
Article

Property Rhetoric and the Public Domain

David Fagundes[†]

Most legal terms mean little to laypeople. Ask an average person about an adhesory contract, the doctrine of equivalents, or even a plain old tort, and you're nearly certain to get no more than a blank stare. But property is different. People care about property—a lot. Consider, for example, how the Supreme Court's 2005 decision in *Kelo v. City of New London*¹ moved an often apathetic public into apoplexy. The outrage generated by *Kelo* spanned the political spectrum from Limbaugh on the right² to Nader on the left.³ It also spawned a ferocious legislative reaction as states hastily sought to overturn the decision's

[†] Associate Professor, Southwestern Law School; J.D., Harvard Law School; A.B., Harvard College. Thanks to Tom W. Bell, Mike Dorff, Bryant Garth, Cynthia Ho, Diane Klein, Saul Levmore, Robert Lind, Jonathan Masur, Carrie Menkel-Meadow, Austen Parrish, Gowri Ramachandran, Angela Riley, Alice Ristroph, Gary Rowe, Joyce Sterling, Rebecca Tushnet, Dov Waisman, and Jonathan Zittrain, as well as participants in the 2009 Stanford-Yale Junior Faculty Forum, the University of Chicago Law School Works-in-Progress Seminar, the Southern California Junior Law Faculty Workshop, the PCSE Property Workshop at Chapman Law School, the IP Works-in-Progress Conference at American University's Washington College of Law, and the Intellectual Property Scholars' Colloquium at Stanford Law School for helpful comments on earlier versions of this paper. Copyright © 2010 by David Fagundes.

1. 545 U.S. 469 (2005).

2. *Rush Limbaugh: Liberals Like Stephen Breyer Have Bastardized the Constitution* (Free Republic radio transcript Oct. 12, 2005) [hereinafter *Limbaugh*], available at <http://www.freerepublic.com/focus/f-news/1501453/posts> (claiming that because of *Kelo*, “[g]overnment can kick the little guy out of his and her homes and sell those home [sic] 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.”).

3. Ralph Nader, Statement, June 23, 2005, <http://ml.greens.org/pipermail/ctgp-news/2005-June/000507.html> (“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.”).

force via statute.⁴ 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.⁵

At first blush, the impassioned negative reaction to *Kelo* is unsurprising. The public recoiled at the Court's ratification of government's power to force homeowners to involuntarily exchange their property for cash.⁶ Yet not all government attenuations of property interests have generated the same kind of reaction. Consider, for example, *Eldred v. Ashcroft*.⁷ In *Eldred*, the Court upheld the Copyright Term Extension Act (CTEA),⁸ which added twenty years to all extant copyright terms.⁹ *Eldred*, like *Kelo*, can be understood as approving government confiscation of an ownership right, albeit a confiscation of a public rather than a private entitlement.¹⁰ CTEA's passage meant that the public would have to wait another two decades before its use rights in copyrighted works of authorship would vest. This had implications writ 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 Mickey Mouse). But while CTEA and its judicial approval drew criticism in academic circles, public response was muted—especially compared to the reaction to *Kelo*.

4. For a complete list of such state initiatives, see Castle Coalition, Enacted Legislation Since *Kelo*, http://www.castlecoalition.org/index.php?option=com_content&task=view&id=510 (last visited Dec. 7, 2009). 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*, 93 MINN. L. REV. 2100, 2103–04 (2009) (finding the majority of reform laws “likely to be ineffective”).

5. 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. The movement failed. See Jeannie Suk, *Taking the Home*, 20 LAW & LITERATURE 291, 293–94 (2008).

6. See *id.* at 295–98 (describing the potential loss of home ownership to eminent domain or to foreclosure as distinctly generative of anxiety).

7. 537 U.S. 186 (2003).

8. Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.) (also known as the “Sonny Bono Copyright Term Extension Act”).

9. *Eldred*, 537 U.S. at 193–94.

10. See Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 123, 128 (2002) (calling CTEA “a massive giveaway of public domain resources for private use”).

The disparity between the reactions to these two decisions becomes even more puzzling on closer examination. Despite uninformed media commentators' characterizations of *Kelo* as an instance of judicial activism,¹¹ the Court's opinion was rather mundane jurisprudentially.¹² The decision broke little new legal ground, largely following precedent originally established in *Hawaii Housing Authority v. Midkiff*.¹³ Nor did the Court exercise its authority expansively; on the contrary, the majority couched its opinion primarily in terms of its obligation to defer to the Connecticut state legislature's discretionary decision to exercise its eminent domain power.¹⁴ Nor did the decision (as many members of the public misunderstood) rob anyone of their property without recompense. Although Suzette Kelo's property was taken, she was, as the Constitution requires, paid a compensatory amount in exchange by the government.¹⁵ Although one may well believe *Kelo* was wrongly decided, this does not mean that the decision represented an institutionally aggressive move or that it was 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.¹⁶ Like the state action in *Kelo*, CTEA trans-

11. See *Limbaugh*, *supra* note 2.

12. 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 . . .").

13. 467 U.S. 229 (1984).

14. *Kelo v. City of New London*, 545 U.S. 469, 480 (2005) (emphasizing the Court's "longstanding policy of deference to legislative judgments in this field").

15. 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. See, e.g., RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 183 (1985). Recent scholarship has, however, 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 precondemnation negotiations with the government. Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 121–31 (2006).

16. I am not arguing that CTEA really did work a taking actionable under the Just Compensation Clause. Textually, this is not possible because the Clause governs only takings of "private" property, U.S. CONST. amend. V, and

ferred an entitlement from one group (the public) to another (copyright owners) without the former's consent. But unlike the plaintiffs in *Kelo*, the dispossessed public received no compensation in exchange for its 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 the original plaintiff Eric Eldred, but from every member of the public the entitlement to use expired copyrighted materials for another twenty years.¹⁷

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 on the public consciousness. Underneath the politicized invective that characterized much of *Kelo*'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 forcible taking of her home. Popular writing on the subject typically invoked the notion of "property" without considering the meaning of the term or the institution in any real depth.¹⁸ This highlights the instinctive sense of connection between "property" as it is popularly understood and instinctive notions of both personal identity and the invi-

as I discuss below in more detail, the public domain is plainly a form of public property. That does not change the fact that *Eldred* can still be cast as an uncompensated taking of public entitlements, even though it does not give rise to a cause of action under the Fifth Amendment.

17. One could argue that CTEA thus merely delayed, and did not take, the public's acquisition-of-use rights in copyrighted materials. While this descriptive claim is right, it 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. *Cf. Hemphill v. Miss. State Highway Comm'n*, 145 So. 2d 455, 463 (Miss. 1962) (holding that state takings of future interests require a just compensation remedy). 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 twenty-year add-on terms begin to expire. *See, e.g., Eldred v. Reno*, 239 F.3d 372, 382 (D.C. Cir. 2001) (Sentelle, J., dissenting) ("[T]here is no apparent substantive distinction between permanent protection and permanently available authority to extend originally limited protection.").

18. *See, e.g.,* Press Release, Am. Conservative Union, Judicial Activism Strikes Again: Supreme Court Rules Government Can Seize Your Home (June 23, 2005), http://www.conservative.org/pressroom/06232005_un.asp ("Today's Supreme Court ruling is a slap in the face to property owners everywhere.").

olability of ownership. That property can generate such emotional power also shows how much mileage a social movement can gain by couching its aims in terms of protecting possession and ownership.

The *Kelo-Eldred* puzzle also indicates, by negative implication, the curious absence of property rhetoric when public, rather than private, entitlements are depleted.¹⁹ The outrage over *Kelo* was outrage about property taken without the owner's consent: Suzette Kelo and her co-plaintiffs had their homes confiscated by the government, and this inflamed the public consciousness. *Eldred* might 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 their vesting date. One can search in vain for the kind of popular outrage against involuntary government confiscations of property in reaction to *Eldred* that was commonplace in the wake of *Kelo*.²⁰ *Eldred* evoked nothing like the angry reaction that accompanied *Kelo* in large part because the public did not evaluate the decision within the moral or rhetorical framework of property rights.

The *Kelo-Eldred* puzzle provides a jumping-off point for an exploration of the role of property rhetoric in judicial, policy-making, and popular cultural debates about the ideal scope of intellectual property protection. Why is it that *Eldred* was as notable for its silence as *Kelo* was for the angry reaction it generated? As I detail in Part I of this Article, the answer lies in the impoverished way we talk about property, especially with respect to dialogue about the ideal scope of copyright and patent. Those who prefer broader intellectual property (IP) rights

19. 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. See *infra* Part I.B.

20. There was ample *academic* outrage, of course. See generally, e.g., Symposium, *Eldred v. Ashcroft: Intellectual Property, Congressional Power, and the Constitution*, 36 LOY. L.A. L. REV. 1 (2003) (collecting articles critical of *Eldred* from academics of all political stripes). There was also some popular reaction to the decision, such as Bill Amend's sarcastic jab at the Court's decision in the cartoon *FoxTrot*. BILL AMEND, FOXTROTUS MAXIMUS 144 (2004).

and those who resist them both assume that speaking about IP in the idiom of property will inevitably lead to an expansion of private rights in information.

In Part II, I show that this shared assumption is flawed because it depends on an incomplete view of what ownership means. One strain of property discourse invokes a libertarian vision of ownership as bulwark of individual liberty against state oppression and an efficient means of maximizing private wealth. 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 taken 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. A descriptively accurate and balanced use of property rhetoric—including intellectual property rhetoric—must take into account each of these traditions and their concomitant values.

Finally, in Part III, I argue that it is not only possible but particularly appropriate to talk about IP in the language of a socially focused property discourse. Property rhetoric that situates public resources at its center aligns particularly well with intellectual property, which, after all, is grounded in a constitutional clause that emphasizes the public domain and the common good.²¹ Seen from this perspective, property rhetoric is not necessarily the enemy of the public domain, as most scholars seem to assume. Rather, it is possible to explicitly present public entitlements in information as a subject of ownership, albeit a mutually owned possession that we are all entitled to access and use.

Using property rhetoric this way 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. First, emphasizing that property includes public entitlements as well as private ones provides needed pushback against the powerful but overly broad claims of rights in information that are commonly made by content industry players such as movie studios and music lobbyists. Emphasizing the public character of many information entitlements helps to cabin owners' claims of property rights within

21. U.S. CONST. art. I, § 8, cl. 8.

their appropriate bounds. Second, talking about shared IP entitlements using the language of ownership promises not only 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 use 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, shared cultural resources.

I. PROPERTY ROMANCE AND PROPERTY ANXIETY

A. LAW AND/AS RHETORIC

Law's language is so crowded with graceless terminology ("fee simple subject to condition subsequent") and obscure Latin (*ignorantia legis neminem excusat*) that "intellectual property," at least by contrast, possesses something like elegance.²² This is not only because the phrase itself is kind of mellifluous,²³ but also because it contains an internal contradiction. Intellectual property at once expresses something ephemeral and abstract (the process of intellection) as well as something hard and concrete (the bordered, fixed, and certain notion of possession). So it should come as no surprise that much ink has been spilled about IP's peculiar status as a form of property.²⁴ Writers have

22. "Patent law" and "copyright law" were, until only a few decades ago, largely thought of as formalist fields of practice that were mainly about fussing with registration applications. After the term "intellectual property lawyer" was coined, however, the profession gained both esteem and adherents. See Mark Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1034 & n.5 (2005).

23. Say it a few times. It's just short of being a three-foot anapest. Cf. *id.* at 1034 ("Intellectual property' is an appealing term for a variety of reasons. It is sexy: practitioners in the field will tell you that their stock at cocktail parties went up immeasurably when they began to tell people they 'did intellectual property' rather than that they were 'patent lawyers.'").

24. 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."). Not all writers are convinced 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)."); The Patry Copyright Blog, *Does It*

considered whether property or liability rules should govern copyright and patent,²⁵ asked whether the differences between physical and intellectual property can be explained in terms of information costs,²⁶ and defended the view that the law governing tangible and intangible things should be essentially continuous.²⁷ In this Article, I seek to investigate this question from a different perspective. Rather than looking at this issue from the perspective of law as regulation, I examine the social meaning of invoking property as a rhetorical trope in debates over the scope of patent and copyright protection. This investigation begins with a descriptive account of how commentators, jurists, and policymakers embrace or resist the language of property in the IP setting, and then explores how enthusiasm for (or resistance to) this use of property rhetoric correlates with preferences for broad or narrow IP rights.

Rhetoric has a bad rap in contemporary public discourse. We often dismiss arguments as “mere rhetoric,” suggesting that they are flawed by sloppy inexactitude, or even characterized by disingenuous manipulation. Notwithstanding a number of masterful studies in a rhetorical vein,²⁸ legal scholarship often shies from openly treating law as rhetoric. As a result, writers in the field most often regard law exclusively as an external system of rules that can be manipulated to reach particular substantive ends by means of coercing and enticing action.²⁹ The relative absence of rhetorical study in legal scholarship is particularly puzzling. The ancients regarded rhetoric as inextricably intertwined with dialogue about the good life, which had its ultimate manifestation in law. Aristotle idealized rhetoricians as gifted communicators who convinced the public about important normative questions using a balance of compelling

Matter if Copyright Is Property?, <http://williampatry.blogspot.com/2006/06/does-it-matter-if-copyright-is.html> (June 20, 2006, 09:57 EST).

25. See, e.g., Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 783–84 & 784 n.4 (2007).

26. See Smith, *supra* note 24, at 1799–1819.

27. See Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J.L. & PUB. POL’Y 108, 113–14 (1990).

28. Examples abound. My favorite is Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

29. See 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 with ancient Judeo-Christian notion of law as authority and with contemporary social scientific view of law as an external system of rules to be manipulated to reach particular substantive ends).

logic (*logos*) and appealing character (*ethos*).³⁰ If this sounds like what lawyers and legal academics do on a daily basis, that's probably because it is. As Dave McGowan conjectured, the reason that law and its practitioners often express disdain for rhetoric may be because it so closely approximates what it is they do.³¹

In this Article, I seek to embrace rather than resist the centrality of rhetoric in law. In Plato's eponymous dialogue, Gorgias defined rhetoric as "the art of persuading people about justice and injustice in the public places of the state."³² 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."³³ This persuasion is achieved primarily by appealing to a set of common understandings.³⁴ In legal discourse, this appeal has two valences. First, rhetoric frames legal arguments, and those frames determine what substantive legal analysis applies to the issue at hand.³⁵ Second, the choice to use particular terms can persuade—or dissuade—by calling up particular associations that generate visceral reactions in listeners.³⁶

Rhetoric not only frames public discourse, but also has the capacity to change how we think about the subjects of that dis-

30. See David McGowan, *(So) What if It's All Just Rhetoric?*, 21 CONST. COMMENT. 861, 861 (2004) (reviewing EUGENE GARBER, FOR THE SAKE OF ARGUMENT: PRACTICAL REASONING, CHARACTER, AND THE ETHICS OF BELIEF (2004)).

31. *Id.* at 886 ("Maybe we condemn the word 'rhetoric' to divert attention from how well it applies to what we do.").

32. White, *supra* note 29, at 684 (citing PLATO, GORGIAS 452e, 454b).

33. *Id.*

34. *Id.* at 688–89.

35. See David McGowan, Information-Forcing Liability Rules in Copyright Law (Nov. 10, 2009) (unpublished manuscript, on file with author).

36. See DEIRDRE N. MCCLOSKEY, THE RHETORIC OF ECONOMICS 3–4 (2d ed. 1998) (discussing how Judge Posner uses phrases like "allocate," "maximize," "value" and "scarcity" in both a technical sense and "to evoke Scientific power, to claim precision without necessarily using it" to describe the efficiency of the common law in RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 98–99 (1st ed. 1972)).

Contemporary behavioral psychology has introduced a variation on the idea of rhetorical framing, showing that how issues are framed affects the heuristics people use to decide on the morality of particular conduct. See Cass R. Sunstein, *Moral Heuristics*, 28 BEHAV. & BRAIN SCI. 531, 535 (2005). For example, framing a decision as a choice between actively aiding someone's death versus failing to save someone in mortal peril will trigger very different moral instincts, even though they lead to the same result. *Id.* at 540–41.

course. Recasting same-sex marriage as a civil rights issue, for example, exemplifies this sort of “constitutive” rhetorical move.³⁷ It is not only an attempt to use language to persuade us to adopt a particular position, but seeks also to convince us about what the world actually is like (or at least, what it should be like). If same-sex marriage advocates can occupy the rhetorical high ground, they not only score a legal and political victory, but also convince the public that access to marriage *really is* a part of America’s ongoing struggle to provide justice for all its citizens. So rhetoric represents not only a way of understanding the world; it is a form of reasoning with constitutive force because it has the potential to construct the way we think about the world.³⁸ 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 in *eBay Inc. v. MercExchange, L.L.C.*,³⁹ provides an object lesson in how property can be used as a rhetorical device to inveigh in favor of broad IP rights. MercExchange had successfully argued that eBay’s “Buy it Now” function violated its patent.⁴⁰ eBay posed the question whether a permanent injunction should automatically follow this violation of MercExchange’s exclusive rights.⁴¹ Justice Scalia unsurprisingly sought to recast the case in simpler terms, and invoked the language of property to do so.⁴² “[W]e’re talking about a property right,” said the Justice to eBay’s counsel

37. Cf. GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 4–5 (2d ed. 2003) (discussing constitutive metaphors); Diane Gurman, *Why Lakoff Still Matters: Framing the Debate on Copyright Law and Digital Publishing*, FIRST MONDAY, June 1, 2009, <http://www.uic.edu/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2354/2210> (discussing how rhetorical frames can be used to push public dialogue about copyright in a progressive direction).

38. White, *supra* note 29, at 701 (“[O]rdinary language . . . provides a ground for challenge and change, a place to stand from which to reformulate any more specialized language. . . . Rhetorical 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.”).

39. 547 U.S. 388 (2006).

40. *Id.* at 390–91.

41. *Id.* at 391.

42. Transcript of Oral Argument at 6, *eBay*, 547 U.S. 388 (No. 05-130).

during oral arguments.⁴³ “[A]ll he’s asking for is give me my property back.”⁴⁴

Justice Scalia’s invocation of property language in the *eBay* oral argument relies on a rhetorical move that I call “property romance.”⁴⁵ This is 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, patent or copyright—can be understood in terms of the same basic rules and ideas. Part of this is a claim that the kinds of doctrines that govern ownership of tangible things are essentially continuous with the doctrines that should govern intangibles.⁴⁶ But here I address not this substantive aspect of the issue, but instead the attempt to use 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 IP settings. The briefing that preceded *eBay* provides one example. Justice Scalia’s invocation of a big-tent vision of property in oral argument may have been due to the fact that the Property Rights Movement (PRM)—a group traditionally devoted to defending landowners whose ownership rights are threatened—enfolded patent holder MercExchange into its cause.⁴⁷ Of course, the

43. *Id.*

44. *Id.*

45. *Cf.* Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331 *passim* (2004) (invoking the notion of romance in connection with the public domain); Saul Levmore, *Two Stories About the Evolution of Property Rights*, 31 J. LEGAL STUD. 421, 429–33 (2002) (contrasting “optimistic” private-property stories in the Demsetzian vein with “pessimistic” private-property stories that stress public choice and interest group problems).

46. *E.g.*, Easterbrook, *supra* note 27, at 118 (“[W]e should treat intellectual and physical property identically in the law.”); I. Trotter Hardy, *Not So Different: Tangible, Intangible, Digital, and Analog Works and Their Comparison for Copyright Purposes*, 26 U. DAYTON L. REV. 211, 213 (2001) (“For 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*, PROGRESS ON POINT 13.24 (Progress & Freedom Foundation, Aug. 2006), available at http://www.pff.org/issues-pubs/pops/pop13.24RAE_9_26.pdf.

47. *See* Brief of Various Law & Economics Professors as Amici Curiae Supporting Respondent, *eBay*, 547 U.S. 388 (No. 05-130) (supporting strong protection of property rights).

ownership at issue in *eBay* seemed in many senses distinct from the kind of ownership the PRM usually defends.⁴⁸ MercExchange wasn't a small business threatened by an adverse zoning law or a homeowner faced with an eminent domain action; it was the owner of an infringed-upon patent.⁴⁹ Moreover, MercExchange was, in popular parlance, a "patent troll."⁵⁰ It did not engage in research or development, but merely acquired large numbers of patents—such as the one at issue in *eBay*—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.⁵¹ Yet the PRM, in the throes of property romance, brushed these distinctions aside. On the romantic view, the fact that small business proprietors, homeowners, and patent trolls alike share status as property owners is sufficient to render them roughly equal objects of concern.

Consider as well the "cybertrespass" flap from a few years back. The internet explosion presented businesses with novel problems. Some had servers that were bombarded with spam.⁵² Others were irritated that competitors culled facts from their sites via visits from unauthorized bots.⁵³ In response, some businesses argued that the 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

48. See Peter S. Menell, *The Property Rights Movement's Embrace of Intellectual Property: True Love or Doomed Relationship?*, 34 *ECOLOGICAL L.Q.* 713, 717–19 (observing the essential discontinuities between the PRM's traditional constituency and the property rights in dispute in *eBay*).

49. Yuki Noguchi & Charles Lane, *High Court Considers eBay Case on Patent*, *WASH. POST*, Mar. 30, 2006, at D1.

50. *Id.*

51. See *eBay*, 547 U.S. at 396–97 (Kennedy, J., concurring) (stressing that the practical effect of the Court'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*, *LAW.COM*, May 22, 2006, <http://www.law.com/jsp/article.jsp?id=1147943132930> (discussing how patent trolls operate and using the *eBay* case as an example).

52. *Intel Corp. v. Hamidi*, 71 P.3d 296, 299–301 (Cal. 2003) (rejecting trespass to chattels claim based on defendant's sending unauthorized e-mails to plaintiff's servers).

53. *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1069–70 (N.D. Cal. 2000) (holding that an action for trespass to chattels based on defendant's sending unauthorized information-gathering programs to plaintiff's website had a reasonable likelihood of success, for the purposes of granting a preliminary injunction).

(and obscure) tort of trespass to chattels.⁵⁴ The characteristic rhetorical simplicity of property romance captures this view perfectly, though courts have been divided in their reaction.⁵⁵ 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.⁵⁶ Here too, property provides a rhetorical 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 legislation.⁵⁷ IP owners and pro-industry lobbyists testifying before Congress have a long history of using florid metaphors of all kinds.⁵⁸ De-

54. See *id.* (assessing plaintiff's trespass to chattels claim, but noting that it is unusual as a theory of liability); *Hamidi*, 71 P.3d at 302–03 (discussing the development of the trespass to chattels claim and its elements).

55. Compare *Hamidi*, 71 P.3d at 299–301 (denying cybertrespass claim), with *eBay*, 100 F. Supp. 2d at 1070 (allowing cybertrespass claim), and *Sotelo v. DirectRevenue, LLC*, 384 F. Supp. 2d 1219, 1229–33 (N.D. Ill. 2005) (allowing contributory trespass to chattels claim based on sending unwanted advertisements to plaintiff's computer).

56. See Richard A. Epstein, *Cybertrespass*, 70 U. CHI. L. REV. 73, 76 (2003) (“[T]he various equipment and facilities that make up the internet are not . . . real property. Rather, they 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, 120 (2002) (analogizing real and intellectual property and arguing that trespass to chattels is an appropriate cause of action).

57. Property romance imbues debates about patent legislation as well. Those opposed to laws that would enable third world countries to acquire patented medicines via compulsory licenses have framed their arguments in terms of being for or against property generally. Ronald A. Cass, *Patent Remedy*, WALL ST. J., Aug. 28, 2007, <http://online.wsj.com/article/SB118824874547610202.html> (stating that those who endorse compulsory licenses “oppose protection of all property rights”); see also Cynthia M. Ho, *Unveiling Competing Patent Perspectives*, 46 HOUS. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1461515> (discussing rhetorical invocations of property in debates over global pharmaceutical sales).

58. Consider, for example, Motion Picture Association of America (MPAA) President 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.” *Home Recording of Copyrighted Works: Hearing on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the H. Comm. on the Judiciary*, 97th Cong. 8 (1982).

bates about the passage of two major pieces of legislation affecting copyright—the Copyright Term Extension Act (CTEA)⁵⁹ and the Digital Millennium Copyright Act (DMCA)⁶⁰—also included dramatic moments, many of which relied on a romantic view of property as the basis for their appeal.⁶¹ Jack Valenti defended the Motion Picture Association of America’s interest in just these terms: “We don’t want to shut down innovation We just want to stop private property from being pillaged.”⁶² 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. Register of Copyrights Marybeth Peters’ defense of the DMCA’s anticircumvention provisions invoked the familiar lock-and-key example that relies on equating information ownership with home ownership.⁶³ The late Johnny Cash’s testimony in defense of Title I of the DMCA epitomizes the easy elision of all forms of possession that characterizes property

Even more amusing than Valenti’s overwrought metaphor is the fact that it turned out to be so utterly mistaken. The advent of the videotape medium actually turned out to diversify and expand the market for movies and has been an enormously lucrative development for the film industry. See Giovanna Fessenden, *Peer-to-Peer Technology: Analysis of Contributory Infringement and Fair Use*, 42 IDEA 391, 392–93 (2002).

59. Pub. L. No. 105-298, §§ 101–106, 112 Stat. 2827, 2827–29 (1998) (codified as amended in scattered sections of 17 U.S.C.).

60. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

61. See, e.g., 144 CONG. REC. H10,620 (daily ed. Oct. 12, 1998) (statement of Rep. Jackson Lee) (“[The DMCA] demonstrates our commitment to protecting the personal rights and property of American citizens.”); 144 CONG. REC. S12,378 (daily ed. Oct. 12, 1998) (statement of Sen. Hatch) (“In my view, property is property whether it’s dirt or intangible.”).

62. Edmund Sanders & Jube Shiver, Jr., *Digital TV Copyright Concerns Tentatively Resolved by Group*, L.A. TIMES, Apr. 26, 2002, at C5.

63. *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 Intellectual Property of the H. Comm. on the Judiciary*, 105th Cong. 49 (1997) (prepared testimony of Marybeth Peters, Register of Copyrights) (speaking on the need for the DMCA).

It has long been accepted in U.S. law that the copyright owner has the right to control access to his work 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 . . . 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.

Id.

romance: “[O]ur laws respect what we create with our heads as much as what we build with our hands.”⁶⁴

Each of these examples illustrates more than the character of property romance as a rhetorical device. Property romance is almost invariably used 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 possesses moral force as well. Framing an IP issue in the idiom 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.⁶⁵ This Manichean dichotomy, however artificial,⁶⁶ 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.⁶⁷

64. *Id.* at 199 (statement of Johnny Cash).

65. In a 2005 interview, Bill Gates was asked if he believed that intellectual property needed to be reformed. Gates answered that “there’s more that believe in intellectual property today than ever. There are fewer communists in the world today than there were. There are some new modern-day sort of communists who want to get rid of the incentive for musicians and moviemakers and software makers under various guises.” Michael Kanellos, *Gates Taking a Seat in Your Den*, CNET NEWS.COM, Jan. 5, 2005, http://news.cnet.com/Gates-taking-a-seat-in-your-den/2008-1041_3-5514121.html.

66. See Patricia Loughlan, *You Wouldn’t Steal a Car’: Intellectual Property and the Language of Theft*, 29 EUR. INTELL. PROP. REV. 401, 403 (2007) (“The use of the term ‘pirate’ is clearly metaphorical and not even the most naïve of participants in the discourse of intellectual property could or would take it literally.”). Lawrence 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 early 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* 21–25 (2004).

67. Susan Cheever, *Just Google “Thou Shalt Not Steal,”* NEWSDAY, May 31, 2009, <http://www.newsday.com/columnists/susan-cheever/just-google-thou-shalt-not-steal-1.531984>. Harry Potter creator J.K. Rowling’s comments during 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. “Are we or are we not the owners of our own work?” she asked during the trial. John A. Sellers, *Rowling and RDR Meet in Court*, PUBLISHERS WKLY., Apr. 17, 2008, <http://www.publishersweekly.com/article/CA6552416.html>. On the witness stand, Rowling compared the

Judges have done the same, solemnly beginning opinions holding that any sampling of sound recordings requires a licensing fee with the same imperious religious command.⁶⁸ And academic writers who tend to use property romance also tend to prefer a high-protection vision of IP rights.⁶⁹

C. PROPERTY ANXIETY AND INTELLECTUAL PROPERTY

Property romance possesses a simple and seductive appeal. It uses 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 is still possible to find echoes of this idea in cyber-zines and on discussion boards.⁷⁰ The hacker battle cry “information wants to be free” has also seeped into popular culture.⁷¹ 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 for some time been heavily regulated.

While most writers—even strong proponents of the public domain—would agree that IP is more or less a form of property, there remains substantial ambivalence about the issue.⁷² There

“theft of her words to the removal of all the plums from a cake she might have baked.” *Id.*

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

69. To take just one data point, all three of the authors of the brief associated with the PRM in *eBay* tend to prefer strong protection of IP owners’ rights in their scholarly work. See F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, 85 MINN. L. REV. 697, 703–04 (2001); R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995, 997 (2003); Richard A. Epstein, *Respect Bayer’s Patent: Cheap Cipro Now Could Cost Us Dearly in the Long Run*, WALL ST. J., Oct. 25, 2001, <http://www.opinionjournal.com/extra/?id=95001372>. *But cf.* Chander & Sunder, *supra* note 45 (critiquing the public domain from a distributional perspective).

70. See, e.g., FreedomForIP.org, 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).

71. See Wagner, *supra* note 69, at 999 n.14.

72. Compare LESSIG, *supra* note 66, at 172 (“The issue is therefore not simply whether copyright is property. Of course copyright is a kind of ‘property,’ and of course, as with any property, the state ought to protect it.”), *with*

is something in the equation of traditional and intellectual property that causes many writers profound unease, which I call “property anxiety.”⁷³ Property anxiety is as conflicted and complex as property romance is simple and straightforward. This ambivalence comes from a number of 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.⁷⁴ Examined more

LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A 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 to fair use of your book.”). See also Bill D. Herman, *Breaking and Entering My Own Computer: The Contest of Copyright Metaphors*, 13 COMM. L. & POL’Y 231, 252 (2008) (observing that “free culture advocates are 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 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 345, 350–56 (Peter K. Yu ed., 2007) (arguing that applying property ideas to copyright can limit rather than expand owners’ rights).

Other writers resist the equation of IP and property for a different reason. They argue 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.”).

73. Cf. Carol M. Rose, *Canons of Property Talk, or, Blackstone’s Anxiety*, 108 YALE L.J. 601, 605–06 (1998) (discussing anxiety in popular conceptions of property).

74. E.g., Olufunmilayo B. 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); 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”); 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 proprietarian and anti-dissemination attitude toward information than that which the law has previously displayed”); Mark Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 902 (1997) (reviewing JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996)) (observing that the public character of information goods

closely, though, this notion expresses reservation about the expansion of private rights in information at the expense of the public domain.⁷⁵ 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.⁷⁶ 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.⁷⁷ Hence while we can say that one “enters” another’s land when someone 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 a personal computer.⁷⁸ Critics of the online incarnation of trespass to chattels argue that these discontinuities are pervasive enough to render talking about information in the language of tangible property “faintly ludicrous.”⁷⁹

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 public domain.⁸⁰ Judicial reliance on

“seems to suggest that propertization is a uniquely bad idea, precisely because the consumption of that good is ‘nonrivalrous’”).

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

76. *E.g.*, Mark A. Lemley, *Place and Cyberspace*, 91 *CAL. L. REV.* 521, 527 (2003).

77. *Id.* at 523.

78. *Id.* at 527–28.

79. *Id.* at 523.

80. See Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 *CAL. L. REV.* 439, 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 evi-

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.⁸¹ For example, IP more than physical property depends on preservation of large public commons in order to function efficiently.⁸² Property anxiety suggests that an ownership-centered approach to regulating information goods fails to account for this fact, and that the net result will be judicial prioritization of claims of private possession even where those claims potentially create an inefficient lockup of information that would be more efficiently held as a publicly available resource.⁸³

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 po-

dence 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.”).

81. See, e.g., Hunter, *supra* note 80, at 483–84 (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); Lemley, *supra* note 76, at 528–33 (critiquing judicial reliance on physical property rules like trespass in regulating information). But see David McGowan, *The Trespass Trouble and the Metaphor Muddle*, 1 J.L. ECON. & POL’Y 109 (2005) (reviewing opinions in cyber-trespass cases and concluding that there is no evidence that analogizing cyberspace to real space will lead to flawed judicial decisionmaking).

82. See Edward Lee, *The Public’s Domain: The Evolution of Legal Restraints on the Government’s Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91, 151 n.306 (2003) (“The [‘free as the air to common use’] analogy . . . conveys the importance of the public domain to sustain democratic living: just as air is essential for existence, so too is the public domain. The former sustains our physical needs; the latter, our mental and intellectual needs. People could not breathe without air, nor think freely without information that is available to all. The analogy also illuminates the relationship between the public domain and the free flow of information. Information in the public domain is meant to spread like the atmosphere, to flow freely for all to enjoy. Finally, the analogy suggests the strength that courts attributed to the constitutional restraint against government incursions of the public domain. For government to deplete the public domain or prevent the public’s access to it would be akin to the government attempting to take away a person’s ability to breathe.”).

83. Hunter, *supra* note 80, at 443–44 (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, Jr., *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”).

licymakers, and focuses instead on the broader social implications of treating most information as subject to claims of private right. Niva Elkin-Koren, for example, cautions that talking about information goods primarily in terms of property may cause us to change from a culture that freely trades in information to one that regards information first and foremost as a commodity.⁸⁴ Rhetoric is (as we have seen above) connected to reality.⁸⁵ So regarding information as any other object-in-trade may discourage modes of production that are inspired by incentives other than pecuniary gain. 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.⁸⁶ Property anxiety's reservations about property talk derive in part from this sense that complete commodification of intellectual resources will choke off these burgeoning methods of production.⁸⁷

From all of these directions, property anxiety pushes back against the romantic view that physical property doctrine can provide a coherent template for thinking about intellectual property. Where property romance suggests that all forms of possession are essentially continuous, property anxiety seeks to disaggregate that claim, suggesting instead that physical and intangible property are essentially discontinuous. Whatever one thinks of the merits of this approach, property anxiety dif-

84. Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM L. REV.* 375, 378 (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 Jane Radin, *Market-Inalienability*, 100 *HARV. L. REV.* 1849, 1885–86 (1987) ("[T]o see the rhetoric of the market . . . as the sole rhetoric of human affairs is to foster an inferior conception of human flourishing.").

85. Radin, *supra* note 84, 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.").

86. See, e.g., YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 4–6 (2006) (discussing Wikipedia as an example of nonmarket production).

87. Lawrence Lessig, *Re-crafting a Public Domain*, 18 *YALE J.L. & HUMAN.* 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.").

fers from property romance in that it lacks a powerful central theme that allows it to operate effectively as a rhetorical device. Although equating IP with familiar notions of possession allows 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.⁸⁸

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. Just as property romance correlates almost exclusively with a high-protection vision of the ideal scope of IP regulation, so does property anxiety correlate with a lower protection approach to this issue. Whether resisting judicial extension of trespass doctrine in online settings or legislative expansion of owners' rights in information, the above examples indicate that property anxiety is used 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 question the central assumption 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.

88. 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* note 146.

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 good life is (or should be) using an appeal to a set of common understandings.⁸⁹ This is precisely what is at play in using the language of property 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.⁹⁰ Invoking the notion of property in dialogues about IP is not just an attempt to trick listeners into supporting a particular policy, but aims to convince the public that IP *actually is* a form of property largely indistinguishable from chattels or land. 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, manages to access the force that property holds over the popular mind.

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 “[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”⁹¹ Much as Cardozo warned about the seductive character of rhetorical appeals, friends of the public domain similarly assert that property romance is a foundationally flawed rhetorical de-

89. See *supra* Part I.A.

90. Cf. Patricia Loughlan, *Pirates, Parasites, Reapers, Sowers, Fruits, Foxes . . . The Metaphors of Intellectual Property*, 28 SYDNEY L. REV. 211, 212 (2006) (comparing overtly descriptive metaphors with constitutive metaphors that more subtly express one thing in terms of another).

91. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926). Cardozo’s observation itself uses liberation and slavery as a constitutive metaphor for vivifying its warning about using metaphor in legal reasoning. *Id.*

vice because it fails to account for essential differences between the objects governed by the two fields, such as rivalrousness and excludability.⁹²

But however much property romance and property anxiety may take diametrically opposed views 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 possesses in these debates. As we 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 nearly total degree of owner control.⁹³

But why do all of these writers assume that property necessarily entails a nearly 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 notion that property establishes relationships between people with respect to things.⁹⁴ This idea seems counterintuitive because property means something very different in the popular mind than it does to lawyers.⁹⁵ In common American parlance, to say that

92. See Boyle, *supra* note 75, at 41–42 (2003) (arguing that the distinguishing features of information as property are nonrivalrousness and nonexcludability).

93. See Herman, *supra* note 72, at 245 (arguing that “if copyright is a real property right, [an owner] gets near total control over how [his/her works of authorship are] used”); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283, 286 (1996) (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”).

94. Morris R. 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).

95. See BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 97–100, 113–67 (1977); Thomas C. Grey, *The Disintegration of Property*, in *XXII NOMOS: PROPERTY* 69 (J. Roland Pennock & John W. Chapman eds., 1980) (“In the English-speaking countries today, the conception of property

something is your property is to claim dominion and control over it,⁹⁶ and likely also to express that the thing over which you assert ownership has some dignitary connection to your identity.⁹⁷ And it is this 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 model” of property.⁹⁸ 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.”⁹⁹ Though even property enthusiasts acknowledge that the institution admits of some limits on owners’ prerogatives,¹⁰⁰ the equation of property with nearly absolute rights continues to dominate the popular imagination.¹⁰¹ The power of

held by the specialist (the lawyer or economist) is quite different from that held by the ordinary person.”).

96. See Grey, *supra* note 95, 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.”).

97. See Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982).

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

99. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (photo. reprint 1979) (1765–69).

100. See, e.g., 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.”); Richard A. Epstein, *Intellectual Property: Old Boundaries and New Frontiers*, 76 IND. L.J. 803, 805 (2001) (calling Blackstone’s “despotic dominion” phrasing an “injudicious overgeneralization”).

101. See Milton C. Regan Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2338–39 (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

this view of property is unsurprising. 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.¹⁰²

The ownership discourse provides the background assumption animating much property scholarship as well,¹⁰³ 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."¹⁰⁴ Most American courts share this assumption, elevating property owners' rights over claims even to constitutional freedoms like speech¹⁰⁵ or religion.¹⁰⁶ The prevalence 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.¹⁰⁷

is (apparently) popular among schoolchildren: "This land is my land/And it ain't your land/I 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 Roberts*, and came to my attention when it was quoted in Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 280 (1998).

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

103. See Williams, *supra* note 101, at 284–89 (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).

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

105. See *A.R. Barnes & Co. v. Chi. Typographical Union No. 16*, 83 N.E. 940, 944–45 (Ill. 1908) (upholding injunction against striking workers on the theory that business owners had a property right to preclude protests). *But cf. PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (upholding the California Supreme Court's construction of the state constitution to require owners of private shopping centers to allow certain kinds of speech on the premises).

106. See *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 458 (1988) (holding that the federal government's title to property trumps Native American interests in holding religious rites on the same land).

107. See generally Thomas W. Merrill & Henry E. Smith, *The Morality of*

B. THE PERSISTENT MYTH OF PROPERTY ABSOLUTISM

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 ownership discourse on which each of these perspectives relies is the prevalent way of thinking about property in American culture (although not necessarily within the legal academy). Yet this one-sided approach to property is more myth than reality. What property romance and anxiety each miss is that there are not one, but many discourses of property, and that the ownership discourse is only one way to talk about what possession means. A counter-narrative to this way of thinking 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 ignores 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.¹⁰⁸ Of particular relevance for this investigation, the social discourse of property stresses that "property" is not coterminous with private property, but instead includes common and public forms of property that often prove to be superior ways of regulating resources.

This latter idea has deep 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,¹⁰⁹ the earliest property regimes 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

Property, 48 WM. & MARY L. REV. 1849 (2007).

108. See, e.g., JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 95–139 (2000) (discussing property as a system of social relations that accounts for the rights of owners as well as the interests of nonowners); cf. Stephen R. Munzer, *Property as Social Relations*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 36, 36–37 (Stephen R. Munzer ed. 2001) (surveying the work of writers who conceive of property as a system of social relations rather than solely as ownership and exclusion).

109. Nor, in context, does it 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 101, at 281.

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).¹¹⁰ Indeed, the public trust tradition that animates modern environmental law traces to Justinian's Code.¹¹¹ 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!'"¹¹² The legal realists of the early twentieth century echoed this idea, characterizing property as an essentially social institution that links various individuals in relationship to a given resource.¹¹³

Theorists have articulated the social discourse of property in a variety of ways. In this Article, I focus on four particular features that distinguish this approach.¹¹⁴ To begin, the social discourse is premised on a foundationally different vision of property than the ownership discourse. The ownership discourse is about individuals possessing objects in the interest of maximizing private wealth. The social discourse takes a broader view, instead seeing property as a system of social relations in which a variety of actors have overlapping interests in things and resisting the notion that individual wealth maximization is property's *telos*.¹¹⁵ The social discourse's iconic case is *State v. Shack*,¹¹⁶ in which the New Jersey Supreme Court required an owner to permit social service providers onto his land in order

110. See Dean Lueck, *The Rule of First Possession and the Design of the Law*, 38 J.L. & ECON. 393, 422 (1995).

111. J. INST. 2.1 & 2.2; 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, 395 (1997) (citing Justinian's Code as the forerunner of public trust doctrine).

112. MARC BLOCH, *FEUDAL SOCIETY* 113–16 (L.A. Manyon trans., University of Chicago Press 1961); see also Williams, *supra* note 101, at 290–91 (discussing the variety of social obligations and entitlements with respect to land in the Middle Ages).

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

114. This is not meant to be an exhaustive description of theories of property that may fall within the social discourse. I seek only to identify the strains that are particularly relevant to this discussion.

115. See Munzer, *supra* note 108, at 38–44 (cataloguing eight principles that reflect the core tenets of the view of property as a system of social relations).

116. 277 A.2d 369 (N.J. 1971).

to treat resident workers. The Court did not simply ignore the owner's interests, but merely held that they were overborne by the importance of maintaining resident workers' access to social services.¹¹⁷ Some theories within the social discourse tradition go a step further, suggesting not only that owners' rights are limited by competing social considerations, but that owners have affirmative duties to care for their land. Cultural property theorists, for example, have shown that other cultures regard their relation to land not in terms of domination and use, but in terms of stewardship—a duty to respect and care for the earth.¹¹⁸ This view finds expression in modern American law as well, most notably the public trust doctrine, which imposes on government a fiduciary duty of care over natural resources for the good of the beneficial owner of those resources, the public.¹¹⁹

Second, 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.¹²⁰ By contrast, the social discourse of property does not prioritize any particular form of

117. *Id.* at 372 (“Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises.”).

118. See generally Kristen Carpenter et al., *In Defense of Property*, 118 *YALE L.J.* 1022, 1067–77 (2009) (discussing stewardship).

119. See, e.g., National Historic Preservation Act, 16 U.S.C. § 470 (2006) (seeking to maintain historic properties by limiting development that would adversely affect them); see also Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 *MICH. L. REV.* 471, 485–89 (1970).

120. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 *AM. ECON. REV.* 347, 354–59 (1967) (arguing that conversion of public or common land 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.* 1, 9–11 (2006) (conceding only “a small, and shrinking place, for some fair use defense” in copyright law).

Recently proposed IP legislation also exhibits this failure to recognize the centrality of public as well as private forms of property. The Prioritizing Resources and Organization for Intellectual Property Act of 2008 is known by the salubrious acronym “The PRO-IP Act.” This falsely makes the legislation sound as though it were designed to protect all intellectual property, when it actually represents a strengthening of only private rights in information via stronger penalties for and enhanced enforcement of infringement. See PRO-IP Act of 2008, H.R. 4279, 110th Cong. (2d Sess. 2008).

possession, instead acknowledging the simultaneous presence of different kinds of property ownership such as commonly held resources, public lands, and novel alternatives like limited common property regimes.¹²¹ The social discourse of property also includes a wider range of objects within its definition of property, while the ownership discourse remains primarily concerned with land and chattels. The New Property movement of the 1960s represents the high-water mark of the former approach.¹²² At its peak, the movement convinced the Supreme Court to regard public assistance as a form of property entitlement.¹²³ Courts have since backed off this expansive view, 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,¹²⁴ self-expression,¹²⁵ and racial identity.¹²⁶

Third, and closely 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 laid the foundation for this approach by arguing that as the value of any resource grows, private property in that resource will emerge.¹²⁷ 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.¹²⁸ To

121. See Eric T. Freyfogle, *Private Property: Correcting the Half-Truths*, PLAN. & ENVTL. L., Dec. 10, 2007, at 3, 7 (observing the public/private character of property entitlements). See generally 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).

122. See generally Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (articulating a broad vision of property that would extend to intangibles like labor or state entitlements beyond real property and chattels).

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

124. See James Salzman & 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).

125. See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1535–39 (1993).

126. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1714–15 (1993).

127. See Demsetz, *supra* note 120, at 354–59.

128. See Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 51

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.¹²⁹

Finally, the social discourse of property calls attention to the nonmarket ways in which property creates social welfare. This theme is largely absent in the ownership discourse, which tends to equate the creation of value only with private wealth maximization, overlooking the generation of value that is not readily commodifiable. For example, public squares create a gathering space that enables individual interactions between members of a community and enriches civic identity.¹³⁰ National parks provide for shared experiences of wonder that can create bonds between otherwise disparate members of society.¹³¹ Other writers who fit broadly within this social discourse stress the extent to which the experience of ownership can empower the dispossessed,¹³² or enhance freedom by enabling individuals to more fully realize their basic human capabilities.¹³³ In each of these cases, the social discourse seeks a broader definition of property's value than the purely 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

(1990) (observing that a property system itself is a public good).

129. Carol 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 rather than private resources in order to enable travel and commerce).

130. *Id.* at 775–80 (discussing the socializing effects of property); cf. Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1911–12 (2005) (discussing the extent to which acquisition of property enables and reflects humans' inherent tendency toward sociability).

131. Cf. Carol M. Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, 66 LAW & CONTEMP. PROBS. 89, 108–09 (2003) (discussing *res divini juris*, a Roman category of property that included sacred sites that were considered public in order to reflect their common importance to all citizens).

132. See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000) (suggesting that capitalism's failure in developing countries could be reversed by investing the poor with property rights in their material possessions).

133. See AMARTYA SEN, *RATIONALITY AND FREEDOM* 501–30 (2002) (discussing the capability of market-based property systems to enhance freedom by creating more individual autonomy).

limitations on owners' rights. The rule against perpetuities imposes temporal limits on an owner's ability to bequeath property.¹³⁴ Nuisance laws have long constrained an owner's prerogative to engage in certain property uses that may prove harmful to his neighbors.¹³⁵ Easements and covenants that run with the land require owners to put up with uses that have been established by previous generations.¹³⁶ Modern property owners experience these ancient restrictions in addition to a host of more recent ones. Environmental regulations, eminent domain, and civil rights laws all constrain the way in which landowners can use their land and the extent to which they can exclude others from it.¹³⁷ Law even imposes certain affirmative duties on owners, such as property taxes or (in some jurisdictions) obligations to develop their land in particular ways imposed by aesthetic zoning laws. And while we normally think of property law as establishing and defending the rights of private owners, the state also regulates and protects shared ownership interests 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 trespassing on land held by a condominium association for its members).

The foregoing discussion shows that for all their differences, property romance and property anxiety share a common flaw: they are rooted in an impoverished view of what property means. By assuming that the equation of intellectual property and physical property will necessarily result in an absolutist, owner-dominated view of copyright and patent, both property romance and property anxiety understate the complexity of ownership, and in particular fail to account for the significant

134. See UNIF. STATUTORY RULE AGAINST PERPETUITIES (1990), 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*, (1681) 22 Eng. Rep. 931 (Ch.).

135. 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. *Aldred's Case*, (1610) 77 Eng. Rep. 816 (K.B.). Aldred prevailed. *Id.*

136. 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*, (1582) 77 Eng. Rep. 72 (K.B.).

137. See Carrier, *supra* note 74, at 54–80 (compiling a similar compendium of restrictions on property owners' rights).

counterpoint of the social discourse of property. In the next Part, I take this point one step further and show not only that there is something important missing from the current scholarly debate, but that what is missing—the social discourse of property—actually provides both the best descriptive account for what it means to think of IP as property and a promising rhetorical strategy for balancing public and private interests in information goods.

III. PROPERTY RHETORIC FOR THE PUBLIC DOMAIN

A. EXPLAINING IP THROUGH THE SOCIAL DISCOURSE OF PROPERTY

The previous Part showed that property is a capacious idea that includes the notion of ownership as exclusion as well as a system of social relations. In this Part, I take this point one step further and show that the social discourse of property provides a superior idiom in which to talk about patent and copyright. We have seen that the social discourse of property differs from the dominant ownership discourse in four primary ways. Proceeding through each of these points shows how the social discourse of property provides a better account than the ownership discourse for understanding the distinctive way in which the products of creation and innovation count as forms of property.

To begin, the central premises that underlie the social discourse of property are more consonant with copyright and patent law than are those underlying the ownership discourse. The latter view regards the property relation as binary and exclusive: one individual (or limited group of individuals, or a corporation) owns an object to the exclusion of all others.¹³⁸ Yet while we call the possessor of a copyright or patent an “owner,” this person looks nothing like the solitary despot of Blackstone’s caricature. Rather, the *res* in IP is a site at which the interests of various actors—titleholders and non-titleholders alike—converge. If I own the copyright in a work of authorship

138. See J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 71 (1997) (“[T]he law of property is driven by an analysis which takes the perspective of exclusion, rather than one which elaborates a right to use.”); Thomas W. Merrill, *Property and the Right to Exclude*, 77 *NEB. L. REV.* 730, 730 (1998) (“[T]he right to exclude others is more than just ‘one of the most essential’ constituents of property—it is the *sine qua non*. Give someone the right to exclude others from a valued resource . . . and you give them property. Deny someone the exclusion right and they do not have property.”).

or the patent for a device, my entitlements are subjected to the interests of previous authors or inventors (because the only protectable elements of intellectual property are those that are novel—in the case of patent—or original—in the case of copyright—advancements over prior work); contemporary authors or inventors (insofar as they are permitted to use the work or device subject to the fair use or experimental use doctrines); the original author of a work of authorship (as where the Visual Artists' Rights Act prevents owners from mutilating or misattributing works); and the public at large (to the extent that the public has a future interest in the device or work of authorship that will vest when it becomes part of the public domain).

Second, 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 as an incentive to create is obviously integral to patent and copyright law. But these private rights in information exist alongside and in symbiosis with public rights in information. Indeed, the public domain—a site of information 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.¹³⁹ 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.¹⁴⁰ 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 useful Arts."¹⁴¹ Indeed, the Supreme Court has emphasized that the aim of federal IP law is to create a rich public domain, with private owners' wealth a secondary consideration.¹⁴²

Since the eighteenth century, then, intellectual "property" has referred not only to privately owned information, but to the

139. Patent Act of 1790, ch. 7, 1 Stat. 109 (fourteen-year term); Copyright Act of 1790, ch. 15, 1 Stat. 124 (fourteen-year term plus possible additional fourteen-year term upon application).

140. Patent Act of 1790, ch. 7; Copyright Act of 1790, ch. 15.

141. U.S. CONST., art. I, § 8, cl. 8.

142. *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 useful arts.'").

public domain—itself a form of property, albeit a public one—as well.¹⁴³ In fact, any coherent account of intellectual property must constantly invoke public forms of ownership as well as the private forms with which they exist concurrently.¹⁴⁴ The specific expression contained in 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 of the Copyright Act.¹⁴⁵ 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.¹⁴⁶

143. 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.

144. Cf. Brett M. Frischmann, *Evaluating the Demsetzian Trend in Copyright Law*, 3 REV. L. & ECON. 649, 653 (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 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 religious sites is the product of agreements between the government and the churches. See generally *IN THE LIGHT OF REVERENCE* (PBS Film Aug. 14, 2001).

145. 17 U.S.C. § 107 (2006). The 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) (comparing fair use to a public easement); Timothy J. Brennan, *Copyright, Property, and the Right to Deny*, 68 CHI.-KENT L. REV. 675, 712–13 (1993) (same).

146. 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. See Rose, *supra* note 129, at 740. Village greens in early modern England, for example, were subject to limited exclusion rights (villagers could enter but outsiders could not) and li-

Third, 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 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.¹⁴⁷ 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.¹⁴⁸ 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.¹⁴⁹ This is particularly true because the full social value of creative or inventive work can only be realized by enabling others to use it.¹⁵⁰ 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.¹⁵¹ 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

mitted use rights (some greens could be used exclusively for grazing, others only for growing crops). *Cf. id.* 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 Rose, supra* note 131, at 93–105 (contrasting Roman property law categories *res communes* with *res publicae*).

147. *See Rose, supra* note 129, at 723 (observing the "service to commerce" generated by inherently public property, and explaining that "here, the commons was not tragic, but comedic, in the classical sense of a story with a happy outcome"). Admittedly, there is much debate over the efficiency of some public resources. *See id.* at 715–16. 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, *The Tragedy of the Commons*. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1242 (1968).

148. *See Rose, supra* note 131, at 102.

149. *See id.* at 104.

150. *See id.* at 102.

151. *See Julie E. 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).

first instance.¹⁵² The limited nature of copyright and patent owners' prerogatives—comprising only a modest number of exclusive rights and subject to various user-oriented use privileges¹⁵³—during the exclusive rights period further ensures that there is enough public access to protected work to maintain a robust exchange in ideas.¹⁵⁴ 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 property, in which public and private resources depend on each other to maximize social wealth,¹⁵⁵ than with the ownership discourse of property, which stresses almost exclusively the efficiency of private ownership.¹⁵⁶

The final reason that the social discourse of property is a superior language in which to express the character of intangible resources as property 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.¹⁵⁷ But as the social discourse of property stresses, this is not the only kind of value generated by the institution. Possession can enhance community, generate civic

152. Cf. Litman, *supra* note 143, at 966 (“[T]he 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.”) (emphasis omitted); SPIDER ROBINSON, *MELANCHOLY ELEPHANTS* 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 Robinson quotation not in reading his work, but because it is the epigram for the Litman piece cited just beforehand.

153. Jessica Litman, *War Stories*, 20 *CARDOZO ARTS & ENT. L.J.* 337, 337 (2002) (“The copyright statute doesn’t give copyright owners the exclusive right to *use* their works for limited times, or the exclusive right to *exploit their works commercially* for limited times. Instead, it gives copyright owners the exclusive rights to reproduce, adapt, distribute to the public and publicly perform or display their works, subject to a host of statutory exceptions.”).

154. See Frischmann, *supra* note 144, at 673 (arguing that the “leaks” that characterize copyright owners’ entitlements are critical to maintaining allocative efficiency); Lemley, *supra* note 22, at 1058 (arguing that total control for IP owners would undermine the efficiency of the copyright and patent systems).

155. See Lemley, *supra* note 22, at 1072–73.

156. See *id.* at 1037.

157. See *id.* at 1072.

pride, and foster cultural interchange.¹⁵⁸ Copyright and patent also generate value far in excess of the dollar value associated with the information goods whose production they encourage.¹⁵⁹ Works of authorship are not valuable only because they are part of an exchange in which authors get royalties for book sales, but because songs and literature provide a common language that allows us all to more eloquently and effectively express ourselves.¹⁶⁰ The Copyright Act creates space for these nonmarket values by permitting *de minimis* uses (such as trivial mentions in everyday conversation) and even creative variations (such as transformative re-imaginings of art or literature) of protected works.¹⁶¹ Similarly, the value of invention lies not only in the sales or licensing of patented devices, but also in the contributions that innovations make to the store of collective scientific knowledge.¹⁶² For this reason, the Patent Act extends exclusive rights to inventors only on the condition that they disclose their process publicly so that others may learn from it.¹⁶³

Significantly, positive law does not find the public-regarding elements of patent and copyright at all inconsistent with their treatment as forms of property. The Copyright Act and the Patent Act create regulatory schemes that reflect the basic ownership structure that arose out of the common law of real and personal property.¹⁶⁴ These statutes enshrine users'

158. See Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127, 142–43 (2009) (stating that society has an interest in recognizing the obligations of owners and the state to respect and facilitate the flourishing of others).

159. See, e.g., Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 572 (2004) (“[C]opyright law recognizes that selection and arrangement can be highly creative, valuable activities even if the editor does not add content of her own.”).

160. See, e.g., *id.* at 573 (observing that in his *Texas v. Johnson* dissent, Chief Justice Rehnquist expressed the strength of his feeling for the American flag by quoting John Greenleaf Whittier’s poem *Barbara Frietchie* (citing *Texas v. Johnson*, 491 U.S. 397, 424–25 (1989) (Rehnquist, C.J., dissenting))).

161. E.g., *Blanch v. Koons*, 467 F.3d 244, 259 (2d Cir. 2006) (finding no liability for appropriation artist Jeff Koons for his use of copyright-protected photographs of fashion models in collages).

162. See Cohen, *supra* note 151, at 1809.

163. See U.S. PATENT & TRADEMARK OFFICE, GENERAL INFORMATION CONCERNING PATENTS (2005), <http://www.uspto.gov/web/offices/pac/doc/general/#novelty>.

164. This is in reference to Thomas Grey’s familiar, though somewhat informal, definition of property as entailing the rights to use, exclude, transfer, and possibly to destroy. Grey, *supra* note 95, at 69. On whether the last of

rights to use and transfer their goods, and to exclude others from using those goods.¹⁶⁵ IP can be bequeathed on death and attached following an adverse court settlement.¹⁶⁶ The elements of patent and copyright that make them seem unlike land or chattels—most familiarly the limited terms of owners’ rights—do not lead courts to conclude that they are not property, but rather that they are forms of property that happen to be subject to limitations in the public interest.¹⁶⁷ These authorities all suggest that, contrary to what the ownership model presupposes, a property system animated largely by the idea of the public good lies in perfect harmony with the notion of private ownership in ideas.¹⁶⁸ As the Supreme Court observed, while the law extends the exclusive rights of creators and inventors, it “never accorded the copyright owner complete control over all possible uses of his work.”¹⁶⁹

The characteristics of intellectual property that I 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, with its full-blooded embrace of the language of possession, and property anxiety, with its ambivalent resistance to 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 falls victim to the same flawed assumption that “property” means only what the ownership discourse says it means: private ownership concentrated in firms or individuals, resulting in complete control of the owned object.¹⁷⁰ Thus both property romance and property anxiety profoundly misconstrue the nature of property, which includes multiple forms of possession,

these really is a meaningful constituent component of the property right, see Lior Jacob Strahilevitz, *The Right to Destroy*, 114 *YALE L.J.* 781, 783–87 (2005).

165. See Grey, *supra* note 95, at 69.

166. Cf. *id.* (describing some elemental features of property).

167. See, e.g., *Blanch v. Koons*, 467 F.3d 244, 259 (2d Cir. 2006).

168. See, e.g., *Rose*, *supra* note 129, at 712 (“When things are left open to the public, they are thought to be wasted by overuse or underuse.”). This does not mean, of course, that the balance of public and private interests in information goods lies at an optimal level; that is a debate I am not seeking to engage here.

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

170. See Grey, *supra* note 95, at 69.

as well as a variety of limits and obligations on owners.¹⁷¹ This is why the social discourse of property provides a more coherent account of how IP *is* property: it doesn't shrink from regarding shared information resources as owned resources, but instead stresses that they are shared—not purely private—forms of property in which the public has entitlements.

B. ADDRESSING THE *KELO-ELDRED* PUZZLE

With these points in mind, I turn back to the puzzle with which I began this Article. 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 we have seen, the reason is that *Kelo* was portrayed primarily as an incursion on property (which it was) while public dialogue about *Eldred*, by contrast, did not invoke the language of possession or 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. *Eldred* was not cast in this same light, so the taking of the public entitlement approved in that case could not access the deeply felt emotions necessary to generate a *Kelo*-style backlash. The *Kelo-Eldred* puzzle is not merely an intellectual conundrum, but a social problem. The absence of public outcry in response to uncompensated takings of public information permits this practice to proliferate, as evidenced by the spate of owner-friendly legislation in the past decade.¹⁷² The result is a classic public choice problem.¹⁷³ The public's diffuse interests in preserving shared information entitlements will continue to be underrepresented in legislative processes compared to the narrowly focused interests of content industries, causing the latter to prevail despite representing the less socially optimal outcome.

Understanding IP through the social discourse of property sheds new light on this dilemma. Consider a thought experi-

171. See Litman, *supra* note 153, at 337.

172. See, e.g., Artists' Rights and Theft Prevention Act of 2005, Pub. L. No. 109-9, 119 Stat. 218 (codified as amended in scattered sections of 17 and 18 U.S.C.); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.); Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.).

173. See generally MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION 141-48 (1965) (discussing the tendency of special interests to dominate legislative processes).

ment. What if, rather than resisting property-talk, writers concerned about public entitlements in information explicitly cast their concerns about the public domain in terms of attempts to protect an affirmative ownership entitlement—in terms, that is, of defending threats to public property? Content industries currently deploy, with great effect, property romance as a rhetorical strategy designed to protect and extend their entitlements in information resources.¹⁷⁴ The romantic message is simple and resonant. IP is property, and if you steal it, you're committing a legal and moral wrong.¹⁷⁵ Property romance proved, in this respect, spectacularly persuasive. As Peggy Radin observed, “analogies to physical property, and invasion of physical property . . . are showstoppers of persuasion.”¹⁷⁶

My suggestion is that defenders of the public domain should also leverage the persuasive power of property rhetoric.¹⁷⁷ The users' rights approach should combat content industries' property-talk with more, rather than less, property-talk by invoking the notion of property in a way that uses the social discourse to emphasize the public/private nature of ownership. Low-protectionists should concede that information, like physi-

174. See, e.g., Doug Bedell, *The MP3 Wave: As Millions Download Music Off the Net, Piracy Enforcement Flounders*, DALLAS MORNING NEWS, July 27, 1999, at 1F (quoting former Recording Industry Association of America President Hillary Rosen describing her aim as protecting artists whose property is being “taken from them and distributed without their permission”).

175. See *id.*; I would be remiss in ending this footnote without mentioning 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
 PIRACY. IT'S A CRIME.

YouTube: Downloading Movies from the Internet Is Illegal, <http://www.youtube.com/watch?v=-7QAS5ze86c> (last visited Dec. 11, 2009). 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. It is both the apotheosis of property romance, and a great indication of how powerful and pervasive a rhetorical device it can be.

176. Margaret Jane Radin, *Information Tangibility*, in *ECONOMICS, LAW AND INTELLECTUAL PROPERTY* 395, 400 (Ove Granstrand ed., 2003).

177. Cf. Gurman, *supra* note 37 (arguing that emphasizing public values in debates about copyright and digital media has the potential to push copyright law in a more progressive direction).

cal resources, can be thought of as property, but emphasize that this does not mean that all information must be subject to private control. This rhetoric would stress that while culture and information can be thought of as the subjects of a property relationship, that conception includes not only private, but also *public* property—something we are all entitled to enjoy. Such an approach would access the powerful moral heuristics associated with physical property, but would do so in a way that extends to all forms of ownership, rather than just private possession.¹⁷⁸

Thus, when content industries claim that “information is ours, and stealing it is wrong,” the best rhetorical countermove is one that invokes, rather than shrinks, from property. Instead of responding with something along the lines of “information wants to be free,” it would be more effective to say “certainly some information is yours, but some is not, and the latter belongs to all of us as shared property that you are free to use.” This approach would manifest itself in legislative debates over the scope of IP rights,¹⁷⁹ litigation that touches on the same issue,¹⁸⁰ and public service messages designed to raise consciousness of the existence of the public domain and the importance of preserving it.¹⁸¹

178. See Sunstein, *supra* note 36, at 531–35 (discussing how framing issues affects the use of particular moral heuristics).

179. When owners and their representatives angrily claim that their property is being threatened as a basis for demanding broader copyright and patent protection, users’ rights advocates should counter that such expansions in IP rights should be made subject to the limitation that they do not excessively attenuate the public’s property interests in common information entitlements.

180. When judicial opinions say “thou shalt not steal,” *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (quoting *Exodus* 20:15), the answer will become “from whom?” A decision that too narrowly interprets the fair-use defense effectively takes entitlements from the public, just as a decision that permits illegal filesharing would countenance taking from a private owner.

The litigants in *Eldred* employed a variation on this theme at the trial level, arguing that the CTEA violated the public trust doctrine. *Eldred v. Reno*, 74 F. Supp. 2d 1, 2 (D.D.C. 1999). The district court rejected this argument, narrowly construing the public trust doctrine to apply only to navigable waters. *Id.* at 4 (“Insofar as the public trust doctrine applies to navigable waters and not copyrights, the retroactive extension of copyright protection does not violate the public trust doctrine.”).

181. This ad might be phrased as: “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 cultural resources to private companies by extending

This approach promises two salubrious effects. The first is restoration of rhetorical balance in debates over the scope of patent and copyright. Content industries' claims of wrongful taking resonate because they possess a core of truth. Unambiguous cases of infringement—such as unauthorized copying and reselling of protected works like DVDs—reduce artists' incomes and attenuate their incentives to create, while producing almost no social utility gain.¹⁸² But the aggression with which content industries press their message threatens to over-deter. 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 when available to all.¹⁸³ The unbalanced character of the content industries' information campaign is particularly evident in their recent attempts to inculcate a strong pro-owner perspective in young Americans.¹⁸⁴ Owners' and content industries' ability to capture the rhetorical high ground in this debate depends, in large part, on their being the only side in the debate that invokes property rhetoric. This creates a dialogue that pits property against not-property and results in "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).¹⁸⁵ Here is where a users' rights approach that uses property-talk can help, by providing an effective rhetorical counterpunch to owners' overbroad intimations that all takings of information are

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 for free to wealthy businesses."

182. See Bedell, *supra* note 174.

183. See Epstein, *supra* note 10, at 127–28 (arguing that the CTEA's copyright term extension benefits a few individuals at the expense of the larger public).

184. See, e.g., Nate Anderson, *Boy Scouts Get MPAA-Approved Merit Badge*, ARS TECHNICA, Oct. 20, 2006, <http://arstechnica.com/gadgets/news/2006/10/8044.ars> (describing approval by the Los Angeles Boy Scouts of a merit badge designed to promote respect for copyrights on terms influenced by the MPAA); Posting of David Kravets to WIRED, <http://www.wired.com/threatlevel/2008/08/nonprofit-distr/> (Aug. 21, 2008, 15:06 EST) (showing youth-oriented anti-infringement materials, which wrongly state that illegal peer-to-peer filesharing is a state criminal offense).

185. Cf. James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 901–03 (2007) (illustrating examples of strategic behavior on the part of copyright owners).

wrongful. By using the language of possession in a full-blooded manner and stressing that the public's claim to shared cultural resources is an enforceable property interest that merits much the same kind of respect that private entitlements do, low-protectionists can capture some of the rhetorical thunder of property romance that is now monopolized by high-protectionists and restore balance to what is now a skewed dialogue.¹⁸⁶

Second, explicitly invoking the language of property in dialogues about copyright and patent promises to create social consciousness about the public domain. Owners use the language of property with facility because they conceive of devices and works of authorship as particular objects and things that belong to them.¹⁸⁷ The existence of well-defined entitlements in things is a prerequisite to consciousness of a property relationship with those things.¹⁸⁸ The reason that attenuations of public entitlements in information fail to generate widespread resistance is, to a large extent, because (users like Eric Eldred and law professors like Lawrence Lessig aside) the public is not acutely conscious that such entitlements exist.¹⁸⁹ Nor are current rhetorical approaches likely to change this. Casting debates about entitlements in intellectual property as between property and not-property¹⁹⁰ does not give a sense that the latter position stands for anything, and correspondingly fails to access the kinds of visceral reactions occasioned by the language of possession and ownership invoked by the other side.¹⁹¹

186. Cf. Marty Jezer, *Capture the Flag*, COMMONDREAMS.ORG, Aug. 6, 2004, <http://www.commondreams.org/views/04/0806-03.htm> (discussing how Democrats' overt assertions of patriotism and use of American-flag imagery in the 2004 Democratic National Convention were an attempt to attenuate the previously dominant view that Republicans held a monopoly on patriotism).

187. See David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139, 147 (2009) ("The term 'property' is commonly conflated with private property in both academic literature and the popular mind . . .").

188. See *id.* (stating that clearly demarcated entitlements in public or private resources are a prerequisite for their efficient exploitation); cf. Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 453, 455–56 (2002) (discussing the role of clear boundaries in strategies for governing real property).

189. Cf. Anderson, *supra* note 184 (mentioning that an MPAA-approved merit badge program fails to inform Los Angeles Boy Scouts about "public domain material").

190. E.g., JAMES BOYLE, *THE PUBLIC DOMAIN* 69 (2008) (comparing copyright to Swiss cheese—i.e., as owners' rights shot through with empty spaces to symbolize users' privileges and the public domain).

191. See Sunstein, *supra* note 36, at 531–35.

Property rhetoric promises to foster this lacking consciousness by emphasizing the extent to which the public domain is something we all possess via shared access and use entitlements. Articulating the public's interests in terms of possession will also cause the public to understand that shared culture is *theirs*—a resource they own in common, rather than something unrelated or unconnected to them—and will encourage a sense of both entitlement to these resources and corresponding anger when these resources are taken without compensation.¹⁹² The development of a new consciousness about public resources is not unprecedented. As recently as the 1950s, the now-familiar idea of the environment was not well-known.¹⁹³ But with growing concern about eco-catastrophes in the 1960s and 1970s, widespread concern about natural resources emerged and coalesced into what we now know as the environmental movement.¹⁹⁴ Using property rhetoric for the public domain could aid the project of creating a similar kind of social movement for the preservation of commonly owned information by encouraging consciousness and stewardship of our shared cultural resources.¹⁹⁵

192. See Jonathan R. Nash & Stephanie M. Stern, *Property Frames*, 87 WASH. U. L.R. (forthcoming 2010) (manuscript at 7), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1463782 (“[F]raming similar information in different ways systematically attenuates . . . or conversely strengthens . . . property perceptions, attitudes, and reactions.”).

193. Cf. Elizabeth Kolbert, *Human Nature*, NEW YORKER, May 28, 2007, at 23, 23 (discussing the U.S. Department of Agriculture's lack of knowledge regarding the environmental ramifications of using certain pesticides to kill fire ants during the 1950s).

194. See *id.* (characterizing the emergence of an environmental consciousness in the 1960s brought on, to a large extent, by Rachel Carson's writing and activism).

195. A variation of this movement is already afoot to the extent that many defenders of the public domain describe their work as part of a “cultural environmentalist” movement. See, e.g., BOYLE, *supra* note 190, at 230–47 (calling for an “[e]nvironmentalism for [i]nformation”); James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 110–12 (1997) (drawing lessons for intellectual property politics from the environmental movement). The explicit linking of environmentalism and a progressive politics of IP is undoubtedly helpful insofar as it seeks to create consciousness of public entitlements in information.

Similarly, numerous scholars have deployed commons theory as a way to identify the social benefits of shared information resources. E.g., BENKLER, *supra* note 86, at 23; Michael J. Madison et al., *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1265793>; Rose, *supra* note 129, at 723. This approach, too, bears great promise as a way to push academic dialogue about IP

The commonplace tendency—especially in the popular consciousness—to conflate “property” with privately owned physical resources may raise skepticism about using property as a rhetorical strategy to preserve the public domain. This objection has two valences. The first is that rhetorically recasting IP as property simply cannot access the same visceral reaction that people have to incursions on possession of land and chattels because we possess a uniquely strong connection to physical things in the world rather than to abstractions like information.¹⁹⁶ It is certainly right that land—and the family home in particular—occupy a privileged place in the pantheon of objects of the property relation, but this does not mean that other kinds of property cannot generate powerful emotional reactions. Consider the content industries’ reaction to peer-to-peer filesharing and other forms of digital infringement. Owners and their representatives are invariably outraged at these infringements, and express that outrage in terms of wrongful deprivations of property.¹⁹⁷ If anything, there is reason to think that attenuations of rights in intangible property are more keenly felt by owners than attenuations of rights in physical property. The subject matters of copyright and patent are products of someone’s creative and inventive faculties, and so

to recognize the distinctive features of IP that cause it to generate high value when governed as a commons.

In light of this, it should be clear that my thesis is not that there have been no attempts to link the idea of physical property with IP in a way that pushes in favor of enhancing the public domain. Neither of these approaches, though, encourages the inclusion of IP within a rhetorical (as opposed to analytical) property tradition. I thus seek to supplement these two extant views by encouraging the deployment of property *language* in public debates about the ideal scope of IP. My approach thus differs in two respects from the cultural environmentalism and commons literature. First, I encourage public dialogue about IP to explicitly cast public information resources as *property*, rather than as nonproperty, *see, e.g.*, James Boyle, *Foreword: The Opposite of Property*, 66 LAW & CONTEMP. PROBS. 1, 1 (2003) (describing the public domain as “the ‘outside’ of the intellectual property system”), for all the pragmatic reasons enumerated in this Part. Second, I encourage this usage beyond the context of academic debates about IP, but also in public dialogue—whether legislative, judicial, or popular—in order to create a general consciousness of the property status of shared intangible goods.

196. Courts tend to prioritize land over other forms of property—at least in takings law—but commentators have questioned the viability of this distinction. *See* Eduardo Moisés Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 ECOLOGY L.Q. 227, 230–33 (2004).

197. *See supra* text accompanying notes 58–67 (cataloguing IP owners’ use of property language to articulate their concerns about attenuations of copyright and patent rights).

may well be tied in some essential sense to the self.¹⁹⁸ Creative work in particular has an expressive quality that makes it more than just a commodity in trade, as evidenced by the hoary but telling cliché invoked by countless musicians, “my songs are like my kids.”¹⁹⁹ Certainly some physical property—the family home, a beloved heirloom—has a similar sense of connection with the self that transcends objective valuation, but the prevalence of commercial property and functional apartments belies any claim that we necessarily have a stronger emotional connection to real property and personalty than to intangible goods.

One might also argue that property rhetoric cannot be effectively leveraged in favor of preserving public information goods because even if owners of *private* intellectual property react with outrage at incursions on their possession, the same reaction cannot accompany incursions on *public* information resources. Again, experience shows otherwise. Consider the public backlash that ensued in 1996 when the American Society of Composers, Authors, and Publishers (ASCAP) sent cease-and-desist notices to the Girl Scouts concerning their singing campfire songs like “Puff the Magic Dragon” and “God Bless America.”²⁰⁰ The Scouts had believed (wrongly, as it turned out)²⁰¹ that these songs were part of the public domain, and the incident led to a public outcry at ASCAP’s attempt to put a price on the Scouts’ exercise of this nonexclusive, shared en-

198. See Radin, *supra* note 97, at 958–61, 978–79 (discussing the extent to which the self can become entangled with the object of ownership, and propounding a theory of ownership that correlates property protection with the extent to which an object is bound up with its owner’s identity). The *owner* of the patent or copyright, as opposed to its creator, may have no such personal connection to the device or work, of course.

199. *E.g.*, Rod McKuen, Flight Plan, <http://www.mckuen.com/flights/101000.htm> (last visited Dec. 11, 2000) (“My songs are like my kids and I want them treated right.”).

200. Lisa Bannon, *Birds May Sing, But Campers Can’t Unless They Pay Up*, S. COAST TODAY, Aug. 23, 1996, <http://archive.southcoasttoday.com/daily/08-96/08-23-96/b02li056.htm>.

201. Most of the songs at issue actually were copyright protected, which meant that ASCAP’s claim was perfectly valid. *Id.* As a representative from ASCAP said, the Girl Scouts “buy paper, twine and glue for their crafts—they can pay for their music, too.” *Id.* The fact that the use was widely perceived to be in the public domain, though, suffices to illustrate the point that the public is capable of visceral outrage when they feel as though their public—as well as private—entitlements in information come under attack.

titlement.²⁰² Certainly part of the backlash derived from ASCAP's choice of target; corporate licensing organizations bullying Girl Scouts can hardly be expected to garner much sympathy. But the public's reaction derived also from a sense that ASCAP was encroaching on a preexisting public entitlement.²⁰³ 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. And whether we are right or wrong about that as a matter of law, the fact of the backlash alone shows that the public is capable of reacting with outrage to takings of public as well as private entitlements.²⁰⁴

This point rests on the rather unsurprising premise that people are more than myopic utility-maximizers. The assumption that only takings of private property are capable of generating powerful reactions relies on the facile assumption that we can see no further than the short-term maximization of our own wealth.²⁰⁵ In fact, there are numerous instances of people acting to counter threats to someone else's private property in the interest of sustaining a beneficial system of property. In

202. The threats to sue the Scouts led to a huge public outcry that turned into a PR disaster for ASCAP. Thaa Walker & Kevin Fagan, *Girl Scouts Change Their Tunes*, S.F. CHRON., Aug. 23, 1996, at A1 (quoting ASCAP's licensing vice president as saying "we got a big black eye from this"). 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. *Id.* Now a chastened ASCAP charges the Girl Scouts \$1 per year for the right to sing licensed songs. Jonathan Zittrain, *Calling Off the Copyright War*, BOSTON GLOBE, Nov. 24, 2002, at D12.

203. Similar indignation has accompanied attempts to perform the song "Happy Birthday to You," 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, *The Same Old Song*, WIRED, July 2005, at 100. Some writers have suggested that "Happy Birthday to You" is in fact no longer copyrighted, Robert Brauneis, *Copyright and the World's Most Popular Song*, 56 J. COPYRIGHT SOC'Y U.S. 335, 338 (2009), but regardless of the song's legal status, the point remains that asking people to treat "Happy Birthday to You" as privately proprietary rather than a free element of shared culture causes a visceral sense of injustice.

204. The popular resistance to the enclosure movement in early modern England provides a historical example of widespread objection to reallocation of common land to private owners. See THOMAS MORE, UTOPIA 32–33 (Mildred Campbell ed., Walter J. Black, Inc. 1947) (1516) (satirizing the enclosure movement and characterizing public-to-private redistribution of commons as a form of theft).

205. See generally Rose, *supra* note 128, at 43–45 (cataloguing different kinds of preference models that include but are not limited to the standard rational utility maximizer).

northern cities, the social norm is to let the individual who digs the snow out of a street parking space use that space exclusively until it is snowed back in.²⁰⁶ Where drivers inconsiderately park in spaces they have not dug out themselves, members of the local community often come to the aid of the space's rightful possessor by warning the offender or even vandalizing the offending vehicle.²⁰⁷ Similarly, local residents in Boulder, Colorado protested vociferously when a citizen acquired part of a neighbor's land by adverse possession, even though the adverse possession claim posed no threat to anyone else's title.²⁰⁸

The instinctive concern for maintenance of shared public resources can also be articulated in terms of existence value. Actors derive value not only from exploiting resources, but in some cases, from merely knowing that they exist. For example, I would object strongly if the federal government sought to sell the Grand Canyon to a private company for use as a garbage dump, even though I may never visit the Grand Canyon again. This phenomenon emerged on a wider scale in 2008 when Governor Schwarzenegger threatened to shut down over fifty California state parks due to an impending budget crisis.²⁰⁹ In response, donations poured in from sources in and out of state,²¹⁰ many 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. Monuments provide a final example of the hold that public property has over the popular imagination, as the debate over San Francisco's Pioneer Monument illustrates. Native American groups wanted the monument removed due to its purportedly offensive account of pioneer history, but this effort met with objections by those who

206. See Richard A. Epstein, *The Allocation of the Commons: Parking on Public Roads*, 31 J. LEGAL STUD. 515, 528–29 (2002).

207. *Id.* at 531–32.

208. See John Aguilar, *Hard Feelings on Hardscrabble Drive*, BOULDER DAILY CAMERA, Nov. 19, 2007, at A1; *Couple Could Lose Third of Land in Boulder*, VAIL DAILY, Nov. 25, 2007, <http://www.vaildaily.com/article/20071125/NEWS/71125004>. Biologists have also observed this kind of other-regarding preference in some species of birds that attack invaders of other birds' established habitats. See Jeffrey Evans Stake, *The Property Instinct*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y LONDON 1763, 1767 (2004).

209. See National Trust for Historic Preservation, *America's 11 Most Endangered Places*, <http://www.preservationnation.org/travel-and-sites/sites/western-region/californias-state-parks.html> (last visited Dec. 11, 2009) (describing budget-related threats to California state parks).

210. See Save Our State Parks Supporters, <http://www.savestateparks.org/supporters/> (last visited Dec. 7, 2009).

derived value from the symbolic value of the monument's presence.²¹¹

We invoke the language of property narrowly to refer to rights in private things, usually land. The foregoing discussion seeks to show that a broader conception of what property means as a matter of law and legal theory gestures at a broader variety of ways to deploy property rhetoric. That intellectual property in particular is most coherently understood as a system of social relations rather than exclusive private dominion suggests that the language of property can be used in defense of, rather than in opposition to, public entitlements in information. That writers across the spectrum have not yet made this move does not mean that it is implausible, but only that popular discussions about the scope of patent and copyright have lacked imagination. But even if it were true that tangible—especially real—property has more of a hold on the popular mind than its intangible counterpart, it would not be the end of the story. The foregoing discussion can be taken as expressing a normative aspiration as well as a descriptive reality. As we've seen, rhetoric not only reflects, but also 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.²¹² By leveraging the romantic power of the idea of possession in the service of the public domain, the public may grow to regard its interests in intangible goods with something like the covetous reverence that it does physical property.

211. See SANFORD LEVINSON, WRITTEN IN STONE 27–28 (1998). The controversy over Decalogues, such as the one in Montgomery, Alabama that Justice Roy Moore refused to remove, provides another illustration of the power of public property in the popular imagination. Moore's intransigence in the face of a court order stirred both anger and support from countless people who will never set foot in Montgomery. Cf. Rob Boston, *Commandment from the Court: Alabama Chief Justice Roy Moore's Decalogue Display Violates Constitution, Says Federal Appellate Panel, as Dispute Moves Toward Showdown*, 56 CHURCH & ST. 172, 172–74 (2003), available at <http://www.au.org/media/church-and-state/archives/2003/09/commandment-from.html>.

212. Cf. Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 948 (2006) (“Social movements . . . construct the semantic normative climate in which people talk about the great constitutional issues of the day . . . [and] can play an important role in reorienting law to shifting social understandings so that legal and social institutions remain in dynamic relation to one another.”).

CONCLUSION:
INSIDE AND OUTSIDE PROPERTY, AGAIN

Hanoch Dagan once observed that “[f]riends of the public domain are typically suspicious of property-talk.”²¹³ Dagan’s pithy characterization of the relationship of property rhetoric to the public domain is descriptively accurate, but it shouldn’t be. Three steps show why. First, exploring invocations of the rhetoric of ownership in debates over the ideal scope of patent and copyright shows why low protectionists have been allergic to property talk. Property romantics have, with great effect, couched their appeals for broader owners’ rights in terms of the simple, appealing language of ownership.²¹⁴ This move has caused property anxiety to emerge in friends of the public domain, who have not unreasonably assumed that more property rhetoric represents a threat to their interests. This initial descriptive step frames the second one: that this presumed opposition between property and the public domain is false. It falsely assumes that property can be understood only in terms of the ownership discourse, which emphasizes nearly complete control of owned resources and maximization of private wealth. This opposition is false because 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 nonmarket goods. In fact, the social discourse of property provides a far better language in which to talk about IP than the ownership discourse does. This second descriptive step sets up a final, normative move: I argue that friends of the public domain would do well to embrace, rather than resist, property rhetoric. Property romantics’ full-blooded embrace of the language of ownership in public debates about the ideal scope of IP has skewed these debates in their favor, and those concerned about the public domain lack an effective counterpunch. By framing their concern about the public domain as a concern about preserving public property (rather than simply resisting property), actors concerned about this issue can restore balance to this debate. This use of property rhetoric for the public domain can also foster a general sense that limiting the public domain is an affront to shared ownership entitlements, thereby

213. Hanoch Dagan, Symposium, *Property and the Public Domain*, 18 *YALE J.L. & HUMAN.* 84, 84 (2006).

214. See Epstein, *supra* note 56, at 75 (arguing that websites “are a new form of chattel, which are presumptively governed by the law of trespass to chattels”); Warner, *supra* note 56, at 120 (same).

encouraging respect for, and stewardship of, common cultural resources.

Beyond this central thesis, I also seek to introduce into the IP literature a series of insights that have long animated writing about physical property. Most property literature roughly follows one of two major schools of thought.²¹⁵ One major strain of property scholarship lies within the Demsetzian tradition, which presumes that property systems trend toward greater private control of resources.²¹⁶ This property tradition, inspired by Coase²¹⁷ as well as Demsetz, has had its modern apotheosis in the neoclassical law-and-economics literature. This approach stresses expansive private ownership rights as the best means of maximizing social welfare.²¹⁸ Such instrumentalist claims about the value of private possession necessarily presuppose strong property rights—and in particular, exclusion rights²¹⁹—that inhere in private individuals or firms. Related libertarian defenses of the ownership discourse of property emphasize the extent to which state-backed private property rights provide individuals with a bulwark against government incursions on liberty.²²⁰

The ownership discourse has no shortage of adherents, but at least as numerous are writers who take a different view. Nineteenth-century radicals argued that property was inherently immoral and should be abolished.²²¹ Margaret Radin has sug-

215. These few paragraphs are meant to be a satellite-level overview rather than anything like the exhaustive literature review that would really do justice to these schools of thought.

216. *E.g.*, Demsetz, *supra* note 120, at 350 (explaining that “the emergence of new private or state-owned property rights” in communities with different ownership systems “will be in response to changes in technology and relative prices”).

217. *See generally* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (establishing the foundations of the Coase Theorem).

218. *See* EPSTEIN, *supra* note 15; *see also* Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1359–60 (1982) (arguing that the touch and concern requirements for covenants and servitudes unnecessarily constrain property and do not uphold “efficient land use”).

219. *See* Patent Act of 1790, ch. 7, 1 Stat. 109; Copyright Act of 1790, ch. 15, 1 Stat. 124.

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

221. *E.g.*, PIERRE-JOSEPH PROUDHON, *WHAT IS PROPERTY?* 38 (Benjamin R. Tucker trans., William Reeves 1902) (1840) (introducing the famous aphorism *la propriété, c'est le vol* translated as “property is robbery!”). This extreme critique lacks many contemporary adherents, though some Native American writers have espoused something close to this view. *See, e.g.*, PETER MAT-

gested 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.²²² Critics in a more doctrinal vein have argued that the ownership discourse's emphasis on an absolute notion of possession cannot be squared with positive law.²²³ Carol Rose's writing shows that a focus on private possession fails to account for the multiplicity of public and common forms of property, and that public property must exist alongside and in combination with private ownership in order to generate maximum social efficiency.²²⁴ Still others have stressed the extent to which ownership can enhance social and communal bonds,²²⁵ and have highlighted the capacity of property to further social justice.²²⁶

These various perspectives on property reveal a richness within the literature about what (physical) property means. While one may be an advocate of strong private property rights for owners of tangible things, one could not do so without consciousness that this is only one of myriad ways to think about possession of physical property.²²⁷ The intellectual property li-

THIESEN, INDIAN COUNTRY 119 (1984) (quoting a Cherokee man, Jimmie Durham, expressing the view that land cannot and should not be privately possessed).

222. Radin, *supra* note 84, at 1851, 1903 (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* Radin, *supra* note 97, at 957–61.

223. 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 T. 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 "our entitlement becomes less and less absolute" and stressing that "ownership of property has always been a privilege granted by society, and revocable" (quoting WILLIAM KITTREDGE, *OWNING IT ALL* 64 (1987))); Williams, *supra* note 101, at 280–83 ("Many commentators have noted the gap between the political rhetoric of absolute property rights and the practice of limited property rights.").

224. Rose, *supra* note 129, at 713, 723.

225. Peñalver, *supra* note 130, at 1894 (highlighting property's capacity to reinforce the bonds of the society in which it exists).

226. Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1242–43 (2005).

227. Some writers would contest the view that nonexclusive forms of property count as property, but even these writers stake their positions in opposition to the substantial literature that takes a contrary view of what property is. *See, e.g.,* Merrill, *supra* note 138, at 730, 734–39 (arguing that the right to

terature, though, fails to reflect this variety of property's meanings. IP writers typically juxtapose "property" (private rights in information) with "not-property" (public rights in information).²²⁸ And as the prevalence of property anxiety among low protectionists suggests, the very introduction of property ideas into copyright and patent is taken as a threat to the public domain. Copyright and patent scholars alike frequently lament the "propertization" of their fields,²²⁹ conflating the privatization of information resources with the propertization of these resources.

The reigning view among IP writers—at least, those who are concerned about maintaining public resources and values in copyright and patent—appears to be: property is a problem.²³⁰ This view stems from legitimate concerns about an excess of private rights in information, but it expresses an impoverished view of what property means. To understand ownership only as domination in the service of private wealth maximization is to caricature the institution. Rather, as Carol Rose observed, "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."²³¹ And the impoverished view of property that prevails in

exclude is both a "necessary and sufficient condition of identifying . . . property" and discussing the major schools of thought on the right to exclude).

228. BOYLE, *supra* note 190, at 38 (describing the public domain as "intellectual property's outside, its opposite").

229. Carrier, *supra* note 74, at 4, 6 (equating the "propertization" of intellectual property, which "scholars have lamented," with "the expansion of the duration and scope of initial rights to approach unlimited dimensions"); Lemley, *supra* note 74, at 895–904 ("Other scholars have lamented the rise of property rhetoric and its effects . . .").

230. Other fields have resisted the introduction of property ideas for similar reasons. In the field of cultural property, for example, some have resisted using property as a strategy to strengthen Native Americans' control over tribal identity. See generally MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 7–10 (2003) ("[W]e should be asking not 'Who owns native culture?' but 'How can we promote respectful treatment of native cultures and indigenous forms of self-expression . . .?"). Recent writing has suggested that this resistance is premised on an inaccurately narrow view of what property means. See Carpenter et al., *supra* note 118, at 1029 ("[C]ultural property critics inappropriately ground their critiques in a narrow set of assumptions about property . . .").

231. Carol M. Rose, *Property in All the Wrong Places?*, 114 YALE L.J. 991, 1021 (2005); see also Peñalver, *supra* note 130, at 1894 ("Property as entrance does not view property principally as a boundary separating individuals from one another but rather as a means of joining individuals to each other in community.").

the IP literature raises very real concerns. It causes us to overlook positive strategies for preserving the public domain that depend on explicit recognition of (rather than resistance to) shared information resources as a form of property. Elsewhere, I have argued that resistance to property can obscure positive strategies for preserving the public domain.²³² And in this Article, I have sought to show that rhetorical strategies that embrace—rather than shrink from—property as a language for talking about public entitlements in information promise to enrich debates about the appropriate scope of patent and copyright law. The claim is, in a sense, simple: we cannot have a complete dialogue about what it means for IP to be a form of property unless we understand property in all its complexity. And property, properly conceived, can highlight rather than obscure the extent to which patent and copyright are systems that rely on a symbiosis between public and private entitlements to achieve optimal value for owners and society alike.

232. See Fagundes, *supra* note 187, at 143.