

Property Rhetoric and the Public Domain

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ABSTRACT

Enthusiasts of a high protection vision of intellectual property often deploy the rhetoric of physical property in defending their preference for broader patent and copyright protection. By contrast, advocates of a lower protection vision of intellectual property resist the use of physical property language in expressing their solicitude for users' rights and the public domain. In this Essay, I use this dichotomy as a starting point for an investigation of the rhetorical power of property talk as a tool in public debate over the proper scope of intellectual property protection. I first observe that this dichotomy is premised on the assumption that invoking the idea of property necessarily entails a libertarian vision of possession that can be used only in defense of an expansive vision of owners' rights. I then critique this prevailing assumption, showing that it fails to account for an alternative, social discourse of property that emphasizes the legal limitations and communal aspects of ownership. Finally, I suggest a novel approach to the use of property rhetoric in debates about the appropriate scope of intellectual property. I argue that rather than resisting the invocation of property rhetoric, enthusiasts of the public domain should embrace it. Specifically, the public domain should be explicitly portrayed as a form of property, one in which the public enjoys a broad entitlement. This approach would encourage public respect for and stewardship of the public domain and would also provide needed pushback against content industries' rhetorical claims that all takings of information are wrongful.

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INTRODUCTION: THE *KELO-ELDRED* PUZZLE

The idea of property has a peculiarly strong hold on the popular imagination. Consider, for example, how the Supreme Court's 2005 decision in *Kelo v. City of New London*¹ moved a politically apathetic public² into apoplexy. The outrage generated by *Kelo* spanned the political spectrum from Rush Limbaugh³ to Ralph Nader.⁴ It also spawned a possibly unprecedented legislative, as states hastily sought to overturn the decision's force via statute.⁵ At the high-water mark of the backlash, a movement even arose to have Justice Souter's house in New Hampshire condemned pursuant to the state's eminent domain power.⁶

At first blush, the impassioned negative reaction to *Kelo* is unsurprising. The popular imagination recoiled at the Court's ratification of government's power to involuntarily force homeowners to exchange their property for cash. Yet not all government attenuations of property interests have generated the same kind of

¹ 545 U.S. 469 (2005).

² Or, perhaps more tastefully, the "rationally ignorant" public. Cf., e.g., Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 *Critical Rev.* 413, 413-19 (1998) (discussing "rationally ignorant" voters).

³ Rush Limbaugh, *Liberals Like Stephen Breyer have Bastardized the Constitution*, Radio Transcript, Oct. 12, 2005, available at <http://www.freerepublic.com/focus/f-news/1501453/posts> (visited Dec. 20, 2006) (claiming that because of *Kelo*, "Government can kick the little guy out of his and her homes and sell those home to a big developer who's going to pay a higher tax base to the government. Well, that's not what the takings clause was about. It's not what it is about. It's just been bastardized, and it gets bastardized because you have justices on the court who will sit there and impose their personal policy preferences rather than try to get the original intent of the Constitution.").

⁴ Ralph Nader, *Statement*, June 23, 2005, available at <http://ml.greens.org/pipermail/ctgp-news/2005-June/000507.html> (visited Dec. 21, 2006) (claiming that "The U.S. Supreme Court's decision in *Kelo v City of New London* mocks common sense, tarnishes constitutional law and is an affront to fundamental fairness.").

⁵ For a complete list of such state initiatives, see <http://www.castlecoalition.org/leegislation/states/index.asp>. However politically popular they may be, the efficacy of these statutes is questionable. See Ilya Somin, *The Limits of Backlash: Assessing the Response to Kelo*, __ *MINN. L. REV.* __ (forthcoming 2008).

⁶ The idea was to have the local council of Weare, New Hampshire condemn the Justice's property in order to create a development that would feature the "Lost Liberty Hotel", a site that would be devoted to libertarian gatherings (seriously). The movement failed. See http://en.wikipedia.org/wiki/Lost_Liberty_Hotel.

reaction. Consider, for example, *Eldred v. Ashcroft*.⁷ In *Eldred*, the Court upheld Congress's passage of the Copyright Term Extension Act (CTEA),⁸ which added twenty years to the terms of all extant copyright terms. *Eldred*, like *Kelo*, can be understood as approving government confiscation of an ownership entitlement. CTEA meant that the public would have to wait another twenty years before its use rights in copyrighted works of authorship would vest. This had implications that ranged from relatively small (preventing Eric Eldred from posting a Robert Frost poem on his public web page) and large (preventing general public use of early Disney creations, including the character of Mickey Mouse). But while CTEA and its judicial approval drew significant criticism in academic circles, public response was muted—especially compared to the reaction to *Kelo*.

The disparity between the reactions to these two opinions becomes even more puzzling on closer examination. Despite uninformed media commentators' characterization of *Kelo* as an instance of judicial activism,⁹ the Court's opinion was rather mundane jurisprudentially.¹⁰ The decision broke no new legal ground, following precedent long established in *Hawaii Housing Authority v. Midkiff*.¹¹ Nor did the Court exercise its authority expansively; on the contrary, the majority couched its opinion largely in terms of its obligation to defer to the Connecticut state legislature's discretionary decision to exercise its eminent domain power. Nor did the decision (as many members of the public misunderstood) rob anyone of their property outright. Although Suzette Kelo's property was taken, she was, as the Constitution requires, paid a compensatory amount in exchange by the government.¹² Although one may well believe *Kelo*

⁷ 537 U.S. 186 (2003).

⁸ Pub. L. 105-298 (1998).

⁹ See Limbaugh, "Liberal Bastards like Breyer", *supra* note 3.

¹⁰ See Marcilynn A. Burke, *Much Ado About Nothing: Kelo v. City Of New London, Babbit v. Sweet Home, and Other Tales From the Supreme Court*, 75 U. CIN. L. REV. 663, 683 (2006) ("Perhaps the only surprising part of the [*Kelo*] decision was Justice Sandra Day O'Connor's scathing dissent[.]").

¹¹ 467 U.S. 229 (1984).

¹² It is a familiar point that the "just compensation" required by the Constitution undercompensates condemned homeowners because the fair market value standard fails to reflect owners' subjective valuations of their homes. Recent scholarship has questioned this assumption, showing that homeowners may in fact be overcompensated by the government in eminent domain proceedings because they receive relocation expenses on top of the value of their home, and because homeowners may be able to receive a premium on top of fair market value through

to have been wrongly decided, this does not mean that the decision represented an institutionally aggressive move or that it should have seemed at all surprising in light of long-settled precedent.

On the other hand, the government conduct approved in *Eldred* in many ways worked a much more dramatic taking than the City of New London did when it confiscated Suzette Kelo's property.¹³ CTEA enhanced the entitlements of copyright owners at the expense of the public, but did so without any gesture in the direction of compensating the loss. CTEA also swept much more broadly than the government action approved in *Kelo*. The taking at issue in *Kelo* directly affected only the plaintiff and a few similarly situated actors. By contrast, CTEA took not just from original plaintiff Eric Eldred, but from every member of the public the entitlement to use expired copyrighted materials for another twenty years.¹⁴

The disparity in the reactions to these two opinions—which I call the *Kelo-Eldred* puzzle—is instructive for a pair of reasons. First, it illustrates the powerful hold that the idea of property has in the public consciousness. Underneath the politicized invective that characterized much of the opinion's aftermath, one can identify in the public reaction a very real sense of indignation at the dignitary harm worked on Suzette Kelo by the City of New London's involuntary taking of her home. Popular writing on the subject typically invoked the notion of "property" without considering the meaning of the term

pre-condemnation negotiations with the government. See Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101 (2006).

¹³ Just to be clear, I am not arguing that CTEA really did work a taking actionable under the Just Compensation Clause. Textually, this could not work because the Clause governs only takings of "private" property, U.S. CONST. amend. V, and as I discuss below in more detail, the public domain is plainly a form of private property. That does not change the fact that Eldred can still be cast as an uncompensated taking of public entitlements, albeit one that likely does not give rise to a cause of action under the Fifth Amendment.

¹⁴ One could argue that CTEA thus merely delayed, and did not take, the public's acquisition of use rights in copyrighted materials. This descriptive claim is right, but this does not mean the government's action is not takings-esque. A law that stated "the acquisition of all future interests in real property will be deferred for twenty years" would undoubtedly be regarded as taking a valuable property right from the owners of those future interests. It is also by no means clear that the public actually will acquire these rights in protected materials upon expiration of the CTEA term extensions. Numerous critics of *Eldred* pointed out that nothing would stop the content industries from again lobbying successfully for additional term extensions once CTEA's 20-year add-on terms begin to expire. E.g., *Eldred v. Reno*, 239 F.3d 372, 381 (D.C. Cir. 2001) (Sentelle, J., dissenting) (embracing this argument).

or the institution in any real depth.¹⁵ This highlights the instinctive sense of connection between “property” as it is popularly understood and instinctive notions of both personal identity and the inviolability of ownership. That the idea of property can generate such emotional power also shows how much mileage a social movement can gain by couching its aims in terms of property and ownership.

The *Kelo-Eldred* puzzle also indicates, by negative implication, the curious absence of property rhetoric when public, rather than private, entitlements are at issue.¹⁶ The outrage over *Kelo* was outrage about property involuntarily taken: Suzette Kelo had her home confiscated by the government, and this rankled in the public consciousness. Eldred could well have been seen in this light too: the public enjoys entitlements to copyrighted works of authorship after their terms of protection expire (an ownership entitlement), and CTEA diminished these rights (confiscated their entitlement) by delaying the date of their vesting. One can search in vain for the kind of simple but powerful outrage against involuntary government confiscations of property in reaction to *Eldred* that were commonplace in the wake of *Kelo*. Thus it becomes clear that *Eldred* evoked nothing like the angry reaction that accompanied *Kelo* in large part because the public, for whatever reason, did not evaluate the decision within the moral framework of property rights.

This Essay uses the *Kelo-Eldred* puzzle as a jumping-off point for an exploration of the role of property rhetoric in judicial, policymaking, and popular cultural debates about the ideal scope of intellectual property protection. First, this Essay investigates in detail how public discourse about IP deploys or resists property rhetoric. It begins by distinguishing between two approaches to the use of property talk in talking about the appropriate scope of IP protection:

¹⁵ Much the same is true of even some academic writing. See generally, e.g., Kristi M. Burkard, *No More Government Theft of Property! A Call for a Return to a Heightened Standard of Review After the United States Supreme Court Decision in Kelo v. City of New London*, 27 HAMLINE J.L. & PUB. POL’Y 115 (2005).

¹⁶ One might also point out that the most salient difference between these two cases is the nature of the entitlement at issue: *Kelo* involved tangible property, while *Eldred* involved intangible resources. This may be a partial explanation for the reaction, but cannot be a complete one. As I discuss at more length below, the intangible character of an entitlement has not prevented owners from effectively leveraging property rhetoric in their favor, so the fact that information rather than land is at issue cannot fully explain why the public failed to react to *Eldred* as an unjustified deprivation of property.

property romance and property anxiety. Property romance regards physical and intangible property as governed by the same essential legal principles, and seeks to use the language of property to create sympathy for broader owners' rights in information. By contrast, property anxiety sees IP as a *sui generis* field that is essentially discontinuous with the law of physical property, and resists the use of property talk as a linguistic strategy in debating the proper line between owners' and users' rights.

Next, this Essay examines and critiques property as a *rhetorical* tool—that is, a linguistic device designed to persuade listeners of a particular outcome—in discourse about the scope of entitlements in information. Although property romance and property anxiety each take very different approaches to the use of ownership rhetoric, they agree on one thing: using that rhetoric in the context of IP is an expansionist, pro-owners' rights move. But this shared assumption depends on an incomplete view of what ownership means. One strain—indeed, likely the dominant strain—of property discourse invokes a libertarian vision of ownership as bulwark of individual liberty against state oppression. But focusing exclusively on this ownership discourse of property ignores an alternative, social discourse that sees possession in a broader social context. From Roman roads to the English village green to the contemporary national park, the property relation has long included the public writ large, and not just private individuals, as its subject. Ownership doesn't only recognize that greed is good, but also attends to the common good, and a descriptively accurate and balanced vision of property rhetoric—including intellectual property rhetoric—must take into account each of these traditions and their concomitant values.

Next, this Essay calls on this second, public, discourse of ownership to advance a novel claim about the appropriate role of property rhetoric in public discussions about the ideal scope of IP protection. Buried within the dichotomy between property romance and property anxiety is the assumption that deploying the rhetoric of ownership in the context of IP necessarily represents an expansionist, owner-friendly strategy. In this Essay, I suggest instead that it is not only possible but particularly appropriate to talk about IP instead in the language of a socially-focused property discourse. A property discourse that situates public resources at its center aligns particularly well with intellectual property, which—at least in its American incarnation—has solicitude for the public domain and the common

good immanent in its constitutional source of law.¹⁷ Seen from this perspective, property rhetoric is not necessarily the enemy of the public domain, as high and low protection scholars each assume. Rather, it is possible to explicitly present public entitlements in information as a form of property to which the public is, in common, entitled to access and use.

Finally, this Essay argues that deploying property rhetoric in this manner in legal and popular debates about the scope of IP protection should prove an effective means for preserving an optimal public/private balance in information entitlements. There are two reasons. First, emphasizing that property includes public entitlements as well as private ones provides needed pushback against content industries' powerful but overly broad claims of rights in information. Certainly it is true that owners must be able to extract value from certain embodiments of their creative work, but the increasingly prevalent rhetoric of the wrongfulness of taking information fails to acknowledge that much information remains public for all to use. Emphasizing the public character of many information entitlements helps to cabin owners' claims of property rights within their appropriate bounds. Second, talking about shared IP entitlements in the language of ownership promises to access the deeply instinctive attachment to property we all share, but to redirect the emotional force of that attachment in the direction of public as well as private resources. This deployment of property rhetoric in talking about the elements of copyright and patent law that explicitly cordon off entitlements for the public promises to encourage respect for and stewardship of this shared cultural resource, cutting back against the familiar "tragedy of the commons" critique of the efficiency of shared ownership.

This Essay proceeds in three parts. First, it investigates the current use of property talk in legal and popular cultural debates about the appropriate scope of IP protection, and creates a taxonomy with which to approach the issue. Second, it evaluates the use of property as a rhetorical move in these debates, and critiques the assumptions on which that rhetorical move relies. Finally, this Essay builds on that critique, suggesting an alternative way to introduce property rhetoric into debates over the appropriate breadth of IP entitlements that promises to better preserve the delicate balance between owners' and users' prerogatives in information.

¹⁷ U.S. CONST. art. I, sec. 8, cl. 8.

I. PROPERTY ROMANCE AND PROPERTY ANXIETY

Much ink has been spilled about the question whether IP is property.¹⁸ In this Essay, I seek to answer neither this question nor its close cousins such as the debate over whether property rules or liability rules better govern IP.¹⁹ Rather, I want to investigate in this Part how property is used as a rhetorical trope in debates over the scope of patent and copyright protection. In particular, it examines the various ways in which commentators, jurists, and policymakers embrace or resist the language of property in the IP setting, and explores how enthusiasm for (or resistance to) this use of property rhetoric correlates with other substantive preferences.

A. *Rhetoric, Legal Analysis, and Social Change*

Because this is a paper about the *rhetoric* of property as deployed in the context of copyright and property, it's necessary to say a word about what a rhetorical analysis of law entails. Thinking about legal discourse as a form of rhetoric differs significantly from the standard approach of regarding law as an external system of rules that can be manipulated to reach particular substantive ends.²⁰ Indeed, the

¹⁸ Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1744 (2007) (“At the core of controversies over the correct scope of intellectual property lie grave doubts about whether intellectual property *is* property.”); *see generally* Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J. L. & PUB. POL’Y 108 (1990).

Other writers have expressed skepticism that this is a question worth engaging. *See* Stephen L. Carter, *Does it Matter Whether Intellectual Property Is Property?*, 68 CHI.-KENT L. REV. 715, 715 (1993) (“Every now and then, the rather discrete and insular world of scholars who care about intellectual property rules turns its collective attention to whether intellectual property is really property at all—or, to put the matter consistently with the vagaries of the field, whether intellectual property (whatever that is) is property (whatever that is) in the same sense that other things are property (whatever that is).”); William Patry, *Does It Matter if Copyright is Property?*, The Patry Copyright Blog, *available at* <http://williampatry.blogspot.com/2006/06/does-it-matter-if-copyright-is.html> (last visited July 10, 2008).

¹⁹ *See generally, e.g.*, Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?* 85 TEX. L. REV. 783 (2007).

²⁰ James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 685 (1985) (contrasting rhetorical analysis of law to ancient Judeo-Christian notion of law as authority and to

very term “rhetoric” has a bad rap in the legal academy, connoting inexactitude at best and disingenuous manipulation at worst. But in this Essay, I use the term rhetoric as Gorgias defined it in Plato’s eponymous dialogue: “the art of persuading people about justice and injustice in the public places of the state.”²¹ Rhetoric thus refers not to merely talking about talking, but to something with meaningful practical implications. It is no less than “the central art by which community and culture are established, maintained, and transformed”.²²

Viewed in this light, rhetoric is an attempt to persuade members of a polity about what the good life is (or should be) using an appeal to a set of common understandings.²³ A particularly effective way to persuade the public to adopt a particular position on a new topic is to frame an appeal in terms of an appealing preexisting one. Consider, for example, the recent trend among proponents of same-sex marriage use bumper stickers with an “equals” sign on them in order to publicize their cause. This is very much a rhetorical move because it recasts the debate over gay marriage from one that centers on, say, the morality of homosexuality or the history of marriage, and instead becomes expressed in the common and appealing language of equality. And with all the positive connotations of struggles for equality in American history, who could possibly be against it?²⁴

The adoption of the “equals” sign by the same-sex marriage movement is an example of a “constitutive” rhetorical move.²⁵ It is not only an attempt to use language to persuade, but seeks also to use language in order to convince us about what the world actually is (or at least, should be). If the same-sex marriage movement effectively occupies the rhetorical high ground, they not only score a legal and political victory, but also manage to convince us that access to

contemporary social science view of law as an external system of rules to be manipulated to reach particular substantive ends).

²¹ PLATO, GORGIAS 452e, 454b.

²² White, *supra* note 20 at 684.

²³ *Id.* at 689.

²⁴ This is obviously a, well, rhetorical question. Opponents of same-sex marriage have responded to the use of the “equals” sign with their own counter-move, distributing bumper stickers showing a three people (presumably a nuclear family) with arms upraised that bears the slogan “Marriage: One Man, One Woman”. <http://www.nogaymarriage.com/> (last visited July 14, 2008).

²⁵ Cf. GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 4-5 (2003) (discussing constitutive metaphors).

marriage *really is* a part of America's ongoing struggle to provide justice for all its citizens. So rhetoric is not only a way of understanding the world; it is a form of analysis with normative force because it has the potential to construct the way we think about the world as well.²⁶ With these general ideas in mind, I now turn to an exploration of how property is used as a rhetorical trope in debates over the ideal scope of patent and copyright protection.

B. *Property Romance and Intellectual Property*

The 2006 patent dispute, *eBay, Inc. v. MercExchange, LLC*,²⁷ provides an object lesson in how property can be deployed as a rhetorical device to inveigh in favor of broad IP rights. *eBay* posed the question whether it was appropriate to enforce a patent owner's strategically acquired exclusive rights by means of a socially costly permanent injunction. Justice Scalia unsurprisingly sought to regard the case in simpler terms, and invoked the language of property to explain why. "We're talking about property rights," said the Justice to *eBay*'s counsel during oral arguments. "All he's asking for is, 'Give me my property back.'"²⁸

Justice Scalia's invocation of property language in the *eBay* oral argument relies on a rhetorical move that I call "property romance". The term is meant to connote among its enthusiasts a romantic belief in the essential unity of property, so that all forms of possession—whether the object is tangible or intangible, land or chattel—can be understood in terms of the same basic rules and ideas. Part of this is a substantive claim—animated by neoclassical economics—that the kinds of doctrines that govern ownership of tangible things are essentially continuous with the doctrines that should govern intangibles.²⁹ But here I address not this aspect of the

²⁶ White, *supra* note 20, at 701 (observing that rhetoric "provides ground for challenge and change, a place to stand from which to reformulate any more specialized language", and that "[r]hetorical analysis invites us to talk about our conceptions of ourselves as individuals and as communities, and to define our values in living rather than conceptual ways.").

²⁷ 547 U.S. 388; 126 S. Ct. 1837 (2006).

²⁸ Yuki Noguchi & Charles Lane, "High Court Considers EBay Case On Patent," *Washington Post*, March 30, 2006 at D01.

²⁹ *E.g.*, Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J. L. & PUB. POL'Y 108, 118 (1990) (arguing that we "should treat intellectual and physical property identically in the law"); Trotter Hardy, *Not So Different:*

argument, but instead the attempt to deploy the language and emotional force of property as it is popularly understood to resolve difficult questions of patent or copyright doctrine. This is just what Justice Scalia sought to do in the *eBay* argument: to use familiar ideas to reduce a complex issue about information regulation to a straightforward claim about the injustice of theft.

Property romance emerges in a variety of different IP settings. The briefing that preceded *eBay* provides one example. Indeed, Justice Scalia's invocation of a big-tent vision of property may have been due to the fact that the Property Rights Movement—a group traditionally devoted to defending landowners whose ownership rights are threatened—enfolded patent holder MercExchange into their cause.³⁰ Of course, the ownership at issue in *eBay* seemed in many senses distinct from the kind of ownership the PRM usually defends.³¹ MercExchange wasn't a small business threatened by an adverse zoning law or a homeowner faced with an eminent domain action. Their acquisition of the patent at issue in *eBay* was entirely strategic, one of many such acquisitions made in the hope that one might turn out to be crucial to a big new application, so that MercExchange could threaten the creator of that application with an injunction and extract a juicy settlement.³² Yet the PRM, in the throes of property romance, brushed these distinctions aside. Regardless of how they acquired their property, the strategy seems to run, small business proprietors,

Tangible, Intangible, Digital, and Analog Works and Their Comparison for Copyright Purposes, 26 U. DAYTON L. REV. 211, 213 (2001) (asserting that “[f]or the purposes of intellectual property rules and regimes, there are no differences between intangible and tangible property”); Richard A. Epstein, *The Structural Unity of Real and Intellectual Property*, available at Progress on Point, http://www.pff.org/issues-pubs/pops/pop13.24RAE_9_26.pdf.

³⁰ See F. Scott Kieff, Richard A. Epstein, and R. Polk Wagner, Various Law & Economics Professors as Amicus Curiae in the U.S. Supreme Court Docket # 05-130, *eBay v. MercExchange*.

³¹ See Peter S. Menell, *The Property Rights Movement's Embrace of Intellectual Property: True Love or Doomed Relationship?* (February 2007). UC Berkeley Public Law Research Paper No. 965083, available at <http://ssrn.com/abstract=965083> (observing the essential discontinuities between the PRM's traditional constituency and the *eBay* plaintiffs).

³² See *eBay*, 547 U.S. at 396-97 (stressing that the practical effect of *eBay*'s holding will be to mitigate the ability of patent acquirers to hold up purported infringers' inventions in exchange for exorbitant settlements); Eric Wesenberg & Peter O'Rourke, *The Toll on the Troll: The Implications of eBay v. MercExchange*, <http://www.law.com/jsp/article.jsp?id=1147943132930> (discussing both *eBay* and the BlackBerry/NTP case as examples of patent trolls).

homeowners, and patent trolls alike share a status as property owners that renders irrelevant any such distinctions.

Consider as well the “cybertrespass” flap. The internet explosion presented novel problems for businesses. Some had servers that were bombarded with spam (hardly a problem unique to businesses).³³ Others were irritated that competitors culled facts from their sites via visits from unauthorized bots.³⁴ One legal response to this was the argument that these uninvited uses of their servers or websites were just like unauthorized uses of their personal property, and amounted to an online iteration of the ancient (and obscure) tort of trespass to chattels. The characteristic rhetorical simplicity of property romance captures this view perfectly (though judges have been divided in their reaction³⁵). *Of course*, a property romantic would say, spam and bot visits are trespasses to chattels. After all, the argument runs, property is property. Owners of a site in cyberspace are like owners of a site in real space. And since you can’t just use or access someone’s personal possessions without their permission, neither can you use or access someone’s virtual possessions without their permission.³⁶ Here too, property provides a template from which one can work to resolve a difficult and novel problem raised by modern technology in easy and familiar terms.

A third site in which we can see property romance at work is in congressional debates about new copyright (or in the case of the DMCA, paracopyright) legislation. IP owners and pro-industry lobbyists testifying before Congress have a long history of using florid

³³ Intel Corp. v. Hamidi, 30 Cal.4th 1342, 1346-47 (2003) (rejecting trespass to chattels claim based on defendant’s sending unauthorized emails to plaintiff’s servers).

³⁴ eBay, Inc. v. Bidder’s Edge, Inc., 100 F. Supp. 1058, 1070 (N.D. Cal. 2000) (holding that an action for trespass to chattels based on plaintiff’s sending unauthorized bots to defendant’s website survived motion to dismiss).

³⁵ Compare *Hamidi*, 30 Cal.4th at 1346-47 (denying cybertrespass claim) with *eBay*, 100 F. Supp. at 1070 (allowing cybertrespass claim) and *Sotelo v. DirectRevenue, LLC*, 384 F.Supp.2d 1219, 1231-32 (N.D. Ill. 2005) (allowing contributory trespass to chattels claim based on sending unwanted advertisements to plaintiff’s computer).

³⁶ See Richard A. Epstein, *Cybertrespass*, 70 U. CHI. L. REV. 73, 75 (2003) (arguing that websites “are a new form of chattel, which are presumptively governed by the law of trespass to chattels”); Richard Warner, *Border Disputes: Trespass to Chattels on the Internet*, 47 VILL. L. REV. 117 (2002) (same).

metaphors.³⁷ 1998's debates about the passage of two major pieces of legislation affecting copyright—the Copyright Term Extension Act and the Digital Millennium Copyright Act—also included its dramatic moments, many of which relied on a romantic view of property as the basis for their appeal. Jack Valenti defended the MPAA's interest in just these terms: “We don't want to shut down innovation... We just want to stop private property from being pillaged.”³⁸ And even testimony that did not explicitly access property's emotional appeal still relied on it as the constitutive metaphor for understanding the need for enhancing owners' rights. Marybeth Peters' defense of the DMCA's anticircumvention provisions invoked the familiar lock-and-key example that relies on an equation of information ownership with home ownership.³⁹ The late Johnny Cash's testimony defense of Title I of the DMCA epitomizes the easy elision of all forms of possession that characterizes property romance. “[O]ur laws respect what we create with our heads as much as what we build with our hands.”⁴⁰

³⁷ Consider, for example, Jack Valenti's famous “Boston Strangler” testimony. “I say to you that the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone.” Jack Valenti, MPAA president, testimony before House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, 1982, *available at* <http://cryptome.org/hrcw-hear.htm>.

Perhaps more amusing than Valenti's violet metaphor is the fact that it turned out to be so utterly mistaken. In fact, the advent of the videotape medium turned out to diversify and expand the market for movies and has been an enormously lucrative development for the film industry.

³⁸ Edmund Sanders & Jube Shiver, Jr., *Digital TV Copyright Concerns Tentatively Resolved by Group*, L.A. Times, Apr. 26, 2002, at C5 (quoting Valenti).

³⁹ Marybeth Peters, WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act, Hearing on H.R. 2281 and H.R. 2280 before the Subcomm. on Courts and Intell. Prop. of the House Comm. on the Judiciary, 105th Congress (1997), 49 (testimony of MaryBeth Peters, Register of Copyrights) (“It has long been accepted in U.S. law that the copyright owner has the right to control access to his work, and may choose not to make it available to others or to do so only on set terms. This means ... that he can publish it while controlling the conditions under which others are allowed to see it such as charging a fee or imposing restrictions on how the work may be used. ... The bill would continue this basic premise, allowing the copyright owner to keep a work under lock and key and to show it to others selectively. Section 1201 has therefore been analogized to the equivalent of a law against breaking and entering. Under existing law, it is not permissible to break into a locked room in order to make fair use of a manuscript kept inside.”).

⁴⁰ WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act, Hearing on H.R. 2281 and H.R. 2280 before the Subcomm. on

Each of these examples illustrates the character of property romance as a rhetorical device. Whether the object of concern is MercExchange's patent, the annoyance of server or website owners at unwanted visits, or the rights of artists, the deployment of the language of property allows the speaker's audience in each of these cases to understand a tricky issue raised by the advent of digital technology in terms of an ancient and familiar idea.

But these examples illustrate still more. Property romance almost invariably operates as a device to militate in favor of broadening copyright and patent owners' rights. Invoking property not only provides a conceptual common ground to make arguments accessible, but it possesses moral force as well. Framing an IP issue in terms of property imbues the debate with a very particular social meaning in which the owner is an aggrieved possessor beset by wrongful takings. This enables a contrasting portrayal of those who seek to limit owners' rights or exercise user privileges as pirates, or (probably worse, in America at least) communists.⁴¹ This Manichean dichotomy, however artificial,⁴² makes it hard for anyone not to feel sympathetic to owners' concerns. Some writers have even invoked religion in favor of owners' rights. Author Susan Cheever invoked the Biblical injunction "thou shalt not steal" in resisting the idea that any taking or use of her copyrighted work of authorship was licit.⁴³ Judges

Courts and Intell. Prop. of the House Comm. on the Judiciary, 105th Congress (1997), 198, 199 (testimony of Johnny Cash).

⁴¹ Michael Kanellos, Gates Taking a Seat in Your Den, <http://news.com.com/> (last modified Jan. 11, 2004).

⁴² See Patricia Loughlan, "'You Wouldn't Steal a Car, Would You?' Intellectual Property and the Language of Theft", 3 (draft Apr. 2008), available at <http://ssrn.com/abstract=1120585> ("The use of the term 'pirate' is clearly metaphorical and not even the most naïve of participants in the discourse of intellectual property would take it seriously"). Larry Lessig has also pointed out that the content industries most likely to invoke the notion of "piracy" to shame would-be users have themselves often taken liberally from the public domain and from other artists. For instance, Disney's first iteration of the Mickey Mouse character, "Steamboat Willie", was a very close imitation of Buster Keaton's earlier audiovisual work, "Steamboat Bill, Jr." LAWRENCE LESSIG, FREE CULTURE 21-23 (2004).

⁴³ Susan Cheever, "Just Google, 'Thou Shalt Not Steal'", *Newsday*, Dec. 12, 2005, at B13. Harry Potter creator J.K. Rowling's comments following the infringement trial of a defendant who created an online guide to Rowling's work were less melodramatic but still relied heavily on both the moral force of possession and property romance. "Am I not the owner of my own work?" she asked reporters when discussing the defendant's fair use defense. John A. Sellers, *Rowling and RDR*

have done the same, solemnly beginning opinions holding that any sampling of sound recordings requires a licensing fee with the same imperious religious command.⁴⁴ And academic writers who tend to deploy property romance also tend to prefer a high protection vision of IP protection.⁴⁵

C. *Property Anxiety and Intellectual Property*

Property romance possesses a simple and seductive appeal. It deploys a familiar and ancient idea in order to make a claim that IP owners should be protected from theft (or piracy, or trespass, or something equally awful-sounding). But what rhetorical ground does this leave for those who seek to resist the encroaching privatization of information? In the early days of the internet, a few cyber-anarchists espoused the reductionist position that IP is simply not property, and it's still possible to find echoes of this idea in cyber-zines and on discussion boards.⁴⁶ The hacker battle-cry "information wants to be free" has also seeped into popular culture.⁴⁷ But even to the extent that these aphorisms express an appealing ideal, they possess no real legal content. Information may want to be free, but if so, information is out of luck, because it is now and has always been heavily regulated. Even strong proponents of the public domain readily concede that IP is a form of property, although they also tend to

Meet in Court, Publisher's Weekly, Apr. 17, 2008, available at <http://www.publishersweekly.com/article/CA6552416.html?nid=2788>. On the witness stand, Rowling compared the "theft of her words to the removal of all the plums from a cake she might have baked." *Id.*

⁴⁴ Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (quoting Exodus 20:15).

⁴⁵ To take just one data point, all three of the authors of the brief written on behalf of the PRM in *eBay* tend to prefer strong protection of IP owners' rights in their scholarly work. See Richard A. Epstein, *Respect Bayer's Patent: Cheap Cipro Now Could Cost Us Dearly in the Long Run*, Wall Street Journal (October 25, 2001); F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, 85 MINN. L. REV. 697 (2001); R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995 (2003).

⁴⁶ See, e.g., "Thomas Jefferson on Why Copyrights and Patents Are not Property", <http://freedomforip.org/2007/10/31/thomas-jefferson-on-why-copyrights-and-patents-are-not-property/> (Oct. 31, 2007).

⁴⁷ http://en.wikipedia.org/wiki/Information_wants_to_be_free (tracing the origin and social meaning of this phrase).

express ambivalence about this idea.⁴⁸ There is something the equation of traditional and intellectual property that causes many writers profound unease—property anxiety, I’ll call it.

Property anxiety is as conflicted as property romance is simple and straightforward. While most writers would agree that IP is more or less a form of property,⁴⁹ there remains substantial unease about the issue.⁵⁰ This unease comes from a number of different directions. It is thus difficult to find a single thread that runs throughout property anxiety in the same way that property romance seems animated by a single unifying idea. Numerous writers lament the “proPERTIZATION” of intellectual property.⁵¹ Examined more closely, though, this notion

⁴⁸ Compare LAWRENCE LESSIG, *FREE CULTURE* (2004) 172 (“The issue is therefore not simply whether copyright is property. Of course copyright is property, and of course, as with any property, the state ought to protect it.”) with LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN THE CONNECTED WORLD* 187 (2001) (“[R]eal property doesn’t map directly onto intellectual property. [I]ntellectual property is a balanced form of property protection. I don’t have the right to fair use of your car; I do have the right of fair use of your book.”).

⁴⁹ There is not widespread agreement about the issue. For example, some writers have argued that IP is a mere “privilege” that should not be equated with real and personal property because the latter categories have a longstanding, natural-rights character that is not shared by modern entitlements that are creatures of statute. See, e.g., Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 763-64 (2001) (“[B]y invoking government power a copyright owner can impose prior restraint, fines, imprisonment, and confiscation on those engaged in peaceful expression and the quiet enjoyment of physical property. By thus gagging our voices, tying our hands, and demolishing our presses, copyright law would violate the very rights that Locke defended.”).

⁵⁰ Bill D. Herman, *Breaking and Entering My Own Computer: The Contest of Copyright Metaphors*, 13 COMM. L. & POL’Y 1, 28 (forthcoming 2008) (draft of Dec. 20, 2007) (observing that “the free culture crowd is already anxious to unsettle the metaphor of property” as a way of describing intellectual property). But see Michael A. Carrier, *The Propertization of Copyright*, in IV INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES IN THE DIGITAL AGE 350-56 (arguing that applying property ideas to copyright can limit rather than expand owners’ rights).

⁵¹ E.g., Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 5 (2004) (lamenting the “proPERTIZATION” of IP as an “irreversible” trend that “sinks its tentacles further into public and corporate consciousness (as well as the IP laws) with each passing day”); Olufunmilayo Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477, 504 (2007) (discussing the tendency of proPERTIZATION narratives of intellectual property to diminish authorship based on creative appropriation); Mark Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873,

expresses reservation about the expansion of private rights in information at the expense of the public domain.⁵² Since property is not coterminous with private property (but in fact includes many public forms like common and public property), it seems more accurate to characterize this strain in the literature as one that opposes *privatization* rather than *propertization*.

It is easier to explore the character of property anxiety by looking not to explicit rejections of the idea of property in the IP setting, but rather by looking more closely at how critics of property romance frame their arguments. Many writers have questioned the coherence of the equation of physical and intangible property that lies at the core of the cybertrespass cases. Mark Lemley, for example, argued that the Cartesian paradigm that applies well to real estate and to moveable objects simply makes no sense in the context of information goods. Hence while we can say that one “enters” another’s land when one crosses over the border of their property, “entering” a website means something entirely different, not physical invasion but a mere request to a site to send data to another site.⁵³ Critics of the online incarnation of trespass to chattels argue that these discontinuities are pervasive enough to render talking about information in the idiom of tangible property “faintly ludicrous.”⁵⁴

This descriptive point has normative implications. The claim that IP and property are essentially discontinuous leads to a related argument that framing debates about information regulation in terms of property language causes judges to apply the law in ways that misunderstand the character of intangible resources and degrade the

902 (1996) (reviewing James Boyle, *Software, Shamans, and Spleens*) (observing that the public character of information goods “seems to suggest that propertization is a uniquely bad idea, precisely because the consumption of that good is ‘nonrivalrous’”); Pamela Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. U. L. REV. 365, 398 (1989) (expressing concern in the patent setting about the development of a “more proprietary and anti-dissemination attitude toward information than that which the law has previously displayed”).

⁵² James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & CONTEMP. PROBS. 33, 37-40 (2003) (describing the increasing trend toward creating private rights in information as a “second enclosure movement”).

⁵³ Mark Lemley, *Place and Cyberspace*, 91 CAL. L. REV. 521, 527-28 (2003).

⁵⁴ *Id.* at 523.

public domain.⁵⁵ Judicial reliance on an equation of physical space and cyberspace, the argument runs, prioritizes a form of reasoning about the latter that fails to account for the distinctive features of information regulation.⁵⁶ For example, IP more than physical property depends on preservation of large public commons in order to function efficiently. Property anxiety suggests that a ownership-centered approach to regulating information goods fails to account for this quality, and that the net result will be judicial prioritization of claims of private possession even where those claims threaten an inefficient lockup of information that would be more efficiently held as a publicly available resource.⁵⁷

A related site of resistance to talking about IP in the language of physical property looks past the coherence of the idea of property itself, or its effects on the behavior of judges and policymakers, and focuses instead on the broader social implications of treating all information as subject to claims of private right. Niva Elkin-Koren, for example, cautions that talking about information goods primarily in terms of property will cause us to change from a culture that freely trades in information to one that regards information first and foremost

⁵⁵ Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 429, 452 (2003) (“[J]udges, legislators, practitioners, and lay people treat cyberspace as if it were a physical place. Examining how people discuss their online interactions, we find a vast amount of evidence that people think about online communications and transactions as occurring in some place. This place may be inchoate and virtual, but no less real in our minds.”).

⁵⁶ E.g., Mark A. Lemley, *Place and Cyberspace*, *supra* note 53, 528-33 (critiquing judicial reliance on physical property rules like trespass in regulating information); Hunter, *supra* note 55 at 488 (criticizing the *Bidder’s Edge* court for using trespass to chattels as a theory to hold liable the senders of unauthorized bots to an auction website). David McGowan, *The Trespass Trouble and the Metaphor Muddle*, 1 J.L. ECON. & POL’Y 109 (2005) (reviewing opinions in cybertrespass cases and concluding that there is no evidence that analogizing cyberspace to real space will lead to flawed judicial decisionmaking).

⁵⁷ Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 429, 452 (2003) (arguing that approaching IP from a property perspective causes judges and policymakers to engage in “suboptimal and wasteful uses because the holders of the exclusion rights block the best use of the resource.”); cf. Glynn S. Lunney, *Trademark Monopolies*, 48 EMORY L.J. 367, 419 (1999) (noting that the trademark “has become its owner’s property not merely in a formal and limited sense, but in an ordinary and increasingly absolute sense,” which results in the mark’s being used “in circumstances entirely divorced from, and sometimes actually in conflict with, [the] mark’s informational role”).

as a commodity.⁵⁸ Rhetoric is (as we have seen above) connected to reality. How we talk about things—and in particular, the extent to which we talk about them in a market idiom—affects how we think about and treat them as well.⁵⁹ This is particularly problematic to the extent that IP is distinctively generative of “nonmarket production”: modes of production that are inspired by forces other than pecuniary gain.⁶⁰ Artistic satires, political commentaries, and religious tracts furnish historical examples, but the advent of the internet has caused this form of production to proliferate. Mash-ups posted on YouTube and Wikipedia entries composed entirely of voluntary contributions provide just two illustrations of the means by which production takes place in the absence of profit motivation. Property anxiety’s reservations about property talk derive from a sense that complete commodification of intellectual resources will choke off this burgeoning method of production.⁶¹

From all of these directions, property anxiety pushes back against the romantic view that physical property doctrine can provide a coherent template for regulating intellectual property. Where property romance represents a universalist view that the two forms of ownership are essentially continuous, property anxiety resists this claim, suggesting instead that physical and intangible property are essentially discontinuous. Whatever one thinks of the merits of this approach, it differs from property romance in that it lacks a powerful central theme that allows it to operate effectively as a rhetorical device. While equating IP with familiar notions of possession allows

⁵⁸ Niva Elkin-Koren, *What Contracts Can’t Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM L. REV.* 375 (2005). This concern echoes Margaret Radin’s articulation of the problems attendant with treating certain objects such as babies and organs as goods in trade. Radin argues that “commodifying” these things—treating them as equivalent to other salable goods like chattels or land—robs them of their essentially human qualities that transcend commercial status. Margaret J. Radin, *Market-Inalienability*, 100 *HARV. L. REV.* 1849, 1884-85 (1987) (“to see the rhetoric of the market . . . as the sole rhetoric of human affairs is to foster an inferior conception of human flourishing.”).

⁵⁹ *Id.* at 1870 (“[A] world in which human interactions are conceived of as market trades is different from one in which they are not. Rhetoric is not just shaped by, but shapes, reality.”).

⁶⁰ YOCHAI BENKLER, *THE WEALTH OF NETWORKS* (2006).

⁶¹ Larry Lessig, *Re-Crafting a Public Domain*, 18 *Supp. YALE J. L. & HUM.* 56, 79 (2006) (“[T]he concern is that the use of licenses to craft freedom may in turn affect the meaning of that freedom. . . . The focus on licenses may thus make that community less likely to engage in property-less creativity.”).

listeners to access their own understanding of ownership, property anxiety offers merely a series of complications that seek to undermine the conceptual coherence and practical wisdom of eliding corporeal and incorporeal forms of property.⁶²

This lack of a persuasive central theme matters because this debate is not merely an academic one over the nature of ownership. Just the contrary: property anxiety has a central place in debates over the appropriate scope of patent and copyright protection, and possesses a particular substantive valence. And just as property romance correlates almost exclusively with a high protection vision of the ideal scope of IP protection, so does property anxiety correlate with a lower protection approach to this issue. Whether resisting extension of trespass doctrine in online settings or legislative expansion of owners' rights in information, the above examples indicate that property anxiety is a rhetorical device deployed almost exclusively in resisting expansions of private rights in information (or, conversely, in seeking to preserve the public domain). This is obviously not a coincidence; rather, writers who express property anxiety fear that the imposition of an expansionist, romantic vision of property onto copyright and patent will lead inexorably to an expansion of owners' rights and a correlative diminishment of the public domain. Given the current limited use of the idea of property in debates over the scope of IP protection, this fear is likely well-founded. In the following Part, though, I critique the assumptions underlying both property romance and property anxiety, and lay the foundation for an approach to thinking about IP as property that is not inimical to the public domain.

II. MYTH AND REALITY IN PROPERTY RHETORIC

A. *The Pervasive Power of Property Rhetoric*

As we have seen, rhetoric, as a form of legal reasoning, represents an attempt to persuade members of a polity about what the

⁶² To some extent, property anxiety offers counter-rhetoric that operates within the romantic property paradigm. Most familiar is the notion of the "information commons" that seeks to emphasize the extent to which many information resources remain accessible to the public. As I explain later, while building on our understanding of physical property to understand intellectual property is an appealing project, the term "information commons" is misleading because it suggests a form of limited, shared ownership rather than unregulated public access. *See infra* n.106.

good life is (or should be) using an appeal to a set of common understandings.⁶³ This is precisely what is at play in using property romance when talking about copyright and patent. To say “owners of copyrights and patents enjoy certain statutorily enumerated exclusive rights, though those rights are subject to other statutorily enumerated user privileges” is a far less effective rhetorical appeal than to simply say “patents and copyrights are their owners’ property”. To take the point one level further, the latter phrasing epitomizes a *constitutive* rhetorical approach to legal reasoning.⁶⁴ Invoking the notion of property in dialogues about IP accesses a set of shared assumptions about what property means. Thus the rhetorical power of using property ideas in an IP context lies just beneath the surface of the appeal itself. Property romance does not explicitly claim that IP and property are essentially continuous, but merely by assuming that this is the case, the speaker manages to access the force that property holds over the popular imagination.

Property anxiety responds to the rhetorical force of property romance by attempting to undermine the coherence of the assumptions that lie beneath it. The essential thrust of property anxiety is that by equating a less familiar notion (information regulation) with a more familiar one (physical property), the latter tends to dominate the imagination, eliding crucial distinctions between the two. Justice Cardozo warned that “Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”⁶⁵ Much as Cardozo warned about the seductive character of rhetorical appeals, low protection writers similarly assert that property romance is a foundationally flawed rhetorical device because it fails to account for essential differences between the objects governed by the two fields, such as rivalrousness and excludability.

But however much property romance and property anxiety may take diametrically opposed view on the appropriate *role* that property rhetoric has in debates over the proper scope of IP protection, they do agree on the *social meaning* that property has in these debates. As we

⁶³ See Part I.A., *supra*.

⁶⁴ Cf. Patricia Loughlan, *Pirates, Parasites, Reapers, Sowers, Fruits, Foxes... The Metaphors of Intellectual Property*, 28 SYDNEY L. REV. 211, 212 (comparing overtly descriptive metaphors with “constitutive” metaphors that more subtly express one think in terms of another).

⁶⁵ *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926). It should not go unnoticed that this observation itself uses liberation and slavery as a constitutive metaphor for vivifying its warning about using metaphor in legal reasoning.

have seen, property romance and property anxiety alike assume that using property ideas in discussing copyright and patent protection is invariably an expansionist move. While these approaches dispute the continuousness of physical property with copyright and patent, they each share the assumption that if information were regulated much as corporeal property is, the result would be a governance regime characterized by largely inviolable entitlements and a near-total degree of owner control.⁶⁶

But why do all of these writers assume that property necessarily entails a near-total suite of ownership entitlements? After all, lawyers learn as first-year students that property is merely a legal relationship. We are taught not to confuse the idea of property with the objects of ownership, and we have to get our minds around the initially counterintuitive idea that property establishes relationships between people with respect to things.⁶⁷ This latter idea seems counterintuitive because property means something very different in the popular imagination.⁶⁸ In common American parlance, to say that something is your property is to claim dominion and control over it,⁶⁹ and likely also to express that the thing (and in common parlance, the

⁶⁶ See Neil W. Netanel, *COPYRIGHT AND A DEMOCRATIC CIVIL SOCIETY* 1 (1998) (unpublished S.J.D. dissertation, Stanford University) (expressing concern that as cultural expression increasingly becomes regarded as a commodity of trade, the result will be “broad proprietary rights [in information] that extend to every conceivable valued use”); Bill D. Herman, “Breaking and Entering My Own Computer: The contest of copyright metaphors”, 13 *COMM. L. & POL’Y* (forthcoming 2008) (draft of Dec. 20, 2007) (arguing that “if copyright is a real property right, [owners] get[] near total control over how [their works of authorship are] used”).

⁶⁷ Morris Cohen, *Property and Sovereignty* 13 *CORNELL L.Q.* 8, 13 (1927); A.M. Honoré, *Ownership*, in *OXFORD ESSAYS IN JURISPRUDENCE* 107, 128-30 (A.G. Guest ed., 1961) (emphasizing that ownership describes relations between persons and other persons, not between persons and objects of ownership).

⁶⁸ See Thomas Grey, *The Disintegration of Property*, in *XXII NOMOS: PROPERTY* 69 (J. Roland Pennock & John W. Chapman, eds.) (“In the English-speaking countries today, the conception of property held by the specialist (the lawyer or economist) is quite different from that held by the ordinary person.”); Bruce Ackerman, *Private Property and the Constitution* 97-100, 113-67 (1977).

⁶⁹ Grey, *supra* note 68, at 69 (“Most people, including most specialists in their unprofessional moments, conceive of property as things owned by persons. To own property is to have exclusive control of something—to be able to use it as one wishes, to sell it, give it away, leave it idle, or destroy it. Legal restraints on the free use of one’s property are conceived as departures from an ideal conception of full ownership.”)

thing is your property) over which you assert ownership has some dignitary connection to your identity.⁷⁰ And it is this latter view of property—rather than the formal legal definition of the institution—that gives property romance its formidable force. One of the foundational ways of thinking about property, and the way that prevails in the popular mind, is what scholars have called the “ownership discourse” of property.⁷¹ This conception of property emphasizes owners’ rights to use, exclude, and transfer as both natural and inevitable. The classic touchstone for this idea is Blackstone’s description of property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”⁷² Though even property enthusiasts acknowledge that the institution admits of some limits on owners’ prerogatives,⁷³ the equation of property with near-absolute rights continues to dominate the popular imagination.⁷⁴ The power of this view of property is unsurprising.

⁷⁰ Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

⁷¹ E.g., Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Native Americans as Nonowners*, 52 UCLA L. REV. 1061, 1085 (2005) (using this term).

⁷² 2 William Blackstone, *Commentaries on the Laws of England* 2 (facsimile ed. 1979) (1765-69) (“There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”).

⁷³ See, e.g., Richard A. Epstein, *Intellectual Property: Old Boundaries and New Frontiers*, 76 IND. L.J. 802, 805 (2001) (calling Blackstone’s “despotic dominion” phrasing an “injudicious overgeneralization”); Robert P. Burns, *Blackstone’s Theory of the “Absolute” Rights of Property*, 54 U. CIN. L. REV. 67, 85 (1985) (“Although private property is said to be an absolute right, the protection of which is a primary aim of government, absolute rights are largely sacrificed for the blessings of civil society.”).

⁷⁴ See Milton C. Regan, *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2340 (1994) (“[P]roperty rhetoric is comprised of diverse strands that co-exist in some tension, rather than forming a unified and harmonious whole. Nonetheless, certain strands have had particularly powerful influence on the cultural imagination, and together constitute what we might describe as the mythology of property.”).

The best anecdotal illustration I’ve seen of this point is the stridently pro-owner version of Woody Guthrie’s populist song “This Land Is Your Land” that is (apparently) popular among schoolchildren: “This land is my land/And it ain’t your land/I’ve got a shotgun/And you don’t got one/If you don’t get off/I’ll blow your head off/This land is private property”. This song appeared in the 1992 film *Bob*

Emphasizing owners' total control fits neatly with the tradition of liberal individualism that animates the American consciousness. To regard property owners as rightful, deserving possessors suggests that they merit freedom from government regulation, and also serves to downplay the moral significance of America's vast disparities in wealth distribution.⁷⁵

The ownership discourse provides the background assumption animating most property scholarship as well,⁷⁶ even though lawyers are aware that the popular notion of property absolutism does not match the complexity of the positive law of property. Richard Pipes, for example, characterizes property as "the right of the owner or owners, formally acknowledged by public authority, both to exploit assets to the exclusion of everyone else and to dispose of them by sale or otherwise."⁷⁷ Most American courts share this assumption, elevating property owners' rights over claims even to constitutional freedoms like speech⁷⁸ or religion.⁷⁹ The dominance of the ownership discourse in the Anglo-American tradition results in a view of property strongly imbued with moral overtones, so that claims of ownership over land or chattels possess force in the popular mind as well as in legal settings.⁸⁰

Roberts, and came to my attention when it was quoted in Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 280 (1989).

⁷⁵ Cf. DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* iii (1991) (observing the American tendency to embrace explanations that look to "the classical ideology of liberal individualism" rather than looking to material causes).

⁷⁶ See also Williams, *supra* note 74, at 285-86 (pointing out that while lawyers pay lip service to resisting the "absolutism" that characterizes the popular view of ownership, this approach to thinking about property still dominates academic writing on the subject).

⁷⁷ RICHARD PIPES, *PROPERTY AND FREEDOM* xv (1999).

⁷⁸ *But cf.* *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (upholding California Supreme Court's construing state constitution to require owners of private shopping centers to allow certain kinds of speech on the premises).

⁷⁹ See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1986) (holding that the federal government's title to property trumped Native American interests in holding religious rites on the same land).

⁸⁰ See generally Thomas Merrill & Henry Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007).

B. *Property Myths and Property Rhetoric*

It is thus understandable that both property romance and property anxiety proceed on the assumption that talking about IP in the language of traditional property will yield a broader view of owners' copyright and patent protections. After all, the traditional ownership discourse on which each of these perspectives relies is the dominant way of thinking about property both within the academy and in American culture more generally. What each of these approaches misses, though, is that there are not one, but many discourses of property, and that the ownership discourse is only one way to talk about possession. Property, as an academic and a popular idea, exists as a series of discourses, which include but are not limited to a story about individual ownership. A counter-narrative to this way of thinking about property deemphasizes the centrality of owners and instead regards property as a system that structures social relationships with resources. This alternative view—what I'll call the social discourse of property—suggests that focusing primarily on private, individual ownership submerges the full range of functions served by property, and blinds us to the ways that property is a communal institution that creates and depends on social relationships. Of particular relevance for this investigation, the social discourse of property stresses that “property” is not coterminous with private property, and instead includes common and public forms of property that often prove to be a superior way of regulating resources.

This latter idea has long historical roots. Although Blackstone's well-worn “despotic dominion” phrasing is often trotted out to suggest the historical primacy of an individualist view of property,⁸¹ earlier property regimes typically employed mixtures of public, common, and private possession, ceding some land for private ownership while reserving other portions for public use. These included public property that was available for anyone to use (such as Roman roads and watercourses) and common property that was subject to the limited use and exclusion rights of a particular group (such as the English village common, which was accessible by any villager but not by outsiders). Indeed, the public trust tradition that

⁸¹ And does not, in context, accurately reflect Blackstone's own ideas. In fact, Blackstone devoted the 518 pages of his treatise following the hoary “despotic dominion” phrasing to qualifying that definition. See Williams, *supra* note 74, at 281.

animates modern environmental law traces to Justinian's *Code*.⁸² And the feudal ownership system that predated Blackstone was characterized not by atomistic notions of possession, but by a system of overlapping relationships with resources "so that many persons ... could say each with as much justification as the other, That is my field."⁸³ The legal realists of the early twentieth century echoed this idea, characterizing property as an essentially social institution that links together various individuals in relationship to a given resource.⁸⁴

We can distinguish the social discourse of property in three primary ways. First, the ownership discourse focuses primarily on private property. Although writers within this tradition acknowledge, as they must, the existence of public and common forms of property, their work tends to emphasize the centrality of privately owned land and chattels.⁸⁵ By contrast, the social discourse of property does not prioritize any particular form of possession, instead acknowledging as the simultaneous presence of various iterations of property ownership, such as commonly held resources, public lands, and novel alternatives like limited common property regimes.⁸⁶ The social discourse of property also looks to a wider range of potential subjects of property, while its ownership-oriented alternative tends to limit its discussion of property to physical things. The New Property movement of the 1960s began this trend, at its peak convincing the U.S. Supreme Court

⁸² THE INSTITUTES OF JUSTINIAN bk. 2, tit. 1, pts. 1-6, at 65 (J. Thomas trans., 1975); see William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385 (1997) (citing Justinian's code as font of public trust doctrine).

⁸³ Marc Bloch, *Feudal Society* 113-16 (L.A. Manyon trans., 1970)); see also Williams, *supra* note 74, at 290-91 (discussing the variety of social obligations and entitlements with respect to land in the Middle Ages).

⁸⁴ See, e.g., Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 361 (1954).

⁸⁵ See Harold Demsetz, *Toward a Theory of Property Rights*, 79 AM. ECON. REV. PROC. 347 (1967) (arguing that conversion of public or common to private property is almost always normatively attractive); cf. Richard A. Epstein, *What Light If Any Does the Google Print Dispute Shed on Intellectual Property Law?*, 7 Colum. Sci. & Tech. L. Rev. at 9-11 (2006) (conceding only "a small, and shrinking place, for some fair use defense" in copyright law).

⁸⁶ Eric T. Freyfogle, *Correcting the Half-Truths*, 59 PLANNING & ENVTL. L. 3, 7 (Oct. 2007) (observing the public/private character of property entitlements); Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129 (1998) (discussing limited common property regimes).

to regard public assistance as a form of property entitlement.⁸⁷ Courts have since backed off this expansive view of what constitutes property, but writers within the social discourse continue to press the boundaries of what constitutes property. Recent work has, for example, sought to extend the application of property law to environmental services,⁸⁸ self-expression,⁸⁹ and racial identity.⁹⁰

Second, and related, the social discourse of property emphasizes the efficiency values of public as well as private property. The ownership discourse tends to focus on the value of private ownership in generating social value. Harold Demsetz, for example, famously argued that as the value of any resource grows, private claims to that resource will emerge, and that this trend is normatively attractive.⁹¹ The social discourse differs insofar as it considers more fully how public resources contribute to the efficiency of property regimes. Carol Rose has shown that property systems require the presence of common or public resources as well as private ones in order to reach optimal outcomes. To take a familiar example, dedication of roads for common use—even when they transect otherwise private tracts of land—enables commerce so that goods produced on those private lands can be taken to market.⁹²

Finally, the social discourse of property calls attention to non-market aspects of property that are often left aside in the ownership discourse. The existence of common property provides a site for socialization. Public squares create a gathering space that enables individual interactions between members of a community. National parks provide for shared experiences that can create bonds between otherwise disparate members of society.⁹³ Other writers who fit

⁸⁷ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

⁸⁸ James Salzman and J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 *Stan L Rev* 607, 614-16 (2000) (analyzing the role of currency selection in environmental trading markets).

⁸⁹ Wendy Gordon, *A Property Right in Self-Expression*, 102 *YALE L.J.* 1533 (1993).

⁹⁰ Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1709 (1993).

⁹¹ See generally Harold Demsetz, *Toward a Theory of Property Rights*, 79 *AM. ECON. REV. PROC.* 347 (1967).

⁹² Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 *U. CHI. L. REV.* 711, 756 (1986) (arguing that roads and watercourses function better as public than private resources in order to enable travel and commerce).

⁹³ *Id.* at 75-80 (discussing the socializing effects of property); see also Eduardo M. Penalver, *Property as Entrance*, 91 *VA. L. REV.* 1889, 1911-12 (2005)

broadly within this social discourse stress the extent to which the experience of ownership can empower the dispossessed,⁹⁴ or enhance freedom by enabling individuals to more fully realize their basic human capabilities.⁹⁵ In each of these cases, the social discourse seeks a broader definition of property's value than the economic vision associated with the ownership discourse.

This alternative story about property reveals itself in doctrine as well as the academic literature. A quick glance at historical and modern property law belies property absolutism, instead revealing a suite of rights riddled with exceptions and limitations. The rule against perpetuities imposes temporal limits on an owner's ability to bequeath property.⁹⁶ Nuisance laws have long constrained an owner's prerogative to engage in certain property uses that may prove harmful to his neighbors.⁹⁷ Covenants that run with the land require owners to put up with uses that have been established by previous generations.⁹⁸ Modern property owners experience these ancient restrictions in addition to a host of more recent ones. Environmental regulations, eminent domain, civil rights laws, and zoning restrictions all constrain the way in which landowners can use their land and the extent to

(discussing the extent to which acquisition of property enables and reflects humans' inherent tendency toward sociability).

⁹⁴ HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST BUT FAILS EVERYWHERE ELSE* (suggesting that capitalism's failure in developing countries could be reversed by investing the poor with property rights in their material possessions).

⁹⁵ Amartya Sen, *Markets and Freedoms*, in AMARTYA SEN, *RATIONALITY AND FREEDOM* 501 (Belknap 2002) (discussing the capability of market-based property systems to enhance freedom by creating more individual autonomy).

⁹⁶ See Uniform Statutory Rule Against Perpetuities, available at <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/usrap90.htm> (invalidating interests that vest later than twenty-one years after some life in being from the time of their creation). The Rule dates to *The Duke of Norfolk's Case*, 3 Ch. Cas. 1, 22 Eng. Rep. 931 (Ch. 1681).

⁹⁷ Both public and private law trace their development to medieval England. In *William Aldred's Case*, for example, the plaintiff complained that his neighbor's pigsty caused "unhealthy odors . . . such that Aldred . . . could not come and go without being subjected to continuous annoyance." 9 Co. Rep. 57b, 77 Eng. Rep. 816 (K.B. 1611). Aldred prevailed.

⁹⁸ The rule that covenants are enforceable against subsequent owners only under certain conditions also has its origins in the common law of the Middle Ages. See *Spencer's Case*, 5 Co. 16a, 77 Eng. Rep. 72 (1583).

which they can exclude others from it.⁹⁹ And while we normally think of property law as establishing and protecting the rights of private owners, the state also regulates and defends other iterations of property as well. Federal law preserves vast tracts of land for public use (such as, for example, our national parks), and state law can be enlisted to enforce violations of common forms of ownership (such as, for example, trespassing on land held by a condominium association for its members).

The social discourse of property represents a significant counterpoint to the ownership discourse, but the latter still predominates in the academic literature, and especially also in the popular consciousness, where property remains commonly equated with absolute ownership. The point I seek to make here, though, is that contrary to what both property romance and property anxiety assume, rhetorical invocations of “property” need not only refer to private ownership and absolute control. There exists a rich alternative social discourse of property that emphasizes the presence of public and common resources, the efficiency generated by these non-private kinds of property, and (related) the extent to which these resources generate both non-market benefits in addition to their traditional market-based ones.

III. Property Rhetoric for the Public Domain

A. *IP and the Social Discourse of Property*

The previous Part showed that regarding resources as property does not necessarily mean domination and complete control, and that there exists a different discourse of property that invokes a different social meaning about the notion of ownership. I now move past this descriptive point to advance a normative one. In this Part, I argue that while the ownership discourse may predominate in both the judicial and academic literature, the social discourse of property provides a superior idiom in which to talk about entitlements in intangible resources. We have seen that the social discourse of property differs from the dominant ownership discourse in three primary ways. Proceeding through each of these three points illustrates that the social

⁹⁹ See Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 54-80 (2004) (compiling a similar compendium of restrictions on property owners' rights).

discourse of property provides the superior account for understanding the distinctive way in which copyright and patent are forms of property.

First, the central role that public and common resources play in the social discourse of property aligns with the importance of public as well as private property in our intellectual property system. The idea of private ownership of information is obviously integral to patent and copyright law, but so are notions of public ownership. In particular, the public domain—a site of information goods that is largely unregulated and available for the public to use at no charge—has occupied a central place in federal IP law since the inception of the republic. The earliest patent and copyright statutes created very narrow exclusive rights so that protected material would become generally available to the public as soon as fourteen years after vesting.¹⁰⁰ The identification of society as the ultimate benefactor of IP regulation finds its roots in the Constitution’s relatively limited extension of Congressional authority to create “exclusive rights” only for “limited times”, and with the aim of furthering “progress of science and the useful arts”.¹⁰¹ Indeed, the Supreme Court has re-emphasized that the aim of federal IP law is to create a rich public domain, with private owners’ wealth a secondary consideration.¹⁰²

Since the eighteenth century, then, intellectual “property” has referred not only to privately owned information, but to the public domain—itself a form of property, albeit a public one—as well.¹⁰³ In fact, any coherent account of intellectual property has to constantly invoke private forms of ownership as well as the public forms with which they exist concurrently.¹⁰⁴ The specific expression contained in

¹⁰⁰ Patent Act of 1790 (fourteen-year term); Copyright Act of 1790 (fourteen-year term plus possible additional fourteen-year term upon application).

¹⁰¹ U.S. CONST., art. I, sec. 8, cl. 8.

¹⁰² *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 511 (1917) (“[T]his court has consistently held that the primary purpose of our patent laws is not the creation of private fortunes for the owners of patents, but is ‘to promote the progress of science and the useful arts.’”).

¹⁰³ Despite this, the public domain has emerged as a subject of attention in legal scholarship only quite recently. Jessica Litman’s *The Public Domain*, 39 EMORY L.J. 965 (1990), is probably the earliest contemporary example.

¹⁰⁴ Cf. Brett Frischmann, *Evaluating the Demsetzian Trend in Copyright Law*, 3 REV. L. & ECON. 649, 652-53 (2007) (stating that IP regimes create “*semicommons*—a complex mix of private property rights and commons”).

We see examples of this in the physical world as well. For example, many national parks include churches, which cannot be owned by the government for

a novel—the literary work, not the physical book itself—is private property, in many ways subject to the owner’s control just as a plot of land would be. However, that work of authorship is shot through with elements that do not lie within the owner’s control, and have been dedicated to the public. The ideas that animate the work remain free for the public to use, and even proprietary elements of the work can be accessed by the public in an easement-like fashion so long as they amount to fair uses as defined by section 107.¹⁰⁵ And once a copyrighted or patented work passes the applicable time horizon, it ceases to have any private elements at all, instead becoming a fully unregulated resource, as open to the public as the high seas or interstate highways.¹⁰⁶

Second, the social discourse of property also fits well with the Anglo-American intellectual property tradition in that both emphasize the efficiency of public forms of property. The taxonomy of

Establishment Clause reasons. Title to these churches is held by their respective religions, though the surrounding land (and access to the churches themselves) remains owned by the federal government. Similarly, the federal government has ceded some degree of ownership and control over traditional Native American sacred sites to the tribe members for whom those sites have particular significance. Access to each of these the religious sites is the product of agreements between the government and the churches. *See generally* Christopher MacLeod & Malinda Mayor, *In the Light of Reverence* (PBS Film, first aired Aug. 14, 2001).

¹⁰⁵ 17 U.S.C. § 107. Government also condemns easements across private property in order to construct public roads, creating a different kind of public/private hybrid form of property. Some scholars have suggested that fair use of copyrighted works (and possibly also the research defense to patent infringement) are much like public use easements over otherwise privately owned resources. Keith Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection*, 6 *IND. J. GLOBAL LEGAL STUD.* 11, 41 (1998); Timothy J. Brennan, *Copyright, Property, and the Right to Deny*, 68 *CHI.-KENT L. REV.* 675, 712-13 (1993).

¹⁰⁶ Here I want to stress that these examples—like the public domain itself—are instances of *public* property. The frequent use of the term “information commons” to refer to the public domain is somewhat misleading, because commons were subject to limited property rights. Village greens in early modern England, for example, were subject to limited exclusion rights (villagers could enter but outsiders could not) and limited use rights (some greens could be used exclusively for grazing, others only for growing crops). The public domain is thus not really a “commons” but public property: a largely unregulated space to which all are welcome, subject to other legal restraints. *See* Carol Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, 66 *L. & CONTEMP. PROBS.* 89, 92-104 (2003) (contrasting Roman property law categories “res communes” with “res publicae” to illustrate the point).

ownership forms described above is functional as well as descriptive. Roman roads and English village greens sought to maximize efficiency by assuring that the public (or certain subsets of it) had access to the means of transportation or agricultural resources that were necessary to the production of goods for the marketplace.¹⁰⁷ Similarly, the existence of the public domain generates socially optimal outcomes by assuring that sufficient cultural material remains available for the creation of future works. The time-limited character of exclusive patent and copyright privileges reflects the concern that allowing any inventor or creator absolute ownership would be counterproductive, and sits ill at ease with IP owners' claims of complete control over their work. This is particularly true because the full social value of creative or inventive work is realized in the use it inspires in others, so that locking up all rights in a single owner for an indefinite period of time may preclude high-value uses that benefit society overall, rather than just a single actor.¹⁰⁸ Protected information reverts to the public domain both to allow the public to use that information in creating future work, and also to compensate the public for owners' partial appropriation from the public domain in the first instance.¹⁰⁹ The limited nature of copyright and patent owners' prerogatives—comprising only a modest number of exclusive rights and subject to various user-oriented use privileges—during the

¹⁰⁷ See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 720-23 (1986) (observing the “service to commerce” generated by inherently public property, and explaining that “here, the commons was not tragic, but comedic, in the traditional sense of a story with a happy outcome”). Admittedly, there is much debate over the efficiency of some public resources. The English village green and the related enclosure movement provided the central metaphor for one of the most famous critiques of public and common property (and the source of the word play in the title of the Rose essay cited above), Garret Hardin’s *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

¹⁰⁸ Cf. Julie Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799, 1809 (2000) (observing that it is difficult to predict which creative work will advance progress, which militates in favor of time-limited exclusive rights).

¹⁰⁹ Cf. Litman, *supra* note 103 at 966 (“the very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea”); Spider Robinson, *Melancholy Elephants*, in MELANCHOLY ELEPHANTS 1, 16 (1985) (“Artists have been deluding themselves, for centuries, with the notion that they create. In fact they do nothing of the sort.”).

In light of the content of this footnote, I really should note that I found the Spider Robinson quotation not in reading his work, but because it is the epigram for the Jessica Litman piece cited just beforehand.

exclusive rights period further makes sure that there is enough public access to protected work to maintain a robust exchange in ideas.¹¹⁰ The productivity of the IP system thus depends as much on availability of resources to the public as it does on incentives for private owners to invest in creation and invention. The duality of this efficiency story meshes better with the social discourse of the property, in which public and private resources depend on each other to maximize social wealth, than the ownership discourse of property, which stresses almost exclusively the efficiency of private ownership.

The final reason that the social discourse of property is a superior idiom in which to capture the character of intangible resources is that it accounts for the many non-market benefits generated by inventive and creative processes. As discussed above, patent and copyright law generate economic efficiency insofar as they comprise a system that maximizes the production of information goods to be sold in traditional marketplaces. But as the social discourse of property stresses, this is not the only kind of value generated by the institution. Possession can also enhance interpersonal community, generate civic pride, and foster cultural interchange.¹¹¹ Copyright and patent too generate value far in excess of the particular commodities whose production they encourage.

Significantly, positive law does not find the public-regarding elements of patent and copyright at all inconsistent with their treatment as a form of property. The Copyright Act and the Patent Act create a regulatory scheme that reflects the basic ownership structure that arose out of common law real and personal property.¹¹² These

¹¹⁰ See Frischmann, *supra* note 104 at 673 (arguing that the “leaks and limitations” that characterize copyright owners’ entitlements are critical to maintaining allocative efficiency); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1058 (2005) (arguing that total control for IP owners would undermine the efficiency of the copyright and patent systems).

¹¹¹ Gregory S. Alexander & Eduardo M. Penalver, *Properties of Community*, Cornell Legal Studies Research Paper No. 07-020, at 24-34 (draft 2008), available at http://ssrn.com/abstract_id=1025569 (arguing that enforcement of property law can enhance community by recognizing the obligations of the owners and the state to respect and facilitate the flourishing of others); Rose, *Comedy of the Commons*, *supra* note 107, at 767-68 (observing that common lands “have value precisely because they reinforce the solidarity and fellow-feeling of the whole community; thus the more members of the community who participate, even if only as observers, the better for all.”).

¹¹² Here, I am thinking of Thomas Grey’s familiar, though somewhat informal, definition of property as entailing the rights to use, exclude, transfer, and possibly to

statutes enshrine users' rights to use and transfer their goods, and to exclude others from it. IP can be bequeathed on death and attached following an adverse court settlement. The elements of patent and copyright that make it seem unlike land or chattels—most familiarly the limited terms of owners' rights—don't lead courts to conclude that they are not property, but that they are subject to limitations in the public interest that underlie our intellectual property law. These authorities all suggest that, contrary to what the ownership model presupposes, the idea of the public good lies in perfect harmony with the notion of ownership in ideas.¹¹³ As the Supreme Court observed, while the law extends creators and inventors exclusive rights, it “has never recognized an author's right to absolute control of his work.”¹¹⁴

The characteristics of intellectual property that I have just discussed are familiar, but I list them here to stress that the patent and copyright system is best described as a property system, albeit one featuring both private and public elements existing in a complex symbiosis. Yet each of the rhetorical approaches that we have seen—property romance, which its full-blooded embrace of the language of possession, and property anxiety, with its wholesale rejection of the same—fail to recognize the nuanced reality of what it means to call copyrights and patents forms of property. Instead, each of these rhetorical tactics fall victim to the same flawed assumption that “property” means only what the ownership discourse of property says it means: private ownership concentrated in firms or individuals, resulting in complete control of the owned object. Thus both property romance and property anxiety profoundly misunderstand the nature of property itself, which includes multiple different forms of possession as well as a variety of limits and obligations on owners. This is why the social discourse of property provides a more coherent account of how IP is property: it doesn't simply shrink from regarding shared information resources as owned resources, but instead stresses that they are shared—not purely private—forms of property to which the public at large shares an entitlement.

destroy. Grey, *supra* note 68, at 69. On whether the last of these really is a meaningful constituent component of the property right, see Lior Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005).

¹¹³ This does not mean, of course, that the balance of public and private interests in information goods lies at an optimal level, but that is a debate I'm not seeking to engage here.

¹¹⁴ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984).

B. *Addressing the Kelo-Eldred Puzzle*

Even if it is true that the social discourse of property provides a better rhetorical framework for talking about information as an object of possession, one still might question the relevance of the issue. Why does it matter how lawyers or the general public talks about property? Here, I turn back to the puzzle with which I began this Essay: why did the confiscation of physical property in *Kelo* provoke such rage, while the broad reduction of intellectual property rights in *Eldred* provoked no such reaction? As the foregoing discussion suggests, at least part of the reason is that *Kelo* was portrayed primarily as an incursion on property (which, of course, it was). By contrast, public dialogue about *Eldred* did not invoke the language of ownership. The difference was not merely semantic. Reading *Kelo* as a case about a wronged property owner gave it a social resonance that led to a massive (and still ongoing) backlash. That *Eldred* was not cast in this same light meant that the taking of the public entitlement approved in that case could not access the deeply felt emotions necessary to generate a *Kelo*-style backlash.

This analysis of *Kelo* and *Eldred* suggests a thought experiment. What if, rather than resisting property talk, low protectionists explicitly cast their concerns about the public domain in terms of attempts to protect a threatened shared entitlement—in terms, that is, of threatened public property? One might respond that rhetorically recasting IP as property simply cannot access the same visceral reaction that people have to incursions on possession of land and chattels. Land, in particular, is different and has a distinctive attachment to identity, right?¹¹⁵ In fact, recent history belies this assertion. Content industries currently deploy, with great effect, property romance as a rhetorical strategy designed to protect and extend their entitlements in information resources. The romantic message is simple and resonant, as we have seen: IP is property, and if you steal it, you're committing a legal and moral wrong.¹¹⁶ Property

¹¹⁵ Courts tend to prioritize land over other form of property—at least in takings law—but commentators have questioned the viability of this distinction. See Eduardo Penalver, *Is Land Special? The Unjustified Preference for Landownership in Takings Law*, 31 *ECOLOGICAL L.Q.* 227 (2004).

¹¹⁶ See also Leslie Simmons, *A Perfect 10 Storm*, *The Hollywood Reporter*, Esq., Aug. 7-20, 2007, at 11 (quoting Perfect 10 online magazine owner Norman Bedell as defending his multiple lawsuits by saying “[w]e’re simply trying to protect our property and the livelihood of our employees”); Doug Bedell, *Internet Piracy*

romance has proved, in this respect, spectacularly persuasive. As Peggy Radin has observed, “analogies to physical property, and invasion of physical property” are “showstoppers of persuasion”.¹¹⁷ And this is true in part because there is something resonant in content industries’ message. Straightforward infringement—mere unauthorized copying and reselling of protected works like DVDs—almost certainly harms artists’ income and incentives to create while producing almost no social utility gain. But the aggression with which content industries press their message threatens to overdeter. If people become convinced that all or even most information is private, they will lose sight of the fact that large swaths of our culture are publicly available resources, dedicated to common use specifically because they generate more utility as commons. This result is particularly likely to the extent that content industries tend to inculcate their message in the very young.¹¹⁸

Here is where a users-rights approach that deploys property talk can help. Not only is the social discourse of property a more apt framework with which to approach intellectual property, it may also prove a more effective way to create a social consciousness that seeks

Enforcement Flounders with the Rise of MP3, Dallas Morning News, July 27, 1999, at 1F (quoting former RIAA President Hillary Rosen describing her aim as protecting artists who are “having their property taken from them”).

I would be remiss in ending this footnote without mentioning as well what is probably the most familiar incarnation of this rhetorical strategy:

YOU WOULDN'T STEAL A CAR
 YOU WOULDN'T STEAL A HANDBAG
 YOU WOULDN'T STEAL A TELEVISION
 YOU WOULDN'T STEAL A DVD
 DOWNLOADING PIRATED FILMS IS STEALING
 STEALING IS AGAINST THE LAW

This MPAA-produced feature plays prior to most major-release motion pictures and at the beginning of most (legitimate) DVDs. The above script is read as a voiceover while images of sleazy-looking robbers breaking into cars are jump-cut alongside images of relatively innocent-looking people using computers. Truly, it is the apotheosis of property romance, and a great indication of how powerful and pervasive a rhetorical device it is.

¹¹⁷ MARGARET JANE RADIN, *Information Tangibility*, in *ECONOMICS, LAW, AND INTELLECTUAL PROPERTY: SEEKING STRATEGIES FOR RESEARCH AND TEACHING IN A DEVELOPING FIELD* 395, 400 (2002).

¹¹⁸ Boy scout badges; college “don’t steal music” campaigns. Good website/video for the latter. Perhaps Girl Scout story, just for amusements’ sake?

to preserve the public domain. Currently, friends of the public domain lack a powerful rhetorical counterpunch to content industries' claim to broad information ownership. The result is "ownership creep"—with nothing in popular culture to counteract content industries' claims, their ownership talk will tend to convince people that all information is proprietary (or at least that far more information is privately owned than actually is).¹¹⁹ My suggestion is to combat content industries' property talk with more property talk, albeit on that uses the social discourse to emphasize the limited character of ownership. Low protectionists should concede that information, like physical resources, can be thought of as property, but stress that this does not mean that all information is subject to private control. This discourse would stress that culture is property, but that it is public property—something we are all entitled to access. Thus when content industries claim that "information is ours, and stealing it is wrong", the best rhetorical countermove might invoke property. So instead of responding with something like "information wants to be free", it would be more effective to say "certainly some information is yours, but some is not, and belongs to all of us as shared property which you are free to use."¹²⁰

The social discourse, applied in the IP setting, stresses rather than shrinks from the proprietary character of information resources. It emphasizes the extent to which much of this information is a shared resource, subject to common access and use entitlements. But at the same time it would deploy the language of possession in a full-blooded manner, stressing that the public's claim to shared cultural resources is a kind of enforceable property interest that merits the same kind of respect that private entitlements do. By doing so, low protectionists could capture some of the rhetorical thunder of property romance that is currently monopolized by high protectionists. Such an

¹¹⁹ Cf. James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2006) (illustrating examples of ownership creep in IP law via other means).

¹²⁰ Or, perhaps more dramatically, consider this ad as a counterpoint to the familiar one mentioned in n.116 *supra*: "You wouldn't let your government sell the Grand Canyon for use as a private garbage dump, would you? You wouldn't let your government give Yellowstone to a developer to create a shopping mall, would you? But this is just what the government is doing when it gives our treasured shared, cultural resources to private companies by extending copyright terms. Culture is a form of property that belongs to all of us, and to future generations, in common. Don't let the government give our property away to wealthy businesses."

approach bears more promise than mere property anxiety because it identifies the public domain as property: a resource of shared value and concern. Causing the public to understand that culture is *theirs*—a resource they own in common rather than something unrelated or unconnected to them—will encourage a sense of entitlement to and stewardship of these resources. A copyright term extension in the absence of any consciousness of our shared entitlements to public domain information raises little concern outside especially interested experts and elites. But if there were a pervasive consciousness that expansions of owners' rights such as term extensions take place at the expense of publicly held resources—that they are, in effect, uncompensated takings of our shared property—then such moves would be more likely to trigger a visceral sense of injustice.

The commonplace tendency—especially in the popular consciousness—to conflate “property” with privately owned physical resources may raise skepticism about deploying property as a rhetorical strategy to preserve the public domain. One might argue that even if private IP owners can summon property-inspired outrage at incursions on their possession, the same cannot necessarily be said about incursions on *public* information resources. Yet recent events suggest that people actually do react with widespread indignation when public information entitlements are limited. Consider the vitriol that has accompanied owners' attempts to recover royalties for performances of well-known songs. In 1996, ASCAP sent cease-and-desist to the Girl Scouts to pay royalties or stop singing certain campfire songs like “Puff the Magic Dragon” and “God Bless America”.¹²¹ The logic under the copyright act was unassailable. As a representative from ASCAP said, the Girl Scouts “pay for paper, twine, and glue for their crafts—they can pay for their music, too.” The threats to sue the Scouts led to a huge public outcry that turned into a PR disaster for ASCAP.¹²² The licensing organization soon backed down, hedging on their original story and claiming that they hadn't meant to target campfire sing-alongs, but only public, for-profit performances by the Girl Scouts. Now a chastened ASCAP charges

¹²¹ “Birds may sing, but campers can't unless they pay up.” South Coast Today, Aug. 23, 1996, available at <http://archive.southcoasttoday.com/daily/08-96/08-23-96/b02li056.htm>

¹²² Thaa Walker & Kevin Fagan, *Girl Scouts Change Their Tunes*, San Francisco Chronicle, Aug. 23, 1996 (quoting ASCAP's licensing vice president as saying “We got a big black eye from this.”). Available at <http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/1996/08/23/MN14140.DTL>.

the Girl Scouts \$1 per year for the right to sing licensed songs.¹²³ What explains the outrage over ASCAP's claims? Certainly part of it must be their choice of target; corporate licensing organizations bullying Girl Scouts can hardly be expected to garner much sympathy. But on a deeper level, the public's reaction seemed to derive from a sense that ASCAP was entrenching on a preexisting public entitlement. The idea of singing well-known songs around a campfire—or in the shower, or in your car—is the kind of participation in culture that we expect to be able to engage in free of charge.¹²⁴ It is a public use of intellectual property, and when owners attempt to assert private control over such common resources, the objections are typically strong enough to shut them down.

One might also argue that attempting to leverage the rhetorical power of property romance on behalf of the public domain can't work because there simply aren't enough people who use the public domain to generate significant social resistance to it. Everyone owns some physical property, even if just a couple beloved personal curios, but the public domain is the province of the few artists and inventors who seek to borrow from it, right? Again, actual practice belies this instinct. First, the public domain is by no means something used only by a few specialists. As the Girl Scouts example above suggests, there is a common store of songs and stories that we all use on a regular basis—and expect to use for free because they are public property. Consider the indignation that would arise if one's child came home from school with a note reading, “All parents will have to donate a monthly fee to defray costs associated with licensing public

¹²³ Jonathan Zittrain, Calling Off the Copyright War, *Boston Globe*, Nov. 24, 2002, <http://cyber.law.harvard.edu/terribletowel.htm>.

¹²⁴ Similar indignation has accompanied attempts to perform the song “Happy Birthday”, which most people consider a standard public entitlement, but for which ASCAP seeks to charge a license fee whenever contacted about it. See, e.g., Lawrence Lessig, “That Same Old Song”, *Wired Online*, July 13, 2007, available at <http://www.wired.com/wired/archive/13.07/posts.html?pg=7>.

Some writers have suggested that “Happy Birthday” is in fact no longer copyrighted, Robert Brauneis, *Copyright and the World's Most Popular Song*, GWU Legal Studies Research Paper No. 1111624 (draft 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1111624, but this fact does not undermine my point that asking people to treat “Happy Birthday” as privately proprietary rather than a free element of shared culture causes a visceral sense of injustice.

performances of literary works for storytime hour.”¹²⁵ And even if this were not the case, the objection fails too because it ignores the existence value associated with having a rich store of shared cultural resources—a value accrued even by individuals who never use the resource. I may never visit the Grand Canyon again, but I would still object strenuously if the federal government sought to sell it to a private company to use as a huge garbage dump. And recently in California when Governor Schwarzenegger threatened to shut down over fifty state parks due to an impending budget crisis,¹²⁶ donations poured in from sources in- and outside the state, most of which came from people who will never use the vast majority of the threatened parks, but still gain existence value from knowing they are there.

The foregoing objections are not without some merit, however much I think they fall short of undermining the project of this Essay. It remains true that tangible—especially real—property has more of a hold on the popular imagination than its intangible counterparts. Hence this last Part expresses a normative aspiration more than a descriptive reality. As we’ve seen, rhetoric not only reflects but constructs the world of law. So the project of recasting IP through the lens of property, as something we all possess rather than something nobody does, has the promise to foundationally change how we regard cultural resources. By leveraging the romantic power of the idea of possession in the service of the public domain, the public may grow to regard this resource with the covetous reverence that it does physical property.

CONCLUSION: INSIDE AND OUTSIDE PROPERTY, AGAIN

Hanoch Dagan once noted that “Friends of the public domain are typically suspicious of property-talk.”¹²⁷ Yet the tensions raised by this comment have gone unexplored in the literature, which instead takes the opposition between property and the public domain as a given. In this Essay, I seek to fill this gap in the literature in three

¹²⁵ Admittedly, this may not be strictly necessary as a teacher’s reading a story to her class would likely fall within an exemption to the public performance right. 17 U.S.C. § 110(5).

¹²⁶ See <http://www.preservationnation.org/travel-and-sites/sites/western-region/californias-state-parks.html> (describing budget-related threats to California state parks).

¹²⁷ Hanoch Dagan, *Property and the Public Domain*, 18 YALE J. L. & HUM. 84, 84 (Supp. 2006).

ways. First, I explore the nature of IP low protectionists' resistance to property (as well as IP high protectionists' enthusiasm for it). This dichotomy traces to the rhetorical power of property, which is leveraged in debates over the proper scope of IP either to argue in favor of more protection (in its property romance valence), or is resisted in those same debates to argue in favor of less protection (in its property anxiety valence). Second, I show that the supposed conflict between property and the public domain is false. Both property anxiety and property romance share the assumption that invoking property as a rhetorical trope in IP debates necessarily militates in favor of an expansive vision of owners' rights. However, this falsely assumes that the only discourse of property is the ownership discourse that focuses on private possession and complete control of resources. It ignores the presence of another, social discourse of property that stresses the presence of public and common resources as well as the capacity of property to generate non-market goods. Indeed, the social discourse of property provides a far better idiom in which to talk about IP than the ownership discourse. And third, I argue that friends of the public domain would do well to embrace, rather than resist, property rhetoric. Uncompensated government reallocation of cultural resources from the public domain to private owners creates almost no general outcry (whereas even a few compensated takings of private property generate a social backlash movement). Part of this differential is explicable by the failure to invoke the rhetoric of possession when talking about IP. By framing debates about the public domain with the social discourse of property, the public will become more likely to regard attenuation of the public domain as an affront to their shared property rights, encouraging respect for and stewardship of this common cultural possession.

Beyond this central thesis, I also engage a debate that animates the property literature more generally. A significant strain of property scholarship lies within the Demsetzian tradition, presuming that property systems trend toward greater private control of resources and that this trend is normatively attractive. This tradition, which has its roots in the writing of Coase¹²⁸ as well as Demsetz and its modern efflorescence in the neoclassical law-and-economics literature, stresses the social value of private reordering and of private ownership of

¹²⁸ *E.g.*, Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (Oct. 1960).

tangible resources.¹²⁹ Underlying the instrumentalist claim about the value of private ownership is an absolutist, atomistic vision of property. This vision of property relies on a descriptive account of the institution that emphasizes the totality of individuals' control over the objects they own, and pushes toward a normative account of the institution in which the extent of individual rights in those objects is maximized.¹³⁰ The libertarian variation on this perspective highlights the extent to which private property provides individuals with a bulwark against state oppression.¹³¹ This is a perspective that resides *inside* property—it takes the premises of the institution as givens, and accepts property's tendency toward increased private ownership as a more or less unalloyed social good.

Numerous writers have reacted against this view by attacking the institution of property from an external perspective. Skepticism of the social good generated by private property has a number of valences and traces at least to the radical anarchist and socialist movements of the mid-1800s. One familiar exposition of this position is Proudhon, who, influenced by Rousseau, took aim on the very foundation of property, arguing that there is no sound theoretical justification for protecting ownership entitlements (save for those resulting from individual labor) and that insisting that property created political dissension rather than social welfare.¹³² Modern writers, in a much less radical but still critical vein, have articulated a variety of

¹²⁹ A classic account in this vein is Richard Epstein's *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1986). See also Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1359 (1982).

¹³⁰ Of course, even a brief consideration of the limits implicit and explicit in real and personal property law reveal the shortfalls of the descriptive aspect of property absolutism. See Eric Freyfogle, *Context and Accommodation in Modern Property Law*, 41 STAN. L. REV. 1529, 1556 (1989) (describing the idea of absolute property ownership as a "myth" that fails to account for the fact that "entitlements are becoming less and less absolute" and stressing that "ownership has always been a privilege granted by society, and revocable") (quoting WILLIAM KITTREDGE, *Owning It All* 62-67 (1987)); Williams, *supra* note 74, at 280-83 (1998) ("Many commentators have noted the gap between the political rhetoric of absolute property rights and the practice of limited property rights.").

¹³¹ MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 7-21 (1962); F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 139-41 (1960).

¹³² Pierre-Joseph Proudhon, *What Is Property?* (1840) (famously introducing the aphorism "la propriete, c'est le vol!" or, roughly, "property is theft").

critiques that undermine the foundations of the institution.¹³³ Some have argued that property's focus on market production creates a general tone of commodification, threatening to reduce the world to no more than a series of objects in trade, and eliminating other criteria of value so that human experience itself is diminished.¹³⁴ Still others have suggested that property regimes are systematically biased in favor of preexisting property-holders, who can leverage their power to skew outcomes in their favor, precluding more equitable distributions than would occur otherwise.¹³⁵ A final, and related, structural critique is that property systems lock society into particular modes of production that preclude the exploration of other alternatives, such as cooperative ventures, that have the potential to yield more efficient outcomes.¹³⁶ All of these perspectives take different tacks on the

¹³³ For example, many Native Americans regard the idea of possession as simply incoherent, since they do not regard land as a thing capable of ownership:

In the language of my people ... there is a word for land: Eloheh. This same word also means history, culture and religion. We cannot separate our place on earth from our lives on the earth nor from our vision nor our meaning as people. We are taught from childhood that the animals and even the trees and plants that we share a place with are our brothers and sisters. So when we speak of land, we are not speaking of property, territory, or even a piece of ground upon which our houses sit and our crops are grown, we are speaking of something truly sacred.

PETER MATHIESSEN, *INDIAN COUNTRY* 118 (1994) (quoting Jimmie Durham, Eastern Band of Cherokees).

¹³⁴ Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1951, 1903 (1987) (resisting the universal commodification of objects "as the sole discourse of human life" and suggesting instead the inalienability of some things, "grounded in noncommodification of things important to personhood"); see also generally Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

¹³⁵ See, e.g., Joel M. Ngugi, *Re-Examining the Role of Private Property in Market Democracies: Problematic Ideological Issues Raised by Land Registration*, 25 MICH. J. INT'L L. 467, 499-500 (2004) (arguing that Kenyan land-title reform was driven by opportunistic elites who used the government's reform to create a landed gentry at the expense of peasant farmers); Emily Marden, *The Neem Tree Patent: International Conflict over the Commodification of Life*, 22 B.C. INT'L & COMP. L. REV. 279, 292-93 (1999) (discussing the benefits Western pharmaceutical companies derive from patents on plants discovered in India, where commodification of such living things runs counter to deeply rooted traditions).

¹³⁶ See, e.g., Ngugi, *supra* note 135 at 513-14 (arguing that the effect of Kenyan land-title reform was to mandate the participation of farmers in commodity markets); Yochai Benkler, *Freedom in the Commons: Towards a Political Economy of*

problems with property, but what links them all is that they lie *outside* the institution, seeking to critique private ownership from an external perspective, and to expose the flaws of the assumptions and structures that animate the law of property.

These two views more or less track the current debate about the role of property ideas in copyright. Most writers—at least, most low protectionists—express property anxiety, which reflects a basic skepticism about the very idea of possession.¹³⁷ As we have seen, this reaction relies on a narrow vision of property as private property, and thus tracks the external critique of physical property.¹³⁸ Concerned about the accretion of private rights in information and the correlative shrinking of the public domain, IP scholars concerned about the public domain reject the idea of using property language in talking about information ownership. By contrast, the relative minority of writers whose work expresses solicitude for owners and private rights rather than users and the public domain, embraces the essential continuousness of copyright and physical property, expressed in the rhetorical trope I’ve termed property romance. This point of view has its roots in the assumptions of neoclassical economics that resource governance inevitably trends toward privatization, and that this trend tends to increase social welfare. The two poles that characterize the debate over IP’s status as a form of property, then, track the two basic discourses about property: public domain advocates critique property from outside the institution while those concerned with owners rights embrace the institution from inside.

But there’s a third way to think about the issue. It’s possible to critique the dominant tradition of ownership as private possession without rejecting the idea of property altogether. Carol Rose has laid the foundation for this position, showing in numerous essays that

Information, 52 DUKE L.J. 1245, 1247-48, 1254 (2003) (describing how pursuing productivity and growth places a limit on commitments to “democracy, autonomy, and equality,” particularly because of two modes of making production decisions—the market and the corporate hierarchy).

¹³⁷ E.g., Mark Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 895-904 (1996) (reviewing JAMES BOYLE, *SOFTWARE, SHAMANS, AND SPLEENS*) (lamenting the “proptertization” of intellectual property); Carrier, *supra* note 51, at 6 (equating the “proptertization” of intellectual property with “the expansion of the duration and scope of initial rights to approach unlimited dimensions”).

¹³⁸ James Boyle, *The Opposite of Property*, 66 L. & Contemp. Probs. 1, 8 (2003) (describing the public domain as “the ‘outside’ of the intellectual property system”).

property contains the seeds of its own humanity. Though it is often regarded by academics and the lay public alike as an atomizing institution that separates and isolates individuals onto separate plots of land, Rose's work illustrates that property has, since Roman times, contained a strongly public-oriented strain as well, and that it functions to balance public and private interests rather than working exclusively in favor of the latter.¹³⁹ Numerous other writers have made similar moves in the context of physical property. Some writers have advocated clarification and consolidation of existing rights in land possessed by third-world slum dwellers. The aim of this project is to allow those individuals to more fully exercise preexisting claims to that land, and participate more fully in civil society.¹⁴⁰ Indian law scholars have suggested ways that Indians can use Anglo-American property theories to enforce their longstanding claims to tribal lands.¹⁴¹ Still others have stressed the extent to which ownership can enhance social bonds rather than separating members of society from one another,¹⁴² and more generally highlighted the capacity of property to further social justice.¹⁴³

All of these projects are critiques of the dominant view of property in that they resist the neoclassical economic and libertarian tradition that prioritizes individuated private ownership. But they are distinct from the dominate critiques in that they come from *inside* property, using the characteristics of the doctrine itself as the basis for constructing a more humane, socially oriented vision of ownership. Carol Rose's phrasing encapsulates the position: We need not regard property as a purely individualistic, atomizing institution, because property "is one of the most sociable institutions that human beings have created, depending as it does on mutual forbearance and on the recognition of and respect for the claims of others."¹⁴⁴

¹³⁹ Rose, *supra* note 92, at 713, 723.

¹⁴⁰ See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000).

¹⁴¹ Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 *UCLA L. REV.* 1061 (2005).

¹⁴² Eduardo Penalver, *Property as Entrance*, 91 *VA. L. REV.* 1889, 1894 (2005) (highlighting property's capacity to reinforce the bonds of the society in which the property is situated).

¹⁴³ Purdy, *supra* note 135 at 1242 (advocating a "freedom-promoting" conception of property).

¹⁴⁴ Carol M. Rose, *Property in All the Wrong Places?* (book review) 114 *YALE L.J.* 991, 1021 (2005). See also Penalver, *supra* note 142 at 1894.

I seek to apply these ideas, familiar in the physical property setting, to copyright as well. The above discussion takes a step toward critiquing and re-imagining the idea of owning ideas from inside rather than outside property. Resistance to the property rhetoric in the IP setting relies on ideas that reside outside property—concern that an accretion of private rights in information is inevitably harmful to the public aims that are so central to our copyright regime. The approach I’ve taken in this Essay critiques a neoclassical view of copyright that pushes always toward greater accretion of private rights in information. However, this is an approach that seeks to do this by operative from within, rather than without property. As we have seen, it is possible to talk about IP in the idiom of the social discourse of property in a way that is not inimical to—and may actually enhance—the public domain.

Ultimately, resistance to propertization may be futile. The U.S. patent and copyright regimes are both undergirded by the idea that providing private, exclusive rights in information is the best means by which to encourage the creation of more information. The concern, then, should not be with whether we talk about IP as a form of property, but rather how we do so. In this Essay, I have sought to show that using property rhetoric bears as much promise for friends of the public domain as it does for advocates of broad private rights in information. The more general idea this suggests is that property does not have a necessary substantive or ideological direction.¹⁴⁵ The insight of Rose and others that property law contains the seeds of a more humane vision of ownership suggests that the rhetoric of property when talking about IP need not threaten the maintenance of a robust public domain, but is perfectly consistent with, and may even be helpful to, the cause of a publicly oriented vision of information governance.

¹⁴⁵ Some writers have gestured in this direction. See Purdy, *supra* note 135 at 1283 (“[T]he tradition of freedom-oriented political economy has always understood that property rights are instruments for the promotion of capabilities and resistance to domination, not naturally fixed categories. This insight is a kind of immunization against the perception that the movement to rewrite intellectual property is ‘anti-property’ or that what the public domain the movement seeks to preserve is ‘the opposite of property.’ Rather, the present debate over intellectual property falls squarely *within* the tradition of property thought.”).