cola-the-brand-that-turned-christmas-red/> [https://perma.cc/8ERW-T5M3]; Lucy Gevorgyan, *Marketing Strategies of Coca-Cola and Pepsi: Which One Is Better?*, MEDIUM (Apr. 24, 2018), <https://medium.com/@lucygevorgyan12/marketing-strategies-of-coca-cola-and-pepsi-which-one-is-better-34ab13f60e9b> [https://perma.cc/QU3T-K6NG] (“Most popular campaigns of the brand include and are not limited to ‘Share a Coke—Share a feeling’, ‘Open Happiness’, ‘Taste the Feeling’, ‘Hug me’, etc.. [sic] Coca Cola designs its advertising messages in a way that would make the content go viral, targeting wider demographics of adults, young adults and children. The idea of friendship,

frequent,<sup>84</sup> the universities they attend,<sup>85</sup> and so forth, representing both consumption power and brand loyalty. Through brands and corporations' strategic advertisement practices, they form bonding, belonging, and connection with consumers.<sup>86</sup> For corporations, brands become important corporate assets subject to financing, monetization, protection, and enforcement.<sup>87</sup>

Famous brands command billions in valuation. For example, BMW has a valuation of \$40 billion, the Disney name captures a valuation of \$45 billion, McDonald's stakes a valuation of \$31 billion, Coca-Cola stands at \$36 billion, and AT&T earns \$108.4 billion in valuation.<sup>88</sup> Consequently, behind each brand is a corporation attractive to Delaware.

love and kindness have become key targets that the brand hits, simply promoting the audience to drink coke and just have fun.”).

84. See Richard Baird, *High Street Wine Co. by Conductor, United Kingdom*, BP&O, <https://bpando.org/bar/> [<https://perma.cc/ZA4U-QTKX>] (opening on the brand identity of certain bars and clubs).

85. Increasingly, universities embrace the idea that they are “brands” and adopt brand guidelines. See, e.g., *Brand Guidelines*, OHIO STATE UNIV., <https://brand.osu.edu/our-brand/> (last visited Feb. 4, 2021) (describing “why [its] brand is important”).

The power of many, succeeding as one[:] The Ohio State University is a special place—a large, multifaceted institution with countless elements that together make up our One University. . . . A brand is more than a logo. It is the voice we use to tell our stories. It is the experience people have with our university. Our brand guidelines are the tools we use to create those stories and reinforce those experiences; they are the operating manual for looking, speaking, and acting as One University.

*Id.* Through marketing efforts, universities and colleges attempt to appeal to potential attendees. See Ellen Wexler, *Your Future Starts Here. Or Here. Or Here.*, INSIDE HIGHER ED (May 2, 2016), <https://www.insidehighered.com/news/2016/05/02/why-colleges-brands-look-so-similar> [<https://perma.cc/4HHT-WRED>] (critiquing the methods that colleges use when trying to differentiate themselves from their peers through marketing efforts).

86. Shayna Smilovitz, *Emotional Marketing Examples Scientifically Proven to Sway Buyers*, INSTAPAGE (Nov. 10, 2020), <https://instapage.com/blog/emotional-marketing> [<https://perma.cc/6BPP-8VK9>]; see also Katya Assaf, *Brand Fetishism*, 43 CONN. L. REV. 83, 84 (2010) (focusing on how brands have become spiritual entities rather than informational devices through corporations' efforts “to create brands with personalities and souls, brands that tug at consumers' heartstrings”).

87. Brand protection and enforcement is a frequent topic for attorneys and their corporate clients to gather and share best practices and insights. See, e.g., *International Brand Protection and Enforcement: Best Practices and Key Insights for the United States, Europe, and China*, FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP, <https://www.finnegan.com/en/insights/international-brand-protection-and-enforcement-best-practices.html> [<https://perma.cc/JNP7-2HGZ>] (advertising a roundtable discussion related to brand protection). In addition, national law firms advertise that their services are devoted to brand protection and enforcement. See *Brand Protection & Enforcement*, DAVIS WRIGHT TREMAINE LLP, <https://www.dwt.com/expertise/practices/brand-protection-advertising/brand-protection-and-enforcement> [<https://perma.cc/9D2K-VG3B>]; *Brand and Content Protection*, VENABLE LLP, <https://www.venable.com/services/practices/brand-and-content-protection> [<https://perma.cc/38ej-azq2>]; Deven R. Desai, *From Trademarks to Brands*, 64 FLA. L. REV. 981, 992–1009 (2012) (identifying the corporate, consumer, and community sides of brands).

88. See BRAND FINANCE, GLOBAL 500: THE ANNUAL REPORT ON THE WORLD'S MOST VALUABLE BRANDS 20 (2019), [https://brandfinance.com/images/upload/global\\_500\\_2019\\_locked\\_4.pdf](https://brandfinance.com/images/upload/global_500_2019_locked_4.pdf) [<https://perma.cc/LD78-GNLC>] (listing the top 100 brand valuations); Lucy Handley, *Amazon Beats Apple and Google to Become the World's Most Valuable Brand*, CNBC (June 11, 2019, 5:43 AM), <https://www.cnbc.com/2019/06/11/amazon-beats-apple-and-google-to-become-the-worlds-most-valuable-brand.html> [<https://perma.cc/GY69-DPDS>].



### III. LEGISLATION TO LURE INTELLECTUAL PROPERTY ASSETS TO BE HELD IN DELAWARE

#### A. The Tax Avoidance Scheme of 1984

In 1983, approximately two million personal computers existed in the United States. Interestingly, *Time* magazine named “The Computer” as its “person of the year.”<sup>89</sup> Witnessing the prominent rise of intellectual property assets in the late 1970s and early 1980s and the beginning of the unleashing power of personal computers, Delaware decided to take action.<sup>90</sup> Knowing intellectual property assets were being created by talent at corporations located in sister states outside Delaware, the State of Delaware passed legislation aiming at intellectual property assets.<sup>91</sup>

Delaware wanted the intellectual property assets to be legally located in Delaware.<sup>92</sup> This meant corporations would form in Delaware solely for the purpose of holding their intellectual property assets in Delaware. As intellectual property assets possess no physical presence, they are deemed to be located where the corporation is incorporated.<sup>93</sup> Therefore, the more entities that are incorporated in Delaware to hold the intellectual property assets, the more fees and associated services Delaware stands to receive.

Specifically, in 1984 Delaware devised a tax avoidance scheme for corporations to attract them to move their intellectual property assets to Delaware. The legislation allows the income generated from the intellectual property assets to be free from corporate income taxation, allowing corporations “to reduce its overall state income tax burden.”<sup>94</sup> Generally, a corporation deriving income from business activities carried on and property located within Delaware is subject to Delaware’s corporate tax regime.<sup>95</sup> Delaware, however, exempts the corporations from corporate income taxation if the corporations

89. See Andrea M. Matwyshyn, *Imagining the Intangible*, 34 DEL. J. CORP. L. 965, 968–69 (2009) (discussing the award).

90. On August 13, 1984, the Delaware General Assembly approved the legislation on intellectual property holding companies. See 64 Del. Laws c. 461 § 10 (1984).

91. *Id.*

92. *Id.*

93. Intangibles have their situs where the corporations are incorporated. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.01 [C] (Matthew Bender, rev. ed. 2020) (“Because a copyright is an intangible, incorporeal right, it has no *situs* apart from the domicile of the proprietor.”); *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1570 (Fed. Cir. 1994) (noting that some courts, for purpose of determining where injury in an infringement suit is felt, situs of patent is where the patent owner resides); *Simonian v. Maybelline LLC*, 2011 WL 814988, at \*7 (N.D. Ill. Mar. 1, 2010) (“situs is where defendant’s headquarters are located and where any patent documentation is housed”).

94. Bradley P. Lindsey et al., *Delaware and the Passive Investment Company: Surveying the State Tax Planning Landscape*, CPA J. (Oct. 2016), <https://www.cpajournal.com/2016/10/01/delaware-and-the-passive-investment-company/> [<https://perma.cc/NT2H-R54K>] (“The Delaware corporate tax rate is 8.7%, higher than the average state corporate tax rate across the United States.”).

95. DEL. CODE ANN. tit. 30, § 1902(a) (2006) provides:

Every domestic or foreign corporation . . . of this section shall annually pay a tax of 8.7 percent on its taxable income, computed in accordance with § 1903 of this title, which shall be deemed to be its net income derived from business activities carried on and property located within the State during the income year. Any receiver, referee, trustee, assignee or other fiduciary or any officer or agent appointed by any court who conducts the business of any corporation shall be subject to the tax imposed by this chapter in the same manner and to the same extent as if the business were conducted by the corporation.

generate income from intellectual property assets through the “maintenance and management of their intangible investment . . . and the collection and the distribution of the income from such investments.”<sup>96</sup>

“Intangible investments” are defined to include the common types of intellectual property assets like patents, patent applications, trademarks, trade names, and “similar types of intangible assets.”<sup>97</sup> Cleverly, the Delaware statute includes the catchall phrase “similar types of intangible assets” for the purpose of extending the corporate income tax exemption to patents and trademarks, such as trade secrets and copyrights, as they are the remainder categories of intellectual property assets.<sup>98</sup> Consequently, a Delaware corporation holding any intellectual property assets is free from paying any corporate tax on the income generated from the maintenance and management of the intellectual property assets.<sup>99</sup>

In response to the attractive tax legislation, corporations doing business in many states flock to Delaware to create wholly-owned subsidiaries for the maintenance and management of their corporate intellectual property assets.<sup>100</sup> That means, generally, a parent corporation forms a Delaware Intellectual Property Holding Company (DIPHC) and transfers the intellectual property assets to the DIPHC. Subsequently, DIPHC then licenses the intellectual property assets to the parent and sibling companies, who conduct business in the forty-nine states, so they can use the intellectual property in their daily operation. These companies then pay DIPHC royalties for the use of the intellectual property assets, and the companies subsequently seek deduction of the royalty payments from their income. Meanwhile, all royalty payments received by DIPHC are corporate income exempted from

96. DEL. CODE ANN. tit. 30, § 1902(b)(8) (2006) provides:

Corporations whose activities within this State are confined to the maintenance and management of their intangible investments or of the intangible investments of corporations or statutory trusts or business trusts registered as investment companies under the Investment Company Act of 1940, as amended (15 U.S.C. § 80a-1 *et seq.*) and the collection and distribution of the income from such investments or from tangible property physically located outside this State. For purposes of this paragraph, “intangible investments” shall include, without limitation, investments in stocks, bonds, notes and other debt obligations (including debt obligations of affiliated corporations), patents, patent applications, trademarks, trade names and similar types of intangible assets . . .

97. *Id.*

98. The fourth type of intellectual property, in addition to patents, trademarks, and copyrights, is trade secrets. See *Trade Secret Policy*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/ip-policy/trade-secret-policy> [<https://perma.cc/49KW-6R2Z>] (defining a trade secret as “information that has either actual or potential independent economic value by virtue of not being generally known,” having “value to others who cannot legitimately obtain the information,” and being “subject to reasonable efforts to maintain its secrecy”).

99. For further analysis, see Xuan-Thao Nguyen, *Holding Intellectual Property*, 39 GA. L. REV. 1155 (2005) (discussing the interaction of IP and taxation); *A & F Trademark, Inc. v. Tolson*, 605 S.E.2d 187 (N.C. Ct. App. 2004) (confronting issues of corporate franchise taxation); *Kmart Props., Inc. v. Tax’n & Revenue Dep’t*, 131 P.3d 27 (N.M. Ct. App. 2001), *overruled by Kmart Corp. v. Tax’n & Revenue Dep’t*, 131 P.3d 22 (N.M. 2005) (involving taxation of a trademark holding company not residing in state).

100. *E.g.*, INST. ON TAX’N & ECON. POL’Y, *supra* note 17, at 2–3; Glen R. Simpson, *A Tax Maneuver in Delaware Puts Squeeze on Other States*, WALL ST. J. (Aug. 9, 2002, 12:01 AM), <https://www.wsj.com/articles/SB1028846669582427320> [<https://perma.cc/XZ8L-8GC5>]; Jeff Mordock, *Donald Trump Moves More Than 110 Trademarks to Delaware*, DEL. ONLINE (June 1, 2016, 8:28 PM), <https://www.delawareonline.com/story/news/2016/06/01/trump-moves-trademarks-delaware/85254878/> [<https://perma.cc/2FR5-Y9P6>] (reporting Trump moved trademarks to Delaware to “avoid paying income tax on royalties made from the trademarks being used” in other states).

Delaware corporate tax. Moreover, DIPHC periodically makes loans to the parent corporation, and any fees or interest payments DIPHC has received are also exempted from Delaware corporate tax.

Illustratively, W.L. Gore & Associates, Inc. (“Gore”) is the parent company of the famous Gore-Tex products.<sup>101</sup> Gore created Gore Enterprise Holdings, Inc. (GEH) to hold its patents. Gore’s employees research, innovate, and invent leading to procurement of new patents.<sup>102</sup> Gore transferred its patented innovations to GEH in exchange for all of GEH’s stock.<sup>103</sup> GEH kept only one employee and relied on Gore’s attorneys to perform all patent prosecution, litigation management, patent infringement, and patent licensing activities.<sup>104</sup> GEH licensed back its entire patent portfolio to Gore under a license agreement wherein Gore pays a 7.5% royalty rate for all Gore’s products sold in the United States.<sup>105</sup> Gore also created Future Value, Inc. (FVI) to assist GEH in managing the vast money paid by Gore to GEH. GEH then transferred all its finance to FVI in exchange for all of FVI’s stock in order for FVI to manage the excess capital. When Gore experienced a negative cash flow, Gore received loans from FVI.<sup>106</sup>

Likewise, VF Corporation, the parent company of Lee and Wrangler jeans through its subsidiary, VFJ Ventures, Inc., transferred the famous Lee and Wrangler trademarks to wholly-owned subsidiaries created in Delaware.<sup>107</sup> The two Delaware trademark holding companies then licensed back the trademarks to VFJ and other VF subsidiaries.<sup>108</sup> In the 2001 taxable year, VFJ paid the two subsidiaries a total of \$102,620,000 in royalties.<sup>109</sup> VFJ then deducted the entire amounts as ordinary and necessary business expenses on its 2001 federal income tax return, reducing its federal taxable income.<sup>110</sup> The income received by the Delaware trademark holding companies is not subject to Delaware corporate tax. Accordingly, the “total state-tax savings for VFJ . . . [is] approximately \$5.5 million. VFJ’s 2001 state-tax savings as a result of royalty payments” to the Delaware trademark holding companies was “approximately \$6 million.”<sup>111</sup>

### *B. Tracing the Origin of Delaware as an Onshore Tax Haven*

In December 1957, the Delaware legislature approved the Delaware Corporation Income Tax Law of 1958. In this original version of the corporate income tax statute, exemptions covered entities that are generally expected to be not-for-profits like fraternal societies; religious, charitable, scientific or education trusts, animal cruelty prevention

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101. *Gore Enter. Holdings, Inc v. Comptroller of Treasury*, 87 A.3d 1263, 1267–68 (Md. 2014).

102. *Id.* at 1267 (“Gore employees generate research and ideas that are sent to GEH for patent application filing.”); *id.* at 1276–77 (“GEH does not create, invent or make anything and must rely on W.L. Gore employees to invent the new process or product. Thus, an idea generated by a technologist with W.L. Gore is prepared by GEH through an application for filing with the patent office. In most cases, the employees of W.L. Gore review the patent application and determine whether it should be pursued.”).

103. *Id.* at 1267.

104. *Id.*

105. *Gore Enter. Holdings*, 87 A.3d at 1267.

106. *Id.* at 1268.

107. *Surtees v. VFJ Ventures, Inc.*, 8 So. 3d 950, 957 (Ala. Civ. App. 2008).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 958.

organizations; chambers of commerce; boards of trades; civil leagues to promote social welfare; and clubs for pleasure and recreation.<sup>112</sup> These exempted entities are listed in categories from one to five. The sixth category covers corporations that maintain a statutory corporate office in Delaware but are not doing business within the State of Delaware.<sup>113</sup> The seventh category extends the exempt status to insurance companies paying taxes upon gross premiums to the Insurance Commissioner.<sup>114</sup>

On February 5, 1958, the Delaware legislature made an immediate amendment to its newly enacted law.<sup>115</sup> Specifically, Delaware added an eighth category of exemptions from corporate income tax.<sup>116</sup> This new eighth category allows corporations whose activities within Delaware are confined to “the maintenance and management of their intangible investments and the collection and distribution of the income from such investments.”<sup>117</sup> In other words, Delaware began recognizing and encouraging the incorporation of passive

112. See 51 Del. Laws, ch. 298 (1957). DEL. CODE ANN. tit. 30, § 1902 (2020) provides the impositions and exemptions of tax on corporations:

(a) Every domestic or foreign corporation that is not exempt under subsection (b) of this section shall annually pay a tax of 8.7 percent on its taxable income, computed in accordance with § 1903 of this title, which shall be deemed to be its net income derived from business activities carried on and property located within the State during the income year. Any receiver, referee, trustee, assignee or other fiduciary or any officer or agent appointed by any court who conducts the business of any corporation shall be subject to the tax imposed by this chapter in the same manner and to the same extent as if the business were conducted by the corporation.

(b) The following corporations shall be exempt from taxation under this chapter:

(1) Fraternal beneficiary societies, orders or associations:

a. Operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system; and

b. Providing for the payment of life, sick, accident or other benefits to the members of such society, order or association or their dependents;

(2) Cemetery corporations and corporations organized or trusts created for religious, charitable, scientific or educational purposes or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual;

(3) Business leagues, chambers of commerce, fire companies, merchants' associations or boards of trade not organized for profit, and no part of the net earnings of which inures to the benefit of any private stockholder or individual;

(4) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare;

(5) Clubs organized and operated exclusively for pleasure, recreation and other non-profitable purposes, no part of the net earnings of which inures to the benefit of any private stockholder or member . . .

113. DEL. CODE ANN. tit. 30, § 1902(b)(6).

114. *Id.* § 1902(b)(7).

115. See 51 Del. Laws, ch. 315 (1958) (amending Subsection 3(b) of Title 30, Section 1902 of the Delaware Code by adding at the end: “8. Corporations whose activities within Delaware are confined to the maintenance and management of their intangible investments and the collection and distribution of the income from such investments or from tangible property physically located outside of Delaware.”).

116. DEL. CODE ANN. tit. 30, § 1902.

117. DEL. CODE ANN. tit. 30, § 1902(b)(8).

holding companies in 1958.<sup>118</sup>

Between 1958 and 1984 Delaware did not revise the statutory provision pertaining to passive holding companies.<sup>119</sup> As discussed earlier, during the period between the late 1970s and early 1980s, the United States witnessed the rise of intellectual property as important corporate assets.<sup>120</sup> On August 13, 1984, Delaware's 132nd General Assembly approved an amended version for passive holding companies to include intellectual property assets. The relevant portion of the amended version expands the definition of "intangible investments," defining the term to include "patents, patent applications, trademarks, trade names and similar types of intangible assets."<sup>121</sup>

Overall, the history of Delaware's corporate income tax exemptions illustrates that the State moved from the normative of providing exemptions to traditional not-for-profit entities with social welfare purposes to corporations with profit maximization purposes.<sup>122</sup> Prior to 1984, Delaware cemented its role as the center for all things corporate. But in August 1984, Delaware took on a new identity by embedding the eighth category of entities entitled to exemptions, the intellectual property holding companies.<sup>123</sup> As of August 1984, Delaware became not just all things corporate but all things intellectual property as an onshore tax haven.

A tax haven, according to the Organization for Economic Cooperation and Development (OECD), is a jurisdiction that allows zero or minimal taxes on specific types of income.<sup>124</sup> In addition, the jurisdiction lacks "effective exchange of information" and "transparency in the operation of the legislative, legal or administrative provisions."<sup>125</sup> Delaware easily meets the OECD's definition. The exemption from corporate income tax allows Delaware intellectual property holding companies to pay zero tax.<sup>126</sup> Delaware notoriously uses secrecy; information relating to incorporation documents, passive holding company's application for exemption, and corporate filings are not available for the

118. See *Delaware Holding Companies*, REGISTERED AGENTS LEGAL SERVS., LLC, <https://www.inlegal.com/delaware-holding-companies/> [https://perma.cc/CKW8-KCXM] ("Delaware corporate tax statute provides significant savings for passive investments held in the state of Delaware.").

119. See DEL. CODE ANN. tit. 30, §§ 1901–18 (2020) (establishing that the statutory provision concerning passive holding companies was not revised between 1958 and 1984).

120. See *supra* Part II (discussing the new-found recognition of intellectual property as corporate assets).

121. 64 Del. Laws 461 (1984) (amending Chapter 19 of Title 30 of the Delaware Code by adding at the end of Section 1902(b): "For purposes of this paragraph 'intangible investments' shall include without limitation investments in stocks, bonds, notes and other debt obligations (including debt obligations of affiliated corporations), patents, patent applications, trademarks, trade names and similar types of intangible assets.").

122. See generally David Groshoff, *Contrepreneurship? Examining Social Enterprise Legislation's Feel-Good Governance Giveaways*, 16 U. PENN. J. BUS. L. 233 (2013) (discussing the "social enterprise legislation" that has cropped up since 2008).

123. Jeffrey A. Maine & Xuan-Thao Nguyen, *The Delaware Gift to Corporations: Tracing the Roots of the Domestic IP Holding Company*, in THE INTELLECTUAL PROPERTY HOLDING COMPANY: TAX USE AND ABUSE FROM VICTORIA'S SECRET TO APPLE 23–54 (2017).

124. *Glossary of Tax Terms*, ORG. FOR ECON. COOP. & DEV., <https://www.oecd.org/ctp/glossaryoftaxterms.htm> (last visited Jan. 28, 2021) ("Tax haven in the 'classical' sense refers to a country which imposes a low or no tax, and is used by corporations to avoid tax which otherwise would be payable in a high-tax country. According to OECD report, tax havens have the following key characteristics; No or only nominal taxes; Lack of effective exchange of information; Lack of transparency in the operation of the legislative, legal or administrative provisions.").

125. *Id.*

126. DEL. CODE ANN. tit. 30, § 1902(a)–(b) (2006).

public.<sup>127</sup> Requests under FOIA about a corporation's wholly-owned intellectual property filings for corporate income tax exemption are denied.<sup>128</sup>

Conveniently, corporations don't need to look offshore for tax havens. Among the fifty states with fifty different state tax regimes, Delaware distinguishes itself by targeting certain types of corporations with certain types of activities or assets for the benefit of zero corporate income tax. Entities incorporated in Delaware but not doing business in Delaware, insurance companies, and passive holding companies, including intellectual property holding companies, enjoy no income tax. They are also completely shielded from public scrutiny.

In the age of technology where intellectual property assets are key assets that generate corporate income, Delaware widely opens its door for the incorporation of companies to park their intellectual property assets beyond the reach of sister states. As the intellectual property holding companies are in Delaware, sister states cannot impose tax on these entities because they neither incur payroll taxes nor occupy offices in those jurisdictions. The Delaware intellectual property holding companies merely license their intellectual property assets to be used by the operating corporations located within and subject to taxation in those jurisdictions. That leaves intact Delaware's status as the onshore tax haven, attracting entities to incorporate their wholly-owned subsidiaries to hold intellectual property assets in Delaware.

#### IV. BENEFITS OF INTELLECTUAL PROPERTY HOLDING COMPANY TO DELAWARE

Why did Delaware race to the bottom in 1984 by exempting corporations whose intellectual property assets are core to their business from paying Delaware's corporate income tax rate of 8.7%?<sup>129</sup> What are the trade-offs or benefits to Delaware for providing corporate income tax exemption to corporations?

Delaware is diminutive in both size and population. Among all fifty states, its population consists of 975,033 or 45th in ranking.<sup>130</sup> Economically, Delaware has been a poorly performing state.<sup>131</sup> It suffers from a struggling public school system where two-thirds of the eighth-graders are "functionally illiterate in reading and math" and a majority of graduating seniors are deemed "not 'college ready.'"<sup>132</sup> Major companies like DuPont and AstraZeneca downsized there.<sup>133</sup> As the Tax Foundation ranks Delaware 50th on

127. See Re: FOIA Request to the Delaware Division of Revenue, *supra* note 18, at \*1 (stating that "the so-called 'tax secrecy statute,' prohibits the Division from providing the requested Applications or any information disclosed" in connection with Victoria Secret's, the Sherwin Williams Company's, and Gore Enterprise Holdings' Application from corporation income tax).

128. See *id.* at \*3 (denying FOIA request).

129. Lindsey et al., *supra* note 94 ("The Delaware corporate tax rate is 8.7%, higher than the average state corporate tax rate across the United States.").

130. *US States—Ranked by Population*, WORLD POPULATION REV., <https://worldpopulationreview.com/states> (last visited Feb. 10, 2021).

131. John Stapleford & Dave Stevenson, *Why Delaware's Economy Will Remain Constrained*, DEL. BUS. TIMES (Aug. 7, 2019), <https://www.delawarebusinesstimes.com/economycaesarrodneview/> ("Over the past 10 years, using the standard measures—e.g., output, employment, personal income, annual wages and median household income—the Delaware economy has been performing poorly. Even Delaware's low unemployment rate, the 11th-lowest among the states, is due primarily to slow growth in the state's labor force.").

132. *Id.*

133. *Id.*

business tax rates—which are the combination of corporate tax and Gross Receipts Tax on sales—companies are not physically moving to Delaware.<sup>134</sup> With poor economic performance, Delaware depends on fees generated from corporations who are not operating in Delaware.

The wholly-owned subsidiaries functioning as intellectual property holding companies are the ideal entities furnishing Delaware the necessary fees. Overall, the “franchise taxes and other fees from subsidiary incorporations” generated between \$600 and \$700 million or 18–22% of Delaware’s annual revenue.<sup>135</sup> By statutorily categorizing these subsidiaries as passive investment companies, Delaware takes advantage of the grim reality that Delaware is not a state where corporations will relocate to engage in activities for the creation of intellectual property assets.<sup>136</sup> Since Delaware is not the home of intellectual property creation, Delaware instead becomes the center of intellectual property holding by providing the tax loophole for corporations to create tax shelters through the use of intellectual property holding companies to reap the zero corporate income tax rate.<sup>137</sup> By recognizing the importance of intellectual property assets to corporations, Delaware beats other states in legislating the passive intellectual property holding and reaping the benefits from the incorporation filing fees and annual franchise taxes.<sup>138</sup>

Generally, these passive entities often share an office address with many other

134. *Id.*

135. Lindsey et al., *supra* note 94; see also Francis Pileggi, *Why Delaware Courts Are America’s Most Important to Businesses*, DEL. CORP. & COM. LITIG. BLOG (Sept. 2, 2007), <https://www.delawarelitigation.com/2007/09/articles/commentary/why-delaware-courts-are-americas-most-important-to-businesses/> [<https://perma.cc/KZA6-4N58>] (describing the importance of Delaware law for the country and the revenue it generates for the state).

136. Delaware’s primary economic sectors are health care and social assistance; administrative and waste services; finance and insurance; retail trade; professional, scientific and technical services; accommodation and food services; manufacturing; educational services; construction; and arts, entertainment and recreation. The finance and insurance sector is the most significant; it contributes 31% to the state’s GDP. See generally DEL. DEP’T OF LAB., DELAWARE ANNUAL ECONOMIC REPORT 2017 (2018), <https://laborfiles.delaware.gov/main/lmi/publications/Delaware%20Annual%20Economic%20Report%202017.pdf> [<https://perma.cc/3TM7-L4EP>] (compiling and presenting Delaware’s economic data for 2017).

137. See generally Leslie Wayne, *How Delaware Thrives as a Corporate Tax Haven*, N.Y. TIMES (June 30, 2012), <https://www.nytimes.com/2012/07/01/business/how-delaware-thrives-as-a-corporate-tax-haven.html> [<https://perma.cc/CY77-Q8X8>] (describing how Delaware serves as a tax heaven and business friendly state); MICHAEL MAZEROV, CTR. ON BUDGET & POL’Y PRIORITIES, STATE CORPORATE TAX SHELTERS AND THE NEED FOR COMBINED REPORTING (Oct. 26, 2007), <https://www.cbpp.org/sites/default/files/atoms/files/10-26-07sfp.pdf> [<https://perma.cc/Z5TG-EPKK>] (discussing Delaware’s tax avoidance strategies and the need for states to adopt combined reporting).

138. Brette Sember, *Incorporating in Delaware: Advantages and Disadvantages*, LEGALZOOM (Dec. 14, 2020), <https://www.legalzoom.com/articles/incorporating-in-delaware-advantages-and-disadvantages> [<https://perma.cc/M5XK-QMC2>] (noting that Delaware corporations must pay an annual franchise tax based on the value of the corporation’s shares); see also *Delaware Corporate Franchise Taxes*, A REGISTERED AGENT, INC., <https://www.delawareregisteredagent.com/how-to/file-delaware-corporate-franchise-taxes> [<https://perma.cc/5NEM-TF6X>] (describing the steps required to file Delaware’s franchise tax); *How Much Does It Cost to Form a Delaware LLC?*, INCNOW.COM, <https://www.incnw.com/delaware-llc/fees/> (last visited Feb. 4, 2021) (providing the costs of filing fee, certificate of good standing, annual franchise tax, and Delaware registered agent fee); James Giacobelli, *The Benefits and Pitfalls of Incorporating in Delaware, Nevada and Wyoming*, FORBES (Mar. 4, 2019), <https://www.forbes.com/sites/forbesnycouncil/2019/03/04/the-benefits-and-pitfalls-of-incorporating-in-delaware-nevada-and-wyoming/#58e49adc5839> [<https://perma.cc/FNL4-B5F5>] (describing the pros and cons of incorporating in Delaware).

companies.<sup>139</sup> Nevertheless, they provide employment to lawyers, paralegals, accountants and office managers.<sup>140</sup> Delaware ensures the jobs of these professionals by requiring that any entity who wishes to incorporate in Delaware must hire a registered agent with an actual address in Delaware to receive documents on behalf of the corporation.<sup>141</sup> In fact, a cottage industry formed in Delaware devoted to providing “registered agent” services,<sup>142</sup> and the government maintains a list of Delaware registered agents in alphabetical order as “a convenience to our website users.”<sup>143</sup>

Additionally, Delaware obtains another layer of benefits from having the types of jobs related to intellectual property holding companies. The benefits stem from the fact that these jobs can generate higher income, allowing a higher level of spending and better payroll tax base for Delaware.<sup>144</sup> Also, these jobs are not associated with polluting the environment.<sup>145</sup> Overall, passive intellectual property holding companies significantly

139. *Corporation Trust Center: A Drab Two-Story Office Space in Delaware Is a Hidden Tax Haven for Hillary Clinton, Donald Trump, and Over Half the Fortune 500 Companies*, ATLAS OBSCURA, <https://www.atlasobscura.com/places/corporation-trust-center> [<https://perma.cc/7JCV-JY2N>] (“15% of all public corporations in the United States use the exact same building as their tax haven”).

140. Employment in the finance, insurance and legal sectors are typically robust in Delaware, and they contribute significantly to the State’s GDP. DEL. DEP’T OF LAB., *supra* note 136.

141. Delaware professionals take advantage of the law by serving as registered agents for passive holding companies. See *Delaware Registered Agent*, NW. REGISTERED AGENT, <https://www.northwestregisteredagent.com/delaware-registered-agent.html> [<https://perma.cc/RH4B-WNV7>] (“Your Delaware registered agent serves as your business’ official point of contact with the state and the legal world. Delaware state law (8 Del. C. 1953, § 131) requires that any business entity formed with the Delaware Division of Corporations has a registered agent. This law is built around the idea of due process and that lawsuits can’t move forward in court unless the parties have been properly notified.”); *What Is a Delaware Registered Agent?*, HARV. BUS. SERVS., INC., <https://www.delawareinc.com/before-forming-your-company/what-is-a-delaware-registered-agent/> [<https://perma.cc/P6MF-36BU>] (“There are several reasons why corporations and LLCs need Registered Agents, the most important of which is that it is required by law. The Delaware Code states that ‘every corporation shall have and maintain in Delaware a Registered Agent,’ per section 132(a) of the Delaware General Corporation Law and section 18-104 of the Delaware LLC Act. In addition to adhering to Delaware law, having a Registered Agent allows you to focus on more important aspects of your business. As your Registered Agent, we will remind you when the annual Delaware Franchise Tax is due and, for a small service fee, assist you in filing it punctually.”).

142. See Wayne, *supra* note 137 (naming 1209 Orange Street, Wilmington, Delaware as the address of 285,000 separate businesses).

143. *List of Delaware Registered Agents*, DEL. DIV. OF CORP., <https://corp.delaware.gov/agents/> [<https://perma.cc/M26U-MR47>] (“This list of Registered Agents is provided solely as a convenience to our website users. The State of Delaware makes no representations or warranties regarding the agents on this list. Registered Agents are not regulated by the State of Delaware. The legal requirements to be a Registered Agent in Delaware are to maintain a street address and office located in Delaware and be open during normal business hours for the purpose of accepting service of process according to 8 Del. C. § 132. Consumers are encouraged to exercise due diligence in researching the Registered Agent prior to selecting them for representation. It is incumbent upon the consumer to contact the Registered Agent prior to filing.”).

144. See DEL. DEP’T OF LAB., *supra* note 136 (listing “management of companies and enterprises” as the sector with the highest pay).

145. Manufacturing jobs are typically the type of employment associated with environmental pollution concerns. Manufacturing constitutes a very small segment of the Delaware economy. *Id.*; FED. RES. BANK OF CLEVE., MANUFACTURING AND POLLUTION: TRENDS IN OLD AND NEW INDUSTRIAL CENTERS (2011), <https://www.clevelandfed.org/~media/content/newsroom%20and%20events/publications/a%20look%20behind%20the%20numbers/alb%2020111107%20manufacturing%20and%20pollution%20trends%20in%20industrial%20centers/alb%2020111107%20manufacturing%20and%20pollution%20trends%20in%20industrial%20c>



support Delaware's overall economy.

As mentioned earlier, in recent years, Delaware continued benefitting from another set of activities relating to the intellectual property companies incorporated in the state. Companies select Delaware as the forum for patent litigation responding to a shift in patent venue law.<sup>146</sup> Because many companies are incorporated in Delaware to hold their intellectual property assets, plaintiffs can easily meet the patent venue requirement by filing the patent infringement actions in Delaware.<sup>147</sup> Because the Supreme Court's ruling in *TC Heartland* dictates that patent venue is where the defendant is incorporated, plaintiffs file their cases in Delaware when they discover that the defendants have incorporated in Delaware.<sup>148</sup> Consequently, filing patent cases in Delaware does not create an ambush on defendants as Delaware is now the "defendant's choice of venue."<sup>149</sup>

As a result, becoming a district for patent litigation's rocket docket, Delaware stands to realize a list of benefits, including spending incurred by out-of-state patent firms in connection with Delaware lodging, dining, and office space.<sup>150</sup> Also, patent litigants must rely on Delaware law firms to serve as local counsel.<sup>151</sup> Witnessing the way the patent litigation docket impacted the local economy in the Eastern District of Texas, Delaware,

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enters%20pdf.pdf?la=en [https://perma.cc/9G7X-ATAC]. Public Affairs UC Berkeley, *Environmental Regulations Drove Steep Declines in U.S. Factory Pollution*, BERKELEY NEWS (Aug. 9, 2018), <https://news.berkeley.edu/2018/08/09/environmental-regulations-drove-steep-declines-in-u-s-factory-pollution/> [https://perma.cc/97RH-QEMA].

146. Some scholars have argued that the practices of the U.S. District Court for the Eastern District of Texas ("EDTX") are too expensive for patent litigations, and patent venue reform is one of the key areas to control the unwarranted cost and to deter abusive patent suits. Brian J. Love & James Yoon, *Predictably Expensive: A Critical Look at Patent Litigation in the Eastern District of Texas*, 20 STAN. TECH. L. REV. 1, 22–23 (2017) (stating that plaintiffs' advantages related to the relative timing of discovery deadlines, transfer decisions, and claim construction make patent litigations in the EDTX expensive for accused infringers to defend patent suits filed in that venue). The alternative is Delaware. See generally Shawn P. Miller, *Venue One Year After TC Heartland: An Early Empirical Assessment of the Major Changes in Patent Filing*, 52 AKRON L. REV. 763, 779–80 (2018) (demonstrating patent cases filing among the top district courts and showing Delaware leads other venues).

147. See generally *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017) (reversing the long-standing venue rule that allowed patent owners to sue multistate corporations in almost any district court). Under *TC Heartland*, the general venue statute does not modify the patent venue statute, and that means for purposes of patent venue under 28 U.S.C. § 1400(b), a domestic corporate defendant only resides in its state of incorporation. *Id.*

148. See Colleen V. Chien & Michael Risch, *Recalibrating Patent Venue*, 77 MD. L. REV. 47, 75 (2017) (explaining that the Supreme Court rectified the three decades of permissive patent venue, and now "corporations could only be sued where they are incorporated or have a regular place of business (and infringe)").

149. See generally Ofer Eldar & Neel U. Sukhatme, *Will Delaware Be Different? An Empirical Study of TC Heartland and the Shift to Defendant Choice of Venue*, 104 CORNELL L. REV. 101 (2018) (positing that Delaware will be better than the Eastern District of Texas in handling patent litigation and curbing related abuses).

150. Leslie Pappas, *The Road More Traveled: Patent Attorneys Head to Delaware*, BLOOMBERG L. (Jan. 29, 2018, 2:25 PM), <https://news.bloomberglaw.com/business-and-practice/the-road-more-traveled-patent-attorneys-head-to-delaware> [https://perma.cc/5GGT-CXXE] (reporting that patent infringement cases filed "in Delaware's federal court, where two-thirds of the Fortune 500 are incorporated, have surged. But law firms were ready for the shift . . . Many firms already had Delaware offices or well-established relationships with local counsel, and patent attorneys were already used to teaming up on cases and flying all over the country.>").

151. Matt Chiappardi, *Delaware Primed for IP Case Bump Despite Bench Vacancies*, LAW360 (May 22, 2017, 9:07 PM), <https://www.law360.com/articles/927028/delaware-primed-for-ip-case-bump-despite-bench-vacancies> [https://perma.cc/FEW9-V97W] (stating that Delaware lawyers are ready to handle the new cases); Edward M. McNally, *What to Expect from Your Delaware Counsel*, MORRIS JAMES LLP (Mar. 6, 2013), <https://www.morrisjames.com/newsroom-articles-165.html> [https://perma.cc/LLR4-Q3GY].

as the new patent litigation venue, stands to gain similar benefits.<sup>152</sup> Delaware is able to replace the EDTX because the Supreme Court recently altered the 30-year-old law on patent venue.<sup>153</sup> As the home of many intellectual property holding companies, Delaware comprises the legitimate forum for patent litigation.<sup>154</sup>

#### V. DELAWARE AND THE PROMOTION OF CORPORATE IRRESPONSIBILITY

Delaware's 1984 legislation of zero tax rate for intellectual property holding companies possesses a dark side. Delaware facilitates corporations' engagement in aggressive tax avoidance schemes and abandonment of their corporate social responsibility.

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152. Bruce Berman, *For Samsung Charity Begins at "Home," Marshall, Texas*, IPCLOSEUP (Feb. 25, 2015), <https://ipcloseup.com/2015/02/25/for-samsung-charity-begins-at-home-marshall-texas/> [https://perma.cc/W5FQ-RTZ8] (noting that Samsung, as a patent litigant in Marshall and Tyler divisions in the Eastern District of Texas, sponsors the ice skating rink in front of the Marshall's historic court house and frequently provides scholarships, field trips, and computer monitors to the high school); Melissa Repko, *How Patent Suits Shaped a Small East Texas Town Before Supreme Court's Ruling*, DALL. MORNING NEWS (May 23, 2017, 6:25 PM), <https://www.dallasnews.com/business/technology/2017/05/23/how-patent-suits-shaped-a-small-east-texas-town-before-supreme-court-s-ruling/> [https://perma.cc/A53N-QQHV]. Delaware can imagine what happened to Marshall as a patent docket:

Cars fill up the courthouse parking lot and more are Lexuses instead of pickups. Businesspeople in suits join locals at popular lunch spots. And at the town's only shoe shop, steel-toed boots are pushed aside so workers can polish pairs of black and brown loafers that arrive all at once. Marshall may be a small town in far East Texas, but in the world of patent litigation, it has been a giant. The Eastern District of Texas—which includes a federal courthouse in Marshall—draws more patent cases than any of the 93 other districts in the U.S. Of all patent cases in the country, 1 in 4 were assigned to a single Marshall judge in recent years. . . . As the patent docket fades away, so will a chunk of the Marshall's economy. Fewer attorneys will pay to stay in the hotels clustered near Interstate 20, put catered meals on their expense accounts, and spend thousands on printers and office furniture to be delivered by the truckload to rented "war rooms."

*Id.*

153. Lauren Rucinski, *Supreme Court Restricts Patent Infringement Venue, Upsets Eastern District of Texas "Rocket Docket"*, KEAN MILLER LLP (June 13, 2017), <https://www.intellectualproperty.law/2017/06/supreme-court-restricts-patent-infringement-venue-upsets-eastern-district-texas-rocket-docket/> [https://perma.cc/P4Y4-6B36] ("The *TC Heartland* effectively nixes the 'patent litigation capital' title in Marshall. The definition of a corporate residence is limited to the jurisdiction of incorporation and the general venue statute does not expand jurisdiction under the patent venue statute."); John G. Browning, *Is the Rocket Docket Crashing?*, D MAG. (Oct. 2017), <https://www.dmagazine.com/publications/d-ceo/2017/october/eastern-district-texas-patent-cases/> [https://perma.cc/8Z67-LPMZ] (stating that the decision "leaves patent owners with two venue options for suing U.S. companies for infringement: the defendant's state of incorporation, or in a judicial district where the defendant has allegedly committed infringing acts and in which it has a regular and established place of business."); Gregory Parker & Andrew J. Rittenhouse, *The Profound Effect of TC Heartland on Patent Litigation*, L.J. NEWSLS. (Jan. 2018), <http://www.lawjournalnewsletters.com/2018/01/01/the-profound-effect-of-tc-heartland-on-patent-litigation/?sreturn=20200010162959> [https://perma.cc/2XQF-B95V].

154. Davis, *supra* note 5 (stating that patent cases "have migrated to Delaware in the months since because most companies are incorporated there," and that patent filings in Texas for 2018 have dropped "80 percent drop from" 2015, "while Delaware suits made up 24 percent of new filings"). See also generally Fabio E. Marino & Teri H.P. Nguyen, *Has Delaware Become the "New" Eastern District of Texas? The Unforeseen Consequences of the AIA*, 30 SANTA CLARA HIGH TECH. L.J. 527 (2014) (asserting that the anti-joinder provision of the Leahy-Smith America Invents Act (AIA) is responsible for the shift in patent litigation venue to Delaware).

### A. Corporate Taxation and Corporate Social Responsibility

Recently, a shift in corporate tax scholarship occurred to focus on tax and corporate social responsibility, as discussed and reported elsewhere in much greater depth.<sup>155</sup> Succinctly, some tax scholars and others have focused their attentions to corporate international tax avoidance strategies and corporate social responsibility (CSR).<sup>156</sup> They assert that corporate international tax avoidance schemes violate CSR obligations.<sup>157</sup>

In corporate investing, CSR is now a familiar, self-regulating business model, as seen through Investopedia's definition. The CSR model helps "a company be socially accountable to itself, its shareholders and the public."<sup>158</sup> Essentially, in practicing

155. E.g., Jasmine M. Fisher, *Fairer Shores: Tax Havens, Tax Avoidance, and Corporate Social Responsibility*, 94 B.U. L. REV. 337, 342 (2014); Hans Gribnau, *Corporate Social Responsibility and Tax Planning: Not by Rules Alone*, 24 SOC. & LEGAL STUD. 225 (2015); Doron Narotzki, *Corporate Social Responsibility and Taxation: The Next Step of the Evolution*, 16 HOUS. BUS. & TAX L.J. 167, 189 (2016); Omri Marian, *Is All Corporate Tax Planning Good for Shareholders?*, 52 U.C. DAVIS L. REV. 905 (2018) (challenging the assumption that planning for lower corporate tax burden enhances shareholder value); Michael J. Vargas, *In Defense of E. Merrick Dodd: Corporate Social Responsibility in Modern Corporate Law and Investment Strategy*, 73 BUS. LAW. 337 (2018); Jeyapalan Kasipillai & Shanthi Rachagan, *Tax Incentives and Corporate Social Responsibility*, (presentation at the International Congress on Innovation and Regional Economic Development at the University of Science and Technology of China, Dec. 2–4, 2012), <https://perma.cc/3JJR-SQ3U> (explaining various tax incentives for corporate social responsibility in countries outside the United States); Margaret Ryznar & Karen Woody, *A Framework on Mandating Versus Incentivizing Corporate Social Responsibility*, 98 MARQ. L. REV. 1667, 1680–81 (2015). Outside academic circles, the focus on corporate tax also evolves around "fair" share and corporate responsibility. See, e.g., Thomas Scheiwiller & Susan Symons, *Corporate Responsibility and Paying Tax, ORG. FOR ECON. COOP. & DEV.*, [http://oecdobserver.org/news/archivestory.php/aid/3132/Corporate\\_responsibility\\_and\\_paying\\_tax.html](http://oecdobserver.org/news/archivestory.php/aid/3132/Corporate_responsibility_and_paying_tax.html) [<https://perma.cc/4BXY-V5UT>] ("If we look back 20 years or so, we can see how aspects of corporate responsibility have developed and become embedded in the mainstream. . . . Today we see that paying tax is already being looked at as an element of corporate responsibility. . . . And some corporations are taking leadership positions and treating tax as an element of their approach to corporate responsibility."); Jonathan Webb, *Tax as the Next CSR Risk: The Subject No One Is Talking About*, FORBES (Apr. 18, 2016), <https://www.forbes.com/sites/jwebb/2016/04/18/tax-as-the-next-csr-risk-the-subject-no-one-is-taking-about/#1ddd525c49> [<https://perma.cc/RH2F-LJWJ>] (reporting that with tax dodging, corporations must "justify their unjustifiably convoluted corporate structures, deliberately designed to minimise the tax burden. Staying quiet on the issue will not work: companies must embrace the debate and look to design financial structures which are considered ethical and not just efficient.").

156. See, e.g., Reuven S. Avi-Yonah, *Corporate Taxation and Corporate Social Responsibility*, 11 N.Y.U. J.L. & BUS. 1 (2014) (evaluating the responsibilities of U.S. corporations toward their shareholders in regard to taxation); Munisami, *supra* note 19 (discussing how CSR principles should influence taxing strategy).

157. See generally Avi-Yonah, *supra* note 156 (illustrating tax avoidance scheme employed by multinational corporations); Munisami, *supra* note 19 (showing the intersection of CSR and taxation schemes); see also Eric C. Chaffee & Karie Davis-Nozemack, *Corporate Tax Avoidance and Honoring the Fiduciary Duties Owed to the Corporation and Its Stockholders*, 58 B.C. L. REV. 1425, 1427–32 (2017) (positing that corporate social responsibility should be employed "to protect society from the damage that tax avoidance can create" and that "while some minimal amount of tax avoidance may be acceptable, very aggressive forms of tax avoidance should be avoided"); Daniel T. Ostas & Axel Hilling, *Global Tax Shelters, the Ethics of Interpretation, and the Need for a Pragmatic Jurisprudence*, 53 AM. BUS. L.J. 745, 746 (2016) (encouraging "pragmatic jurisprudence . . . with which to invigorate traditional antitax avoidance (ATA) doctrines in the United States and to supplement ATA initiatives worldwide.").

158. Jason Fernando, *Corporate Social Responsibility (CSR)*, INVESTOPEdia (Nov. 17, 2020), <https://www.investopedia.com/terms/c/corp-social-responsibility.asp>. See Munisami, *supra* note 19, at 70–71 (tracing the history of CSR). Scholars differ in their definition of CSR due to conflict in ideological views. *Id.* at

corporate social responsibility, companies behave as corporate citizens and are conscious of “the kind of impact they are having on all aspects of society, including economic, social, and environmental.”<sup>159</sup> Therefore, companies are mindful in their ordinary course of business, ensuring enhancement of “society and the environment, instead of contributing negatively to them.”<sup>160</sup>

In general, three views of the corporation emerge. These include the artificial entity, the real entity, and the aggregate.<sup>161</sup> The three views consist of different implications on CSR and corporate tax.<sup>162</sup> Under the artificial entity doctrine, the corporation is the entity of the state and therefore must meet its duties required by the state.<sup>163</sup> The state cannot provide all the social welfare needs without tax receipts from entities created with authorization from the state.<sup>164</sup> The corporation must pay corporate tax as part of its CSR obligations to the state.<sup>165</sup>

Under the real entity view, a corporation operates as an entity separate from both the state and its shareholders. Therefore, it functions like an individual without obligation to assist other citizens. If the corporation’s managers chose to engage in CSR, such is their prerogative. With respect to paying taxes, the corporation pays them as would any individual. However, the tax-paying individual in the “real entity” view does not engage in “over-aggressive tax planning in an attempt to minimize its tax obligations.”<sup>166</sup>

In the aggregate or nexus-of-contract view, the corporation managers execute the primary purpose of maximizing shareholder profits by minimizing corporate taxes by any means necessary. Accordingly, CSR is unacceptable because it functions as taxes on

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70. See also ANDREW CRANE ET AL., *THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY* 3, 6 (2008) (stating that CSR is “an ideological exercise in describing how the political economy of society should be organized to restraint corporate power.”). Outside the United States, the European Union Commission has defined CSR as the “responsibility of enterprises for their impacts on society.” EUROCOMMERCE, A RENEWED EU STRATEGY 2011–2014 FOR CORPORATE SOCIAL RESPONSIBILITY 3 (2012), [https://www.eurocommerce.eu/media/7237/position-csr-renewed\\_csr\\_strategy\\_2011-14-07.03.2012.pdf](https://www.eurocommerce.eu/media/7237/position-csr-renewed_csr_strategy_2011-14-07.03.2012.pdf); COMM. EUR. CMTYS., *PROMOTING A EUROPEAN FRAMEWORK FOR CORPORATE SOCIAL RESPONSIBILITY* 3 (2001), [https://ec.europa.eu/commission/presscorner/api/files/document/print/en/doc\\_01\\_9/DOC\\_01\\_9\\_EN.pdf](https://ec.europa.eu/commission/presscorner/api/files/document/print/en/doc_01_9/DOC_01_9_EN.pdf) [<https://perma.cc/XQA6-JE9Q>] (“By stating their social responsibility and voluntarily taking on commitments which go beyond common regulatory and conventional requirements, which they would have to respect in any case, companies endeavour to raise the standards of social development, environmental protection, and respect of fundamental rights and embrace an open governance, reconciling interests of various stakeholders in an overall approach of quality and sustainability.”).

159. Fernando, *supra* note 158.

160. *Id.* As a concept, CSR enjoys a long history but has been a subject for debates in the last 50 years. Munisami, *supra* note 19, at 70. See also Eric C. Chaffee, *The Origins of Corporate Social Responsibility*, 85 U. CIN. L. REV. 353, 361–68 (2017) (describing the different theories of how corporations developed). See generally Archie B. Carroll, *Corporate Social Responsibility: Evolution of a Definitional Construct*, 38 BUS. & SOC’Y 268 (1999) (tracing the origin of corporate social responsibility).

161. Eric C. Chaffee, *Collaboration Theory and Corporate Tax Avoidance*, 76 WASH. & LEE L. REV. 93, 131–42 (2019) (describing the three models of the corporation).

162. Professor Avi-Yonah has discussed in great depth corporate taxation and corporate social responsibility. Due to space constraint, for a brief discussion on the three views of corporation and their implications for CSR and the corporate tax, see Avi-Yonah, *supra* note 156, at 17–28.

163. *Id.* at 12–13.

164. *Id.*

165. *Id.*

166. *Id.* at 13.

shareholders without their consent.<sup>167</sup> Professor Reuven S. Avi-Yonah, however, has persuasively argued that multinational corporations' aggressive tax avoidance behavior like corporate inversions appear inconsistent with all three views of the corporation,<sup>168</sup> asserting corporations should "not be permitted to engage in strategic behavior designed solely to minimize its taxes."<sup>169</sup> Likewise, the European Commission has asserted that aggressive tax planning is "contrary to the principles" of CSR and advocated that EU Member States to take concrete steps to address the problem.<sup>170</sup>

Contributing to the existing literature, this Section focuses not on the corporation but the state's behavior which encourages corporations to abandon their CSR by engaging in aggressive tax avoidance schemes.<sup>171</sup> Moreover, this Section aims at Delaware, the leader and originator of the tax haven for intellectual property assets. Instead of devoting itself to the international tax avoidance scheme, this Section directs attention to the long and systematic domestic problem originating in Delaware.<sup>172</sup>

### B. The Dark Side of Delaware

Delaware constantly praises itself as "one of the nation's smallest and least populous states" but boasts it has "captured 75% of all U.S. initial public offerings since January 2003" and "over 63% of Fortune 500 [have] incorporated" in the jurisdiction.<sup>173</sup> On the sunny side of the statistics, Delaware is cherished as the epicenter of corporations and

167. Avi-Yonah, *supra* note 156, at 13.

168. *Id.* at 27–28.

[S]trategic tax behavior seems to be inconsistent with *any* view of the corporation. Under the artificial entity view, it undermines the constitutive relationship between the corporation and the state. Under the real entity view, it runs contrary to the normal obligation of citizens to comply with the law even in the absence of effective enforcement. And under the aggregate view, it is different from other forms of shareholder profit maximization, in that it weakens the ability of the state to carry out those functions that the corporation is barred from pursuing. It would thus seem that whatever view management takes of its relationship to the shareholders, to society, and to the state, it is never justified in pursuing tax strategies that have as their only goal minimizing the corporation's tax payments to the government.

*Id.* at 28

169. *Id.* Other scholars have also advocated for similar position. Chaffee & Davis-Nozemack, *supra* note 157.

170. RICHARD HAMMER ET AL., INTERNATIONAL TRANSFER PRICING: OECD GUIDELINES ¶ 2.08 (2020), Westlaw ITPOECD. Cf. Adam T. Sanderson, Note, *Overstepping Its Boundaries: The European Commission Followed the OECD's Influence but Went One Step Too Far*, 45 SYRACUSE J. INT'L L. & COM. 275 (2018) (arguing that the Commission went too far in addressing multinational corporate tax avoidance).

171. The literature on tax avoidance is devoid of the history of intellectual property-based tax avoidance. E.g., Steven A. Bank, *When Did Tax Avoidance Become Respectable?*, 71 TAX L. REV. 123 (2017).

172. Tax avoidance legal scholarship concentrates on multinational corporation and offshore tax quest for lower corporate tax burden. E.g., Sara Dillon, *Tax Avoidance, Revenue Starvation and the Age of the Multinational Corporation*, 50 INT'L LAW. 275 (2017); David C. Elkins, *The Merits of Tax Competition in a Globalized Economy*, 91 IND. L.J. 905 (2016); Wayne Wood, Note, *The Cost of Progress: Ensuring the Tax Deductibility of International Corporate Social Responsibility Initiatives*, 4 GLOBAL BUS. L. REV. 1 (2013).

173. William B. Chandler III & Anthony A. Rickey, *Manufacturing Mystery: A Response to Professors Carney and Shepherd's "The Mystery of Delaware Law's Continuing Success"*, 2009 U. ILL. L. REV. 95, 99 (2009) ("As of April 2008, over 63% of Fortune 500 companies were incorporated in Delaware, and the state had captured about 75% of all U.S. initial public offerings since January 2003, despite being one of the nation's smallest and least populous states.").

corporate law. Unfortunately, a dark side surfaces underneath the veneer.

Chancellor William B. Chandler, Delaware Court of Chancery, proclaims that with the corporate filing fees and franchise taxes, Delaware can afford not to impose “other taxes” on corporations.<sup>174</sup> Delaware believes it is constitutionally entitled to devise its own tax policy to attract corporations to incorporate in Delaware.<sup>175</sup> Hence, the time has come to take a closer look at Delaware’s tax policy.

While Delaware can comfortably rely on the fees and franchise taxes for its general funds, Delaware attracts negative attention as an onshore tax haven.<sup>176</sup> Specifically, Delaware creates a zone of zero tax rate for multistate corporations with intellectual property assets held in wholly-owned subsidiaries. By treating multistate corporations with intellectual property assets favorably, Delaware encourages multistate corporations to separate *any* intellectual property into a holding company and create a scheme of assignment and license back between parents and subsidiary corporations solely for the purpose of avoiding taxes in sister states. For example, VFJ Ventures, Inc. formed a wholly-owned subsidiary company to hold only the trademark “Lee” for jeans. The Lee Company is comprised of only four employees and no trademark lawyer. However, in a taxable year, the Lee Company collects \$73 million in trademark royalty income paid by the parent company who originally owned the Lee trademark.<sup>177</sup> Likewise, VFJ Ventures, Inc. created another wholly-owned subsidiary to hold only the trademark “Wrangler” for jeans. The Wrangler Company hires no employees and owns no real property.<sup>178</sup> Yet, the Wrangler Company received \$69 million in royalty income from the parent company.<sup>179</sup> In other words, under Delaware’s zero tax rate for intellectual property holding companies, the royalty income from Lee and Wrangler jeans remains tax-free under the exemption from corporate income tax. As these intellectual property holding companies are not paying corporate taxes on the royalty income under Delaware law, the parent companies seek to deduct the royalty payments under federal tax causing “tax losses resulting from income being shifted away from states in which” the intellectual property is actually in use and “was generated.”<sup>180</sup>

Some sister states took action in response to Delaware’s tax policy by demanding multistate corporations to add back what they avoided to pay under Delaware scheme. However, not all states enacted the add-back statute. Delaware thus continues its sunny side of being the innovative state for all things corporate while disguising its dark side as onshore tax haven under constitutional right rhetoric.

Delaware understands that in the technology, information, and knowledge-based economy, intellectual property assets generate large income from licensing arrangements. But Delaware intentionally forgoes taxing the corporate income generated from the

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174. *Id.* (“Delaware has every incentive to maintain its advantage in this area; the franchise taxes and chartering fees procured from this dominance constitute a significant portion of the state’s general fund revenue and allow the General Assembly to avoid imposing other taxes.”).

175. Brief of the State of Delaware as Amicus Curiae in Support of Petitioner, VFJ Ventures, Inc. v. Surtees, 556 U.S. 1207 (2009) (No. 08-916), 2009 WL 481241, at \*5.

176. *Id.* at \*7.

177. Brief of the Amicus Curiae Multistate Tax Commission in Support of Respondents, *Ex parte* VFJ Ventures, Inc. v. VFJ Ventures, Inc., 8 So.3d 983 (Ala. 2008) (No. 1070718), 2008 WL 6486437, at \*11.

178. *Id.*

179. *Id.*

180. *Id.* at \*12.

licensing of intellectual property assets received by multistate corporations. Nevertheless, Delaware calculatedly encourages a tax avoidance behavior: multistate corporations to form multiple wholly-owned subsidiary corporations (think more fees) to hold intellectual property assets separately in Delaware.

### C. The Secrecy

One of the main characteristics of a tax haven is secrecy. Delaware's secrecy protects tax avoidance schemes promoting corporate irresponsibility. Illustratively, on November 3, 2015, Kailyn Collyer, my research assistant, requested documents from the Delaware Division of Revenue ("Division") through the Freedom of Information Act relating to the applications for exemption from corporate income tax filed by Victoria Secret, Sherwin Williams, and Gore Enterprise Holdings.<sup>181</sup> The Division refused to provide any information, citing Delaware's "tax secrecy statute."<sup>182</sup> Moreover, the Division declined to even confirm whether the three corporations filed the applications.<sup>183</sup> The Division relied on Section 368 of Title 30 for the prohibition.<sup>184</sup> Specifically, the Division relied on the following portion of the statute: "it shall be unlawful for any officer or employee of the Department of Finance . . . to disclose or make known to any person in any manner the amount of income or any particulars set forth or disclosed in any report or return required under this title . . ." <sup>185</sup>

Accordingly, the Division argued that the applications for exemption from corporate income tax, Form 1902-AP, are tax "reports" and "returns."<sup>186</sup> The Delaware Attorney General subsequently issued its opinion affirming the Division's argument.<sup>187</sup> The Attorney General also reiterated the "Division's long-held policy" states that the Delaware statute "prohibits the Division" from disclosing both the application's content and the application existence.<sup>188</sup>

Form 1902-AP lends support to neither the Attorney General nor the Division. The form merely asks the name and address of the applicant, name and address of applicant's employees in Delaware, and name and address of any owner with more than ten percent of the stock of the corporation.<sup>189</sup> Also, the form requires the applicant to provide the list of its intellectual property assets and sources of income.<sup>190</sup> The form does not ask for the amount of income. The next set of four questions for checking yes or no boxes relates to corporate entity and services. The form is a total of one page.<sup>191</sup> In other words, the form is designed to be simple and easy for corporations to fill out and submit to Delaware. Nothing on Form 1902-AP discloses the actual income amount to betray a tax report or

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181. Re: FOIA Request to the Del. Division of Revenue, *supra* note 18, at \*1.

182. *Id.*

183. *Id.* at \*1, n.1.

184. *Id.*

185. *Id.* at \*2 (emphasis removed).

186. Re: FOIA Request to the Del. Division of Revenue, *supra* note 18, at \*1.

187. *Id.*

188. *Id.* at \*1, n.1.

189. DEL. DIV. OF REVENUE., FORM 1902-AP, APPLICATION FOR EXEMPTION FROM CORPORATION INCOME TAX (2012), [https://revenuefiles.delaware.gov/docs/12\\_1902.pdf](https://revenuefiles.delaware.gov/docs/12_1902.pdf) [<https://perma.cc/BD5G-KXWP>].

190. *Id.*

191. *Id.*

return under ordinary understanding of the words “report” and “return.”<sup>192</sup>

As Delaware continues to steadfastly protect the identity of any corporations who submitted applications for exemption from corporation income tax, Delaware shields all intellectual property holding companies.<sup>193</sup> Delaware leaves the public in the dark concerning which multistate corporations are engaging in tax avoidance schemes.<sup>194</sup> Sister states likewise possess no knowledge of which multistate corporations have formed intellectual property holding companies if the sister states would like to audit those corporations.

#### D. The Leader of Other States Racing to the Bottom

In the international tax avoidance area, scholars voice concerns that nations are engaging in tax competition and participating in a race to the bottom in order to attract multinational corporations.<sup>195</sup> The race to the bottom for tax havens, however, is not confined to the international context. Domestically, the race to the bottom has long been initiated, perfected, and led by Delaware for the last 40 years.

Delaware’s zero corporate tax rate for intellectual property holding companies attracts little inquiry from the public. Most recently, inquiries surfaced when other sister states faced budget problems during the Great Recession, identifying the tax loophole created by Delaware.<sup>196</sup> Various states attempted to address the loophole with some success.<sup>197</sup> Other states decided instead to mimic Delaware’s statutory scheme as a tax haven but couldn’t

192. Meriam-Webster provides that a “report” is “a usually detailed account or statement.” *Report*, MERRIAM-WEBSTER’S ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/report> [https://perma.cc/H88B-2CGG]. A “return” is “a formal statement on a required legal form showing taxable income, allowable deductions and exemptions, and the computation of the tax due.” *Return*, MERRIAM-WEBSTER’S ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/return> [https://perma.cc/89BF-5K2R].

193. Form 1902-AP is for intellectual property holding companies, as it asks a specific question relating to intellectual property. DEL. DIV. OF REVENUE, *supra* note 189.

194. See Joshua D. Blank, *Reconsidering Corporate Tax Privacy*, 11 N.Y.U. J.L. & BUS. 31, 75–119 (2014) (offering a set of guidelines to better equip policymakers to evaluate specific proposals to make corporate tax return information public).

195. See Iris H-Y Chiu, *From Multilateral to Unilateral Lines of Attack: The Sustainability of Offshore Tax Havens and Financial Centres in the International Legal Order*, 31 CONN. J. INT’L L. 163, 169 (2016) (explaining how small nations have adopted the low tax strategy that may cause harmful tax arbitrage and competition, resulting in “a race to the bottom in terms of governance standards, a competition in laxity”). See generally Michael Littlewood, *Tax Competition: Harmful to Whom?*, 26 MICH. J. INT’L L. 411 (2004) (describing the problematic race to the bottom outcome when countries seek foreign investments); Rosanne Altshuler & Harry Grubert, *The Three Parties in the Race to the Bottom: Host Governments, Home Governments and Multinational Companies*, 7 FLA. TAX REV. 153 (2005) (providing evidence to show different parties’ roles in reducing tax burdens for multinational companies); David E. Spencer, *OECD Report Cracks Down on Harmful Tax Competition*, 9 J. INT’L TAX’N 26 (1998) (explaining the content and context of the April 1998 OECD report that implored member countries to “reduc[e] the distorting influence of taxation on the location of mobile financial and service activities”).

196. See Wayne, *supra* note 137 (reporting that other states are looking for ways to close the “Delaware tax loophole” because in “these troubled economic times, when many states are desperate for tax dollars, Delaware stands out in sharp relief”).

197. *Id.* (stating that Pennsylvania legislators have attempted to close the Delaware loophole as their state “is being robbed of its tax dollars” due to “many companies involved in drilling for natural gas in the Marcellus Shale region of Pennsylvania are, in fact, incorporating in Delaware instead”).



because they lacked the legacy of Delaware as the epicenter of all things corporate.<sup>198</sup> Simply put, in the race to the bottom as a tax haven for intellectual property holding companies, Delaware reached the bottom long ago at the expense of the sister states.

Sister state revenue dollars evaporate through Delaware's tax haven.<sup>199</sup> Corporations with intellectual property holding companies incorporated in Delaware have "a 15–24% lower state income tax burden compared to those without."<sup>200</sup> The tax avoidance scheme results in "millions of dollars of lost corporate tax revenues to other states."<sup>201</sup> Additionally, corporations in the intensive intellectual property sectors like computers, machinery, and pharmaceuticals benefit the most from Delaware's tax haven.<sup>202</sup>

Moreover, Delaware as a tax haven means the budget burden has been shifted from the corporations to the workers.<sup>203</sup> As the corporations pay zero tax, Delaware relies heavily on taxes paid by individuals.<sup>204</sup> There is a limit to what Delaware can extract from working individuals.<sup>205</sup> As a result, Delaware does not, for example, procure the financial means for good public schools.<sup>206</sup> Without a good public school system, Delaware regularly witnesses demographic decline in key areas as parents move to different states for better schools.<sup>207</sup> Ultimately, this race to the bottom proves unsustainable.

198. Under Nevada law, income from the sale, exchange, and licensing of intellectual property is excluded from gross revenue. See NEV. REV. STAT. § 363C.045(3)(a) (2020) (The term gross revenue does not include: "[a]mounts realized from the sale, exchange, disposition or other grant of the right to use trademarks, trade names, patents, copyrights and similar intellectual property."). See also RENAE WELDER ET AL., INSIDE DELOITTE: A FIRST-YEAR REVIEW OF THE NEVADA COMMERCE TAX 6 (2016), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-inside-deloitte-nevada.pdf> [<https://perma.cc/R9RW-RQPK>] (describing exclusions provided for intellectual property in calculating gross revenue).

199. See Scott D. Dyreng et al., *Exploring the Role Delaware Plays as a Domestic Tax Haven*, 108 J. FIN. ECON. 751 (2013) (arguing that, although Delaware continues to exert incredible downward pressure on corporate taxes in the U.S., the benefits available to Delaware corporations "are diminishing over time in response to initiatives by state governments to limit multistate tax avoidance").

200. *Id.*

201. *Id.*

202. Lindsey et al., *supra* note 94 (finding that "the computer, machinery, metal, and pharmaceutical industries generate the greatest tax savings, resulting in an effective state tax rate reduction of 1.0–2.5 percentage points from the 4.6% average state effective tax rate") (citing Dyreng et al., *supra* note 199).

203. Personal income tax for Delaware's fiscal year 2019 is \$1,453.9 million. This number is larger than the combination of franchise tax and limited partnership/limited liability company tax of \$1,139.3 million for the same fiscal year. DEL. OFF. MGMT. & BUDGET, FINANCIAL OVERVIEW (2019), <https://budget.delaware.gov/budget/fy2019/documents/operating/financial-overview.pdf> [<https://perma.cc/L879-MYW8>].

204. See *id.* (providing an overview of Delaware's 2019 budget).

205. Delaware had a budget deficit of \$400 million, and the state could not increase in the personal income tax to bridge the deficit. The State instead increased the realty transfer tax to make up the deficit. Zoë Read, *Delaware General Assembly Approves Fiscal '19 Budget*, WHY.ORG (June 27, 2018), <https://why.org/articles/delaware-general-assembly-approves-fiscal-19-budget/> [<https://perma.cc/4U84-UG7K>].

206. In constant dollars, the average salary for Delaware teachers in 1999–2000 was \$60,724. By 2012–2013 it had dropped to \$59,679. See *Public Education in Delaware*, BALLOTPEdia, [https://ballotpedia.org/Public\\_education\\_in\\_Delaware](https://ballotpedia.org/Public_education_in_Delaware) [<https://perma.cc/F5MV-84EB>] (comparing Delaware school system funding and outcomes against nearby states).

207. For Delaware's 8th graders, only 33% scored at or above proficient on math and reading National Assessment of Educational Progress standardized tests in 2012–2013. See *id.* (providing statistics on Delaware school funding and outcomes). In addition, inadequate and inequitable funding for public schools is the main

## VI. CONCLUSION

Intellectual property assets constitute a cornerstone of U.S. corporations. Delaware's desire to be the intellectual property state seems admirable and benign. Yet the 1984 legislation and tax policy for intellectual property assets encourage multistate corporations to engage in aggressive tax avoidance schemes. While Delaware is within its power to offer itself up as an onshore tax haven, the secrecy and zero tax rate for intellectual property license income cause harm to sister states and Delaware's own citizens. Delaware's race to the bottom stains its reputation as the epicenter of all things corporate.

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issue of a recent lawsuit brought by two civil rights organizations. *Delawareans for Educational Opportunity and the Delaware NAACP*, ACLU DEL., <https://www.aclu-de.org/en/cases/aclu-de-challenges-states-allocation-resources-schools> [<https://perma.cc/5MZC-4TLA>] (Feb. 25, 2021). See also Larry Nagengast, *When Will Public Schools Get Better?*, DEL. TODAY (June 7, 2017), <https://delawaretoday.com/uncategorized/when-will-public-schools-get-better/> [<https://perma.cc/Z99V-JFH6>] (describing the state of Delaware schools); Cris Barrish, *Mass Exodus of Students Is Costing Delaware School District and Taxpayers*, WHYY.ORG (Oct. 13, 2017), <https://whyy.org/articles/mass-exodus-students-costing-delaware-school-district-taxpayers/> [<https://perma.cc/3JGW-6LCF>] (noting how many students opt out of public education and the economic impact of this trend).