THE INCOMPARABLE INFLUENCE OF JULIET MORINGIELLO ON PROPERTY LAW

by

Josh Fairfield*

(In)troduction

Juliet Moringiello was not only a mentor, but a friend and a guiding intellectual light. She made property and commercial law intelligible (and useful) to new industries and fields, and she led a conversation that is now more relevant than ever about the proper treatment of assets in the exploding field of intangible digital property. In remembering her contributions to what it means to be a part of our profession and to the intellectual paths of so many in the field of digital property, I recall the kindness and clarity with which she welcomed people into the complexities of commercial and bankruptcy law. I knew her from her constant guiding presence at American Law Institute meetings and UCC conversations. Each time that I met her, I had a place at the table next to her. She would pull out a chair for anyone. That graciousness kept going year after year, meeting after meeting.

Talking to Juliet meant developing new ideas. In those meetings, I learned from her what it means to be a law professor: to build a way of coming at a problem that opens a thin crack and then an ever-widening wedge, finally creating a complete path forward for understanding and operationalizing an area of law. That is what I want to talk about in this tribute: her ongoing influence on people, scholarship, and doctrine in the field of digital assets and digital property. This essay will therefore attempt to track the growth and path of Juliet's influence on a field, an industry, and a profession as she laid the groundwork for the now-burgeoning markets surrounding digital property.

I. The (Ir)relevance of (In)tangibility

Juliet began with a series of trenchant observations around the lingering and increasingly problematic distinction between intangible and tangible assets in law, to which she felt commercial law offered certain clear paths forward. Her work began with a simple intuition that built on a discourse around digital assets that grew from the early 2000s to 2007 when

* Bain Professor of Law and AI Institute Director, Washington & Lee University School of Law.

Copyright (c) 2026 the National Conference of Bankruptcy Judges

her seminal article *False Categories in Commercial Law: The (Ir)relevance of (In)tangibility* was published.[1] Juliet observed that communities of people deeply valued certain assets—for example, domain names, assets in the video game Second Life, or (later) cryptographic tokens.[2] The legal frameworks of the day denied the existence of property interests in such assets, because courts conflated interests in intangible digital property either with non-property (e.g., contractual) rights, or with intellectual property rights.[3] Conversely, commercial law had already made more than adequate provision for collateralization of other types of intangible assets, such as accounts receivable.[4] Juliet's intensely practical point was that striving for definitional purity based on the surface characteristic of physical tangibility complicated the use of extremely valuable intangible digital assets as collateral for loans, satisfaction of debts, or otherwise.[5]

Juliet noticed that this difference between how digital assets were treated by the law and how they were treated by the markets and communities that valued them created a loophole that deprived owners of their expectations, at best, and opened the door to exploitation, at worst. She set out to provide a critique of the legacy system and to demonstrate that confusion about the legal treatment of intangible digital assets was unnecessary—commercial law already offered practical solutions based on general property principles.

Under the legacy system, at the time, if something was tangible, owners could protect it (and creditors could transfer it) under the regular rules of personal property law, but if it was intangible, courts tended to punt the cases toward intellectual property, even when intellectual property was not a valid characterization.[6] For example, if someone were to assert an interest in an asset within a virtual world, there may well be copyright involved with that asset, but that person would not necessarily assert ownership interests in that virtual world's copyrighted material. Rather, the personal property interest would inhere in the individual copy or the individual specific asset that the

---

[1] *See generally* Juliet M. Moringiello, *False Categories in Commercial Law: The (Ir)relevance of (In)tangibility*, 35 FLA. ST. U. L. REV. 119 (2007).

[2] *See id.* at 119 (discussing problems of domain names and Second Life assets). For her later work on crypto-tokens, see, e.g., Juliet M. Moringiello & Christopher K. Odinet, *The Property Law of Tokens*, 74 FLA. L. REV. 607 (2022).

[3] *See* Moringiello, *supra* note 1, at 139, 147.

[4] *See id.* at 127–28.

[5] *See id.* at 120, 132–35, 138.

[6] *See id.* at 148–49.

person owned.[7] When courts confused ownership of the intellectual property interest with ownership of a specific asset, they not only mistook fully excludable assets for non-excludable ones, but they also invoked a series of inappropriate analogies that cemented the mistake.[8]

Juliet's approach was strongly symbolic of her overall approach to scholarship. She had the courage of her convictions and the willingness to be clear enough so that if she was right, she would start a movement. And if she was wrong, at least she had shown the clarity to be able to move the law forward. Her intuition was this: This abstract discussion about whether digital assets are intangible or tangible no longer truly gave guidance for how digital assets could be treated under the Uniform Commercial Code (UCC), particularly where many of these assets were lumped together as general intangibles. Juliet determined that abstract questions of characterization were less useful than the UCC's clear statements of who could do what with which asset.[9] Thus, what was needed instead of formalism was an intensely pragmatic and focused look at what parties could do with those assets, and who had each right. And when Juliet completed that deep dive, she discovered that the entire concept of tangibility or intangibility was irrelevant for commercial law.[10]

This was not a small problem to take on. Juliet took on one of the greatest divides in asset characterization globally. For example, Commonwealth countries continue to this day to differentiate between choses in possession, which are tangible assets to which one can apply the rules of personal property, and choses in action, which are pure legal rights, which are not tangible and therefore could be duplicated.[11] If there is a legal right and the legal right is not immediately restricted by the bounds of a physical object, law must keep that legal right from spreading to everyone all the time. And so, law must develop an idea of who can benefit from that cause of action: a limitation so that it doesn't metastasize and devour or deeply complicate the entire legal infrastructure of ownership.

That is what Juliet did. She promoted and explained concepts of possession and control of digital assets and pointed out that, in the common

---

[7] *See id.* at 120, 141–42.

[8] *See* Moringiello, *supra* note 1, at 148–49.

[9] *See id.* at 120.

[10] *See id.* at 121 (arguing that "the category of 'tangible' is irrelevant in property law" and concluding that courts should adapt commercial law to electronic assets through general property principles rather than by clinging to tangibility).

[11] *See* U.K. LAW COMM'N, DIGITAL ASSETS: FINAL REPORT 2023, HC 1486, LAW COM. NO. 412, ¶¶ 3.17–3.19, 3.28–3.30, 3.36–3.37, 3.65, 3.68–3.76 (Eng. & Wales 2023).

law, courts could draw on a "whole range of property cases that analyze the problem of obtaining possession or control over assets, tangible or intangible, that cannot easily be grabbed."[12] Her approach was broad, showing how concepts of physical possession, requiring a physical pledge, had adapted and morphed through concepts of control over more intangible assets to provide a practical set of remedies for creditors.[13]

From her comprehensive understanding of commercial law rights and remedies, Juliet then developed a full-fledged approach for handling legal interests in new kinds of assets: she showed that the issues were not new to property law at all. Her approach eschewed formalist thinking and instead applied an advanced legal pragmatism that adopted the most applicable analogies to first possession and then later control developed by common-law cases. She made three points. First, she argued that tangibility was no longer a relevant category in property law, because function should trump the surface characteristics of physical tangibility.[14] Second, she noted that the level of abstraction matters and that formalism was adding unnecessary complexity by using physicality as a proxy for rivalrousness or excludability.[15] And third, she determined that law already had the tools necessary to handle new forms of rivalrous and excludable digital assets—and indeed had always had those tools.[16]

II. The Influence of the (Ir)relevance of (In)tangibility

Juliet's approach was the most effective kind of legal work. Her ideas were prescient, provocative, and constructive. She set the framework for a discussion that remains relevant nearly twenty years later. Juliet demonstrated the power of analogical reasoning in the technology context and showed that pre-existing law (in this case, general property principles) often handles new questions of technology perfectly well. Applying general property principles clears out much of the undergrowth and the theoretical confusion caused by prior, now irrelevant, formal characterizations, and such an application removes the need for tortured legal reasoning, which can in turn cause disconnects between areas of law that need to fit together.[17]

---

[12] *See* Moringiello, *supra* note 1, at 157.
[13] *See id.* at 126, 158–59, 161–63.
[14] *See id.* at 120–21.
[15] *See id.* at 137, 146–47, 164.
[16] *See id.* at 165.
[17] *See id*. at 141.

Juliet's theories are of undoubted foundational influence for the task of building practical steps for handling digital assets. Her focus on pragmatic extension of basic property concepts of possession or control to digital assets (and rejection of formalist characterizations based on tangibility) spread from the common-law cases and Article 9 examples she used into the nascent treatment of digital assets throughout the Code and beyond. Her leadership can be seen in every inch of the modern law of digital assets. UCC Article 12 now provides the modern Code's framework for crypto- and other digital assets. As Vice Chair of the 2022 UCC Amendments, Juliet facilitated a collaborative community process that resulted in a compromise position: although she herself found the cases and concepts related to legal possession to be strong candidates for handling fully excludable assets, she helped to broker a pragmatic solution in favor of developing a new variant of control to handle crypto tokens, which were termed "controllable electronic records."[18]

Juliet's work remains relevant not only to established law, but to its ongoing development. Without detracting from her success in developing a compromise solution that advanced the state of play, it is very clear that we are not done with the work of applying general property law principles to simplify and harmonize approaches to the legal treatment of digital assets.

Juliet's brokered solution, as influential and critical as it was, remains at odds with her sense that the best legal treatment of excludable digital property included concepts of *possession* of fully excludable assets.[19] Juliet's original focus on possession in *False Categories* was correct: exclusive possession often exerts a more persuasive analogical and gravitational pull in the law of fully excludable assets than does control.[20]

The thread of possession of fully excludable assets runs seamlessly from core property theory through the theory of intangible digital assets, and straight into the industry customs and practices that Juliet drew on so heavily.[21] A key distinction that Juliet used to de-center legal discourse from the tangible-intangible debate was to turn to the distinction between excludable and non-excludable (or rivalrous and non-rivalrous, although the terms do not have precisely the same meaning) assets.[22] This is no accident. The most commonly used brief statement of when an intangible interest is

---

[18] *See* U.C.C. §§ 12-102(a)(1), 12-105, 9-107A (Am. L. Inst. & Unif. L. Comm'n 2022).

[19] *See* Moringiello, *supra* note 1, at 164–65.

[20] *See id.* at 165 ("Courts have been refashioning concepts of possession for hundreds of years, and it is a small conceptual jump from determining control over a wild fox to finding control over a domain name.").

[21] *See id.* at 159–60.

[22] *See id.* at 146–47.

subject to the application of general property principles is whether it is 'susceptible of possession,' in the language of *Kremen v. Cohen*.[23] And both possession and control in *Kremen* are characterized by excludability: "We apply a three-part test to determine whether a property right exists: 'First, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control; and third, the putative owner must have established a legitimate claim to exclusivity.'"[24]

The exclusive possession of fully excludable assets invokes the most basic of general property principles: the Hohfeldian right to exclude.[25] Excludability is as close to a single touch-point for identification of what is property and what is not as one can find.[26] And what is true of general property analysis is true of excludable digital property as well. This is precisely why the excludability/rivalrousness conversation has so much weight in determining when property treatment is considered appropriate.

From the perspective of Juliet's functional approach as applied to modern crypto assets, like cryptocurrency, possession of fully excludable assets often remains the best fit.[27] Some early digital assets were more like legal rights or copyable electronic records, so control was a necessary concept to designate *the* authoritative record (control of which would enable collateral transfer to a third party, for example). But modern crypto assets are designed with excludability as their core feature. If they could be duplicated, the asset would lose all value.

Strong excludability—and thus susceptibility to exclusive possession—is the defining technological feature of crypto assets. Such assets can generally only be transferred or accessed with a specific private key. The encryption component of crypto assets is central to their value.[28] In fact, the ability to exclusively possess a crypto asset is even stronger than the ability to protect possession of tangible personal property. Physical possession can be

---

[23] 337 F.3d 1024, 1030 (9th Cir. 2003).

[24] *See id.* (quoting G.S. Rasmussen & Assocs. v. Kalitta Flying Serv., 958 F.2d 896, 903 (9th Cir. 1992)).

[25] *See* Thomas W. Merrill, *Property and the Right to Exclude,* 77 NEB. L. REV. 730, 731 (1998) ("[T]he right to exclude others is a necessary and sufficient condition of identifying the existence of property. Whatever other sticks may exist in a property owner's bundle of rights in any given context, these other rights are purely contingent in terms of whether we speak of the bundle as property.").

[26] *See id.* at 731.

[27] *See* Moringiello, *supra* note 1, at 157 ("[T]he concept of possession has a long history as a centerpiece of property law.").

[28] *See* Joshua A.T. Fairfield, *Bitproperty*, 88 S. CAL. L. REV. 805, 820 (2015).

hacked by stealing someone's bag. It is harder to disrupt possession of crypto assets by a significant margin, and that feature is by design.

One way to see the problem is to compare the terminology of "controllable electronic record" to the language of various crypto asset industries, which overwhelmingly use the language of possession and ownership. In the industry or to an owner or investor, it is not immediately clear that a statute focused on "controllable electronic records" would cover an NFT, for example. As Juliet noted, language matters in determining the closest and therefore best applicable legal analogy, and industry custom and practice should take a driving role.[29]

Control as the governing legal standard for excludable assets in commercial law may have helped the new Article 12 fit better with Articles 7, 8, and 9. However, it has caused commercial law in general to diverge from the general property principles that Juliet described. Control as the sole standard causes disconnects between commercial law treatments and other common law property traditions Juliet discussed related to the deprivation or recovery of possession of property, such as replevin and conversion.[30] When the common-law analogy that we use causes disconnects to related areas of law that need to work harmoniously together (say, the law of transfer of collateral to third parties with the law of recovery of possession of wrongfully taken assets, which should operate as flip-sides of the same coin), Juliet's method of seeking the best tradition of adaptable common-law property doctrine serves as a beacon.

Control is possession with extra steps. It is a concept that we only need when we need to differentiate between overlapping claims in assets and potential sources of control. Where an asset has been intentionally and effectively designed to be fully excludable,[31] we do not need a concept of control distinct from possession. The idea of a controllable electronic record or an authoritative electronic record implies the existence of multiple electronic records, with multiple assertions of control, such that a legal regime should need to establish one of them as the primary one. Modern digital property frameworks have built very robust excludability into assets (if I have a bitcoin, you do not have it, and vice versa) at the protocol level. There is no need to pick a record over which an authoritative entity has control; the asset has characteristics of excludability that differentiate it. The person whose private keys grant access to cryptocurrency is without doubt the person in

[29] *See* Moringiello, *supra* note 1, at 132.
[30] *See id.* at 157–60.
[31] *See* Fairfield, *supra* note 28, at 806, 839–41, 864–65.

control of that asset, but there is now little need for the designation. There is no other copy of that asset or record to compete in the question of which is the authoritative record.[32]

Juliet's work from twenty years ago remains powerfully relevant to our present conversation. She moved the U.S. conversation around intangible assets from non-property treatment to a compromise around control, but the rest of the work that she presciently described remains to be done. And indeed this is what is happening worldwide. Both the U.S. and Commonwealth countries have implemented a control-based or control-like "third way" to permit handling of digital assets, but each of their implementations trend ever more toward treating exclusive possession of rivalrous assets as a still-critical instructive legal narrative.

III. (In) the Ongoing Conversation

Globally speaking, Juliet's influence continues to spread because of her dedication to fostering a community conversation around pragmatic approaches for making law serve people rather than categories. For example, when the United Kingdom asked the question of how it ought to treat digital assets, it chose to thread the same needle between choses in action and choses in possession in a way that mirrored the development of the controllable electronic records concept under Article 12. Tangibility and intangibility continue to plague Commonwealth law the way that it does U.S. commercial and common law, but a practical path has been, again, to chart a third way.[33]

The work of carrying out her vision for applying general property principles to the law of fully excludable intangible assets is not done. Her focus on the most applicable common law analogy, exclusive possession, has paved the way to develop the law even further through an ongoing focus on the pragmatic treatment of digital assets in frameworks for which the control concept runs into limits. Consider, for example, actions for recovery of possession of excludable intangible assets. Most state court decisions still continue to pay lip service to the traditional formulation: actions for conversion and replevin will lie for tangible assets, but not for intangible

---

[32] *Id*. at 820–21, 841.

[33] *See* Property (Digital Assets etc) Act 2025, c. 29, § 1 (UK); *see also* U.K. LAW COMM'N, DIGITAL ASSETS AS PERSONAL PROPERTY: SUPPLEMENTAL REPORT AND DRAFT BILL, Law Com No. 416, ¶¶ 1.3, 1.7 (2024) (recommending legislation to confirm a "third category" of personal property rights capable of accommodating certain digital assets, including crypto-tokens).

assets, even if they are this new category of fully excludable intangible assets that caught Juliet's attention.[34]

Yet the law has developed over the past twenty years exactly as Juliet predicted: courts have pragmatically adapted ideas of possession to cover fully excludable and rivalrous intangible assets by analogy to quotidian common-law cases. In the cases of conversion and replevin, which Juliet discussed, courts have done precisely as she recommended as the obvious pragmatic need for causes of action to recover possession of stolen crypto-assets emerged: provide concrete remedies for recovery of possession for stolen or fraudulently obtained crypto-assets, whether formal characterizations under state law based on tangibility would permit such a remedy or not.[35]

If we do not continue Juliet's work on possession of excludable intangible assets, the use of general property principles to handle these assets—which Juliet grounded and championed—will fragment and the harmonization of commercial law with general property principles will be significantly impeded. The issues Juliet raised remain very much alive to this day. As João Marinotti wrote in his 2022 article, *Possessing Intangibles*: "Possession is frequently seen as a 'linchpin of property law.'"[36] He continues:

> Possession is *not* limited to tangible objects. Rather, possession's expressive role in property law serves to determine when and how traditional property doctrines may be applied to this ever-evolving landscape of intangibles.

---

[34] *See* Moringiello, *supra* note 1, at 128 (noting that replevin traditionally reaches only tangible personal property; tracing the merger doctrine in conversion and discussing the extension of conversion analysis to electronic data).

[35] *See id*. at 143–47; *see also* SEIU Healthcare Nw. Training P'ship v. Evergreen Freedom Found., 427 P.3d 688, 692–96 (Wash. Ct. App. 2018) (applying a replevin statute to intangible property and allowing intangible property to be returned to its owner); Bishop v. Defendant "1", No. 23-CV-24376-RAR, 2024 U.S. Dist. LEXIS 96342, at *12 (S.D. Fla. May 29, 2024) (requiring a defendant that stole cryptocurrency from the plaintiff to within five days of judgment transfer cryptocurrency in partial or total value of damages to plaintiff's counsel); People v. Ung, 88 Cal. App. 5th 997, 999 (2023) (affirming restitution order for defendant to transfer the same quantity and kinds of cryptocurrency to plaintiffs from whom it was stolen); Kremen v. Cohen, 337 F.3d 1024, 1031 (9th Cir. 2003) (noting that although states previously denied actions for conversion where the asset was intangible, most states have functionally abandoned that requirement).

[36] *See* João Marinotti, *Possessing Intangibles,* 116 NW. U. L. REV. 1227, 1228 (2022) (citations omitted).

> Without first understanding the foundational concepts of property law—including possession—we are left with ad hoc, domain-specific regulatory interventions that will only further fragment the legal treatment of digital assets, increasing confusion and decreasing efficiency.[37]

Just as we owe Juliet an enormous debt of gratitude for her collaboration and leadership in leading the conversation to establish a practical compromise around control in order to resolve problems of property treatment in commercial law, so we are in need of continuing to honor her vision of the adaptability and centrality of possession in harmonizing the treatment of intangible assets with the rest of the general law of property, which was her method and inspiring goal. Cabining possession to cases of physical tangible objects would undo the significant evolution of the law she began with establishing the irrelevance of intangibility. As Juliet concluded *False Categories* with characteristic clarity,

> In order for courts to adapt commercial law to transactions in electronic assets, they should keep in mind general property principles. Courts have been refashioning concepts of possession for hundreds of years, and it is a small conceptual jump from determining control over a wild fox to finding control over a domain name. The failure to keep these general principles in mind will inevitably lead to . . . a law that is not only shallow, but one that is unable to adapt to new forms of assets as they develop.[38]

(In) Conclusion

Juliet's scholarship and her collaborative and adaptive leadership illuminated the path forward for property treatment of digital assets: adapt the common law of property by applying the most direct analogy to new kinds of technologically created assets. Her scholarship and leadership were foundational in developing the concept of control as a pragmatic compromise

[37] *See* Marinotti, *supra* note 36, at 1229–30 (citations and footnotes omitted).
[38] *See* Moringiello, *supra* note 1, at 165.

that helped law get over the tangibility/intangibility divide and move forward to a practical global system for property treatment of intangible digital assets. And her vision of excludable assets and the common law of possession serves as a touchpoint for reconciling control-based systems with the rest of the common law, enabling courts to draw on centuries of tradition around possession to apply established legal principles and practical remedies for owners of fully excludable digital assets.

This is why Juliet's scholarship, as well as the community and scholarly conversation she fostered, remains of critical relevance today. We remain guided by her: where practical rights exist and pragmatic analogies draw on general property principles, formalist characterization is a distraction. Juliet Moringiello fostered a community of scholarship, supported a nascent industry, and validated the expectations of a wide-ranging community of investors, all while finding a way to get each what it most practically needed to adapt and harmonize. Her vision continues to light the way forward.

***