

Property Rhetoric and the Public Domain*

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ABSTRACT

Those who prefer broader intellectual property rights often deploy the rhetoric of physical property. By contrast, those who are concerned about maintaining public entitlements in information resist that rhetoric. In this Article, I take this dichotomy as a starting point for investigating the power of property rhetoric as a tool in public debate about the optimal scope of intellectual property rights. I first observe that this dichotomy is premised on a limited view of property as referring only nearly absolute private rights in owned objects. I then critique this prevailing assumption, showing that it fails to account for an alternative, social discourse of property that emphasizes both the limits on and communal aspects of ownership. Finally, I suggest a novel approach to the use of physical property rhetoric in debates about the ideal scope of patent and copyright. I argue that rather than resisting the invocation of property rhetoric, enthusiasts of the public domain should embrace it. Specifically, the public domain should be explicitly portrayed as a form of property, one in which we all enjoy a broad entitlement. This approach would encourage public respect for and stewardship of the public domain and would also provide needed pushback against content industries' expansive intimations that all takings of information are wrongful.

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INTRODUCTION: THE *KELO-ELDRED* PUZZLE

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 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

¹ 545 U.S. 469 (2005).

² Rush Limbaugh, *Liberals Like Stephen Breyer have Bastardized the Constitution*, Radio Transcript, Oct. 12, 2005, available at <http://www.freerepublic.com/focus/f-news/1501453/posts> (visited Dec. 20, 2006) (claiming that because of *Kelo*, "Government can kick the little guy out of his and her homes and sell those home to a big developer who's going to pay a higher tax base to the government. Well, that's not what the takings clause was about. It's not what it is about. It's just been bastardized, and it gets bastardized because you have justices on the court who will sit there and impose their personal policy preferences rather than try to get the original intent of the Constitution.").

³ Ralph Nader, *Statement*, June 23, 2005, available at <http://ml.greens.org/pipermail/ctgp-news/2005-June/000507.html> (visited Dec. 21, 2006) (claiming that "The U.S. Supreme Court's decision in *Kelo v City of New London* mocks common sense, tarnishes constitutional law and is an affront to fundamental fairness.").

⁴ For a complete list of such state initiatives, see <http://www.castlecoalition.org/leegislation/states/index.asp>. However politically popular they may be, the efficacy of these statutes is questionable. See Ilya Somin, *The Limits of Backlash: Assessing the Response to Kelo*, 93 MINN. L. REV. (forthcoming 2009).

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 http://en.wikipedia.org/wiki/Lost_Liberty_Hotel.

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 Congress's passage of the Copyright Term Extension Act (CTEA),⁸ which added twenty years to the terms of all extant copyright terms. *Eldred*, like *Kelo*, can be understood as approving government confiscation of an ownership right, albeit a confiscation of a public rather than a private entitlement.⁹ 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 the character of 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*.

The disparity between the reactions to these two decisions becomes even more puzzling on closer examination. Despite uninformed media commentators' characterization of *Kelo* as an instance of judicial activism,¹⁰ the Court's opinion was rather mundane jurisprudentially.¹¹ The decision broke little new legal ground, largely following precedent originally established in *Hawaii Housing Authority v. Midkiff*.¹² 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. Nor did the decision (as many members of the public misunderstood) rob anyone of their property without recompense.

⁶ See Jeannie Suk, *Taking the Home*, 20 LAW & LITERATURE 291, 295-98 (2008) (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. 105-298 (1998).

⁹ See Richard Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 123, 128 (calling CTEA "a massive giveaway of public domain resources for private use").

¹⁰ See Limbaugh, "Liberal Bastards like Breyer", *supra* note 2.

¹¹ 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[.]").

¹² 467 U.S. 229 (1984).

Although Suzette Kelo's property was taken, she was, as the Constitution requires, paid a compensatory amount in exchange by the government.¹³ Although one may well believe *Kelo* to have been wrongly decided, this does not mean that the decision represented an institutionally aggressive move or that it should have seemed at all surprising in light of long-settled precedent.

On the other hand, the government conduct approved in *Eldred* in many ways worked a much more dramatic taking than the City of New London did when it confiscated Suzette Kelo's property.¹⁴ Like the state action in *Kelo*, CTEA transferred 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 their loss. CTEA also swept much more broadly than the government action approved in *Kelo*. The taking at issue in *Kelo* directly affected only the plaintiff and a few similarly situated actors. By contrast, CTEA took not just from original plaintiff Eric Eldred, but from every member of the public the entitlement to use expired copyrighted materials for another twenty years.¹⁵

¹³ It is a familiar point that the "just compensation" required by the Constitution undercompensates condemned homeowners because the fair market value standard fails to reflect owners' subjective valuations of their homes. Recent scholarship has, 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 pre-condemnation negotiations with the government. See Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101 (2006).

¹⁴ I am not arguing that CTEA really did work a taking actionable under the Just Compensation Clause. Textually, this could not work because the Clause governs only takings of "private" property, U.S. CONST. amend. V, and as I discuss below in more detail, the public domain is plainly a form of 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.

¹⁵ One could argue that CTEA thus merely delayed, and did not take, the public's acquisition of use rights in copyrighted materials. This descriptive claim is right, but this does not mean the government's action is not takings-esque. A law that stated "the acquisition of all future interests in real property will be deferred for twenty years" would undoubtedly be regarded as taking a valuable property right from the owners of those future interests. It is also by no means clear that the public actually will acquire these rights in protected materials upon expiration of the CTEA term extensions. Numerous critics of *Eldred* pointed out that nothing would stop the content industries from again lobbying successfully for additional term extensions

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.¹⁶ This highlights the instinctive sense of connection between "property" as it is popularly understood and instinctive notions of both personal identity and the inviolability of ownership. That 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.¹⁷ The outrage over *Kelo* was outrage about property taken without the owner's consent: Suzette Kelo and her co-defendants 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 the date of their vesting. One can search in vain for the kind of popular outrage against involuntary government confiscations of property in reaction to *Eldred*

once CTEA's twenty-year add-on terms begin to expire. *E.g.*, *Eldred v. Reno*, 239 F.3d 372, 381 (D.C. Cir. 2001) (Sentelle, J., dissenting).

¹⁶ Much the same is true of even some academic writing. *See generally, e.g.*, Kristi M. Burkard, *No More Government Theft of Property! A Call for a Return to a Heightened Standard of Review After the United States Supreme Court Decision in Kelo v. City of New London*, 27 *HAMLIN J.L. & PUB. POL'Y* 115 (2005).

¹⁷ 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.

that were commonplace in the wake of *Kelo*.¹⁸ *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, policymaking, 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 IP rights 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 instead 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

¹⁸ There was ample *academic* outrage, of course. A footnote cataloguing law review articles critical of CTEA and *Eldred* would add five pages to this Article. And there was some popular reaction to the decision as well, such as Bill Amend's sarcastic jab at the Court's decision in the cartoon *FoxTrot*. See <http://books.google.com/books?id=7eDVvbqXBywC&pg=PA144&lpg=PA144&dq=foxtrot+comic+eldred+mickey+mouse&source=web&ots=Sal-HGxWHG&sig=ZaD9XmERwHiX-CGiAdDAsSDtq-4> (2003).

emphasizes the public domain and the common good.¹⁹ 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 content industries' powerful but overly broad claims of rights in information. Emphasizing the public character of many information entitlements helps to cabin owners' claims of property rights within their appropriate bounds. Second, talking about shared IP entitlements 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

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.²⁰ This is not only because the phrase itself is kind of mellifluous,²¹ but also because it

¹⁹ U.S. CONST. art. I, sec. 8, cl. 8.

²⁰ "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, but after the term "intellectual property lawyer" was coined, 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).

²¹ Say it a few times. It's just short of being a three-foot anapest. Cf. Lemley, *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

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's no surprise that much ink has been spilled about IP's peculiar status as a form of property.²² Writers have considered whether property or liability rules should govern copyright and patent,²³ asked whether the differences between physical and intellectual property can be explained in terms of information costs,²⁴ and defended the view that the law governing tangible and intangible things should be essentially continuous.²⁵ 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.

A. *Law and/as Rhetoric*

immeasurably when they began to tell people they “did intellectual property” rather than that they were “patent lawyers.”)

²² 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).”); William Patry, *Does It Matter if Copyright is Property?*, The Patry Copyright Blog, available at <http://williampatry.blogspot.com/2006/06/does-it-matter-if-copyright-is.html> (last visited July 10, 2008).

²³ See, e.g., Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?* 85 TEX. L. REV. 783 (2007).

²⁴ See Smith, *supra* note 22.

²⁵ See Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J. L. & PUB. POL’Y 108 (1990).

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. Legal scholarship often shies from openly treating law as rhetoric (this despite a number of masterful studies in a rhetorical vein²⁶). 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.²⁷ The relative absence of rhetorical study in legal scholars 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 logic (*logos*) and appealing character (*ethos*). 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.²⁸

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.”²⁹ 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”.³⁰ This persuasion is effected primarily by appealing to

²⁶ Examples abound. My favorite is Robert Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

²⁷ James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 685 (1985) (contrasting rhetorical analysis of law to ancient Judeo-Christian notion of law as authority and to contemporary social science view of law as an external system of rules to be manipulated to reach particular substantive ends).

²⁸ Dave McGowan, *(So) What if It’s All Just Rhetoric?*, Minnesota Legal Studies Research Paper No. 04-15 (reviewing EUGENE GARBER, FOR THE SAKE OF ARGUMENT: PRACTICAL REASONING, CHARACTER, AND THE ETHICS OF BELIEF, 2004 (U of Chicago Press)) (“Maybe we condemn the word ‘rhetoric’ to divert attention from how well it applies to what we do.”).

²⁹ PLATO, GORGAS 452e, 454b.

³⁰ White, *supra* note 27 at 684.

a set of common understandings.³¹ 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.³² Second, the choice to use particular terms can persuade—or dissuade—by calling up particular associations that generate visceral reactions in listeners.³³

Rhetoric not only frames public discourse, but also has the capacity to change how we think about the subjects of that discourse. Recasting same-sex marriage as a civil rights issue, for example, exemplifies this sort of “constitutive” rhetorical move.³⁴ 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 as well.³⁵ 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*

³¹ *Id.* at 689.

³² See Dave McGowan, *Pragmatism, Knowledge, Copyright* (draft paper 8/14/2008) (“Rhetoric frames legal analysis. Frames influence decisions, which influence future rhetorical practice. Frames beget frames, in a rhetorical and doctrinal feedback loop.”).

³³ See DEIRDRE MCCLOSKEY, *THE RHETORIC OF ECONOMICS* 3-4 (2d ed. 1988). (analyzing Richard Posner’s *Economic Analysis of Law*, and showing how, in a paragraph on the efficiency of the common law, he 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.”).

³⁴ Cf. GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 4-5 (2003) (discussing constitutive metaphors).

³⁵ White, *supra* note 27, at 701 (observing that rhetoric “provides ground for challenge and change, a place to stand from which to reformulate any more specialized language”, and that “[r]hetorical analysis invites us to talk about our conceptions of ourselves as individuals and as communities, and to define our values in living rather than conceptual ways.”).

The 2006 patent dispute, *eBay, Inc. v. MercExchange, LLC*,³⁶ 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. *eBay* posed the question whether a permanent injunction should automatically follow this violation of MercExchange's exclusive rights. Justice Scalia unsurprisingly sought to regard the case in simpler terms, and invoked the language of property to explain why. "We're talking about property rights," said the Justice to eBay's counsel during oral arguments. "All he's asking for is, 'Give me my property back.'"³⁷

Justice Scalia's invocation of property language in the *eBay* oral argument relies on a rhetorical move that I call "property romance".³⁸ 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.³⁹ 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

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

³⁷ Yuki Noguchi & Charles Lane, "High Court Considers EBay Case On Patent," *Washington Post*, March 30, 2006 at D01.

³⁸ Cf. Saul Levmore, *Two Stories About the Evolution of Property Rights*, 31 J. Legal Stud. 421, 423 (2002) (contrasting "optimistic" private-property stories in the Demsetzian vein with "pessimistic" private-property stories that stress public choice and interest group problems); Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331 (2004) (invoking the notion of romance in connection with the public domain).

³⁹ E.g., Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J. L. & PUB. POL'Y 108, 118 (1990) (arguing that we "should treat intellectual and physical property identically in the law"); Trotter Hardy, *Not So Different: Tangible, Intangible, Digital, and Analog Works and Their Comparison for Copyright Purposes*, 26 U. DAYTON L. REV. 211, 213 (2001) (asserting that "[f]or the purposes of intellectual property rules and regimes, there are no differences between intangible and tangible property"); Richard A. Epstein, *The Structural Unity of Real and Intellectual Property*, available at Progress on Point, http://www.pff.org/issues-pubs/pops/pop13.24RAE_9_26.pdf.

issue about information regulation to a straightforward claim about the injustice of theft.

Property romance emerges in a variety of different IP settings. The briefing that preceded *eBay* provides one example. 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 their cause.⁴⁰ Of course, the ownership at issue in *eBay* seemed in many senses distinct from the kind of ownership the PRM usually defends.⁴¹ MercExchange wasn't a small business threatened by an adverse zoning law or a homeowner faced with an eminent domain action; they were owners of an infringed-on patent. Moreover, MercExchange was, in popular parlance, a "patent troll". They 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.⁴² Yet the PRM, in the throes of property romance, brushed these distinctions aside. On the romantic view, 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 (hardly a

⁴⁰ See F. Scott Kieff, Richard A. Epstein, and R. Polk Wagner, Various Law & Economics Professors as Amicus Curiae in the U.S. Supreme Court Docket # 05-130, *eBay v. MercExchange*.

⁴¹ See Peter S. Menell, *The Property Rights Movement's Embrace of Intellectual Property: True Love or Doomed Relationship?* (February 2007). UC Berkeley Public Law Research Paper No. 965083, available at <http://ssrn.com/abstract=965083> (observing the essential discontinuities between the PRM's traditional constituency and the *eBay* plaintiffs).

⁴² See *eBay*, 547 U.S. at 396-97 (stressing that the practical effect of eBay's holding will be to mitigate the ability of patent acquirers to hold up purported infringers' inventions in exchange for exorbitant settlements); Eric Wesenberg & Peter O'Rourke, *The Toll on the Troll: The Implications of eBay v. MercExchange*, <http://www.law.com/jsp/article.jsp?id=1147943132930> (discussing both *eBay* and the BlackBerry/NTP case as examples of patent trolls).

problem unique to businesses).⁴³ Others were irritated that competitors culled facts from their sites via visits from unauthorized bots.⁴⁴ 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 (and obscure) tort of trespass to chattels. The characteristic rhetorical simplicity of property romance captures this view perfectly (though judges have been divided in their reaction⁴⁵). *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.⁴⁶ 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 (or in the case of the DMCA, paracopyright) legislation. IP owners and pro-industry lobbyists testifying before Congress have a long history of using florid metaphors of all kinds.⁴⁷ Debates about the passage of two major

⁴³ Intel Corp. v. Hamidi, 30 Cal.4th 1342, 1346-47 (2003) (rejecting trespass to chattels claim based on defendant's sending unauthorized emails to plaintiff's servers).

⁴⁴ eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 1058, 1070 (N.D. Cal. 2000) (holding that an action for trespass to chattels based on plaintiff's sending unauthorized bots to defendant's website survived motion to dismiss).

⁴⁵ Compare *Hamidi*, 30 Cal.4th at 1346-47 (denying cybertrespass claim) with *eBay*, 100 F. Supp. at 1070 (allowing cybertrespass claim) and *Sotelo v. DirectRevenue, LLC*, 384 F.Supp.2d 1219, 1231-32 (N.D. Ill. 2005) (allowing contributory trespass to chattels claim based on sending unwanted advertisements to plaintiff's computer).

⁴⁶ See Richard A. Epstein, *Cybertrespass*, 70 U. CHI. L. REV. 73, 75 (2003) (arguing that websites "are a new form of chattel, which are presumptively governed by the law of trespass to chattels"); Richard Warner, *Border Disputes: Trespass to Chattels on the Internet*, 47 VILL. L. REV. 117 (2002) (same).

⁴⁷ Consider, for example, Jack Valenti's famous "Boston Strangler" testimony. "I say to you that the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone." Jack Valenti, MPAA president, testimony before House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, 1982, available at <http://cryptome.org/hrcw-hear.htm>.

pieces of legislation affecting copyright—the Copyright Term Extension Act and the Digital Millennium Copyright Act—also included its dramatic moments, many of which relied on a romantic view of property as the basis for their appeal. Jack Valenti defended the MPAA’s interest in just these terms: “We don’t want to shut down innovation... We just want to stop private property from being pillaged.”⁴⁸ And even testimony that did not explicitly access property’s emotional appeal still relied on it as the constitutive metaphor for understanding the need for enhancing owners’ rights. Marybeth Peters’ defense of the DMCA’s anticircumvention provisions invoked the familiar lock-and-key example that relies on an equation of information ownership with home ownership.⁴⁹ The late Johnny Cash’s testimony defense of Title I of the DMCA epitomizes the easy elision of all forms of possession that characterizes property romance. “[O]ur laws respect what we create with our heads as much as what we build with our hands.”⁵⁰

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

Even more amusing than Valenti’s violet 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.

⁴⁸ Edmund Sanders & Jube Shiver, Jr., *Digital TV Copyright Concerns Tentatively Resolved by Group*, L.A. Times, Apr. 26, 2002, at C5 (quoting Valenti).

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

⁵⁰ WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act, Hearing on H.R. 2281 and H.R. 2280 before the Subcomm. on Courts and Intell. Prop. of the House Comm. on the Judiciary, 105th Congress (1997), 198, 199 (testimony of Johnny Cash).

owners' rights. Invoking property not only provides a conceptual common ground to make arguments accessible, but it possesses moral force as well. Framing an IP issue in 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.⁵¹ This Manichean dichotomy, however artificial,⁵² 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.⁵³ 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.⁵⁴ And academic writers who tend to use property romance also tend to prefer a high protection vision of IP protection.⁵⁵

⁵¹ Michael Kanellos, "Gates Taking a Seat in Your Den", <http://news.com.com/> (last modified Jan. 11, 2004).

⁵² See Patricia Loughlan, "You Wouldn't Steal a Car, Would You?" Intellectual Property and the Language of Theft", 3 (draft Apr. 2008), available at <http://ssrn.com/abstract=1120585> ("The use of the term 'pirate' is clearly metaphorical and not even the most naïve of participants in the discourse of intellectual property would take it seriously"). 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 first iteration of the Mickey Mouse character, "Steamboat Willie", was a very close imitation of Buster Keaton's earlier audiovisual work, "Steamboat Bill, Jr." LAWRENCE LESSIG, FREE CULTURE 21-23 (2004).

⁵³ Susan Cheever, "Just Google, 'Thou Shalt Not Steal'", *Newsday*, Dec. 12, 2005, at B13. Harry Potter creator J.K. Rowling's comments following the infringement trial of a defendant who created an online guide to Rowling's work were less melodramatic but still relied heavily on both the moral force of possession and property romance. "Am I not the owner of my own work?" she asked reporters when discussing the defendant's fair use defense. John A. Sellers, *Rowling and RDR Meet in Court*, PUBLISHER'S WEEKLY, Apr. 17, 2008, available at <http://www.publishersweekly.com/article/CA6552416.html?nid=2788>. On the witness stand, Rowling compared the "theft of her words to the removal of all the plums from a cake she might have baked." *Id.*

⁵⁴ *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (quoting Exodus 20:15).

⁵⁵ To take just one data point, all three of the authors of the brief written on behalf of the PRM in *eBay* tend to prefer strong protection of IP owners' rights in

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's still possible to find echoes of this idea in cyber-zines and on discussion boards.⁵⁶ The hacker battle cry "information wants to be free" has also seeped into popular culture.⁵⁷ 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. Even strong proponents of the public domain readily concede that IP is a form of property, although they also tend to express ambivalence about this idea.⁵⁸ There is something the equation of traditional and intellectual property that causes many writers profound unease, which I call property anxiety.⁵⁹

their scholarly work. See Richard A. Epstein, *Respect Bayer's Patent: Cheap Cipro Now Could Cost Us Dearly in the Long Run*, WALL STREET J. (October 25, 2001); F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, 85 MINN. L. REV. 697 (2001); R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995 (2003); but cf. Sunder & Chander, *supra* note 38 (critiquing the public domain from a distributional perspective).

⁵⁶ See, e.g., "Thomas Jefferson on Why Copyrights and Patents Are not Property", <http://freedomforip.org/2007/10/31/thomas-jefferson-on-why-copyrights-and-patents-are-not-property/> (Oct. 31, 2007).

⁵⁷ http://en.wikipedia.org/wiki/Information_wants_to_be_free (tracing the origin and social meaning of this phrase).

⁵⁸ Compare LAWRENCE LESSIG, *FREE CULTURE* (2004) 172 ("The issue is therefore not simply whether copyright is property. Of course copyright is property, and of course, as with any property, the state ought to protect it.") with LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN THE CONNECTED WORLD* 187 (2001) ("[R]eal property doesn't map directly onto intellectual property. [I]ntellectual property is a balanced form of property protection. I don't have the right to fair use of your car; I do have the right of fair use of your book.").

⁵⁹ Cf. Carol Rose, *Canons of Property Talk, or Blackstone's Anxiety*, 108 YALE L.J. 601, 605-06 (1998) (discussing anxiety in popular conceptions of property).

Property anxiety is as conflicted and complex as property romance is simple and straightforward. While most writers would agree that IP is more or less a form of property,⁶⁰ there remains substantial ambivalence about the issue.⁶¹ This ambivalence comes from a number of different directions. It is thus difficult to find a single thread that runs throughout property anxiety in the same way that property romance seems animated by a single unifying idea. Numerous writers lament the “proPERTIZATION” of intellectual property.⁶² Examined more closely, though, this notion expresses reservation about the expansion of private rights in information at the

⁶⁰ There is not complete agreement about the issue. For example, some writers have argued that IP is a mere “privilege” that should not be equated with real and personal property because the latter categories have a longstanding, natural-rights character that is not shared by modern entitlements that are creatures of statute. See, e.g., Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 763-64 (2001) (“[B]y invoking government power a copyright owner can impose prior restraint, fines, imprisonment, and confiscation on those engaged in peaceful expression and the quiet enjoyment of physical property. By thus gagging our voices, tying our hands, and demolishing our presses, copyright law would violate the very rights that Locke defended.”).

⁶¹ Bill D. Herman, *Breaking and Entering My Own Computer: The Contest of Copyright Metaphors*, 13 COMM. L. & POL’Y 1, 28 (forthcoming 2008) (draft of Dec. 20, 2007) (observing that “the free culture crowd is already anxious to unsettle the metaphor of property” as a ways of describing intellectual property). *But see* Michael A. Carrier, *The Propertization of Copyright*, in IV INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES IN THE DIGITAL AGE 350-56 (arguing that applying property ideas to copyright can limit rather than expand owners’ rights).

⁶² E.g., Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 5 (2004) (lamenting the “proPERTIZATION” of IP as an “irreversible” trend that “sinks its tentacles further into public and corporate consciousness (as well as the IP laws) with each passing day”); Olufunmilayo Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477, 504 (2007) (discussing the tendency of proPERTIZATION narratives of intellectual property to diminish authorship based on creative appropriation); Mark Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 902 (1996) (reviewing James Boyle, *Software, Shamans, and Spleens*) (observing that the public character of information goods “seems to suggest that proPERTIZATION is a uniquely bad idea, precisely because the consumption of that good is ‘nonrivalrous’”); Pamela Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. U. L. REV. 365, 398 (1989) (expressing concern in the patent setting about the development of a “more proprietarian and anti-dissemination attitude toward information than that which the law has previously displayed”).

expense of the public domain.⁶³ Since property is not coterminous with private property (but in fact includes many public forms like common and public property), it seems more accurate to characterize this strain in the literature as one that opposes privatization rather than propertization.

It is easier to explore the character of property anxiety by looking not to explicit rejections of the idea of property in the IP setting, but rather by looking more closely at how critics of property romance frame their arguments. Many writers have questioned the coherence of the equation of physical and intangible property that lies at the core of the cybertrespass cases. Mark Lemley, for example, argued that the Cartesian paradigm that applies well to real estate and to moveable objects simply makes no sense in the context of information goods. Hence while we can say that one “enters” another’s land when one crosses over the border of their property, “entering” a website means something entirely different, not physical invasion but a mere request to a site to send data to another site.⁶⁴ 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.”⁶⁵

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.⁶⁶ Judicial reliance on an equation of physical space and cyberspace, the argument runs, prioritizes a form of reasoning about the latter that fails to account for the distinctive features of

⁶³ James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & CONTEMP. PROBS. 33, 37-40 (2003) (describing the increasing trend toward creating private rights in information as a “second enclosure movement”).

⁶⁴ Mark Lemley, *Place and Cyberspace*, 91 CAL. L. REV. 521, 527-28 (2003).

⁶⁵ *Id.* at 523.

⁶⁶ Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 429, 452 (2003) (“[J]udges, legislators, practitioners, and lay people treat cyberspace as if it were a physical place. Examining how people discuss their online interactions, we find a vast amount of evidence that people think about online communications and transactions as occurring in some place. This place may be inchoate and virtual, but no less real in our minds.”).

information regulation.⁶⁷ For example, IP more than physical property depends on preservation of large public commons in order to function efficiently. Property anxiety suggests that an ownership-centered approach to regulating information goods fails to account for this quality, and that the net result will be judicial prioritization of claims of private possession even where those claims threaten an inefficient lockup of information that would be more efficiently held as a publicly available resource.⁶⁸

A related site of resistance to talking about IP in the language of physical property looks past the coherence of the idea of property itself, or its effects on the behavior of judges and policymakers, and focuses instead on the broader social implications of treating 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.⁶⁹ Rhetoric is (as we have seen above) connected to

⁶⁷ E.g., Mark A. Lemley, *Place and Cyberspace*, *supra* note 64, 528-33 (critiquing judicial reliance on physical property rules like trespass in regulating information); Hunter, *supra* note 66 at 488 (criticizing the *Bidder's Edge* court for using trespass to chattels as a theory to hold liable the senders of unauthorized bots to an auction website). David McGowan, *The Trespass Trouble and the Metaphor Muddle*, 1 J.L. ECON. & POL'Y 109 (2005) (reviewing opinions in cybertrespass cases and concluding that there is no evidence that analogizing cyberspace to real space will lead to flawed judicial decisionmaking).

⁶⁸ Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 429, 452 (2003) (arguing that approaching IP from a property perspective causes judges and policymakers to engage in “suboptimal and wasteful uses because the holders of the exclusion rights block the best use of the resource.”); cf. Glynn S. Lunney, *Trademark Monopolies*, 48 EMORY L.J. 367, 419 (1999) (noting that the trademark “has become its owner’s property not merely in a formal and limited sense, but in an ordinary and increasingly absolute sense,” which results in the mark’s being used “in circumstances entirely divorced from, and sometimes actually in conflict with, [the] mark’s informational role”).

⁶⁹ Niva Elkin-Koren, *What Contracts Can’t Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375 (2005). This concern echoes Margaret Radin’s articulation of the problems attendant with treating certain objects such as babies and organs as goods in trade. Radin argues that “commodifying” these things—treating them as equivalent to other salable goods like chattels or land—robs them of their essentially human qualities that transcend commercial status. Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1884-85 (1987) (“to see the rhetoric of the market . . . as the sole rhetoric of human affairs is to foster an inferior conception of human flourishing.”).

reality.⁷⁰ So to the extent that information comes to be regarded as any other object in trade, that 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.⁷¹ Property anxiety's reservations about property talk derive in part from this sense that complete commodification of intellectual resources will choke off this burgeoning method of production.⁷²

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 differs from property romance in that it lacks a powerful central theme that allows it to operate effectively as a rhetorical device. While equating IP with familiar notions of possession allows 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.⁷³

⁷⁰ *Id.* at 1870 (“[A] world in which human interactions are conceived of as market trades is different from one in which they are not. Rhetoric is not just shaped by, but shapes, reality.”).

⁷¹ YOCHAI BENKLER, *THE WEALTH OF NETWORKS* (2006) (discussing nonmarket production).

⁷² Lawrence Lessig, *Re-Crafting a Public Domain*, 18 *Supp. YALE J. L. & HUM.* 56, 79 (2006) (“[T]he concern is that the use of licenses to craft freedom may in turn affect the meaning of that freedom. ...The focus on licenses may thus make that community less likely to engage in property-less creativity.”).

⁷³ 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

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 protection, so does property anxiety correlate with a lower protection approach to this issue. Whether resisting extension of trespass doctrine in online settings or legislative expansion of owners' rights in information, the above examples indicate that property anxiety is 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.

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.⁷⁴ 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

a form of limited, shared ownership rather than unregulated public access. *See infra* n.128.

⁷⁴ *See* Part I.A., *supra*.

constitutive rhetorical approach to legal reasoning.⁷⁵ 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 “Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”⁷⁶ 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 device because it fails to account for essential differences between the objects governed by the two fields, such as rivalrousness and excludability.⁷⁷

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

⁷⁵ Cf. Patricia Loughlan, *Pirates, Parasites, Reapers, Sowers, Fruits, Foxes... The Metaphors of Intellectual Property*, 28 SYDNEY L. REV. 211, 212 (comparing overtly descriptive metaphors with “constitutive” metaphors that more subtly express one thing in terms of another).

⁷⁶ *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.

⁷⁷ See James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & CONTEMP. PROBS. 33, 41-42 (2003) (arguing that the distinguishing features of information as property are non-rivalrousness and non-excludability).

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.⁷⁸

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.⁷⁹ This idea seems counterintuitive because property means something very different in the popular mind than it does to lawyers.⁸⁰ In common American parlance, to say that something is your property is to claim dominion and control over it,⁸¹ and likely also to express that the thing over which you assert ownership has some dignitary connection to your identity.⁸² And it is this view of property—rather than the formal legal definition of the institution—that gives property romance its

⁷⁸ See Neil W. Netanel, *COPYRIGHT AND A DEMOCRATIC CIVIL SOCIETY* 1 (1998) (unpublished S.J.D. dissertation, Stanford University) (expressing concern that as cultural expression increasingly becomes regarded as a commodity of trade, the result will be “broad proprietary rights [in information] that extend to every conceivable valued use”); Bill D. Herman, “Breaking and Entering My Own Computer: The contest of copyright metaphors”, 13 *COMM. L. & POL’Y* (forthcoming 2008) (draft of Dec. 20, 2007) (arguing that “if copyright is a real property right, [owners] get[] near total control over how [their works of authorship are] used”).

⁷⁹ Morris Cohen, *Property and Sovereignty* 13 *CORNELL L.Q.* 8, 13 (1927); A.M. Honoré, *Ownership*, in *OXFORD ESSAYS IN JURISPRUDENCE* 107, 128-30 (A.G. Guest ed., 1961) (emphasizing that ownership describes relations between persons and other persons, not between persons and objects of ownership).

⁸⁰ See Thomas Grey, *The Disintegration of Property*, in *XXII NOMOS: PROPERTY* 69 (J. Roland Pennock & John W. Chapman, eds.) (“In the English-speaking countries today, the conception of property held by the specialist (the lawyer or economist) is quite different from that held by the ordinary person.”); BRUCE ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 97-100, 113-67 (1977).

⁸¹ Grey, *supra* note 80, 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.”)

⁸² Margaret J. Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982).

formidable force. One of the foundational ways of thinking about property, and the way that prevails in the popular mind, is what scholars have called the “ownership discourse” of property.⁸³ 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.”⁸⁴ Though even property enthusiasts acknowledge that the institution admits of some limits on owners’ prerogatives,⁸⁵ the equation of property with nearly absolute rights continues to dominate the popular imagination.⁸⁶ The power of 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

⁸³ E.g., Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Native Americans as Nonowners*, 52 UCLA L. REV. 1061, 1085 (2005) (using this term).

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

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

⁸⁶ See Milton C. Regan, *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2340 (1994) (“[P]roperty rhetoric is comprised of diverse strands that co-exist in some tension, rather than forming a unified and harmonious whole. Nonetheless, certain strands have had particularly powerful influence on the cultural imagination, and together constitute what we might describe as the mythology of property.”).

The best anecdotal illustration I’ve seen of this point is the stridently pro-owner version of Woody Guthrie’s populist song “This Land Is Your Land” that is (apparently) popular among schoolchildren: “This land is my land/And it ain’t your land/I’ve got a shotgun/And you don’t got one/If you don’t get off/I’ll blow your head off/This land is private property”. This song appeared in the 1992 film *Bob Roberts*, and came to my attention when it was quoted in Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 280 (1989).

regulation, and also serves to downplay the moral significance of America's vast disparities in wealth distribution.⁸⁷

The ownership discourse provides the background assumption animating much property scholarship as well,⁸⁸ 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.”⁸⁹ Most American courts share this assumption, elevating property owners' rights over claims even to constitutional freedoms like speech⁹⁰ or religion.⁹¹ 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.⁹²

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

⁸⁷ Cf. DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* iii (1991) (observing the American tendency to embrace explanations that look to “the classical ideology of liberal individualism” rather than looking to material causes).

⁸⁸ See also Williams, *supra* note 86, at 285-86 (pointing out that while lawyers pay lip service to resisting the “absolutism” that characterizes the popular view of ownership, this approach to thinking about property still dominates academic writing on the subject).

⁸⁹ RICHARD PIPES, *PROPERTY AND FREEDOM* xv (1999).

⁹⁰ *But cf.* *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (upholding California Supreme Court's construing state constitution to require owners of private shopping centers to allow certain kinds of speech on the premises).

⁹¹ See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1986) (holding that the federal government's title to property trumps Native American interests in holding religious rites on the same land).

⁹² See generally Thomas Merrill & Henry Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007).

possesses only one meaning 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 about property deemphasizes the centrality of owners and instead regards property as a system that structures social relationships with resources. This alternative view—what I’ll call the social discourse of property—suggests that focusing primarily on private, individual ownership 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.⁹³ Of particular relevance for this investigation, the social discourse of property stresses that “property” is not coterminous with private property, and instead includes common and public forms of property that often prove to be a superior way of regulating resources.

This latter idea has long historical roots. Although Blackstone’s well-worn “despotic dominion” phrasing is often trotted out to suggest the historical primacy of an individualist view of property,⁹⁴ 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 use (such as Roman roads and watercourses) and common property that was subject to the limited use and exclusion rights of a particular group (such as the English village common, which was accessible by any villager but not by outsiders). Indeed, the public trust tradition that animates modern environmental law traces to Justinian’s *Code*.⁹⁵ And

⁹³ See, e.g., JOSEPH 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 non-owners); Stephen Munzer, *Property as Social Relations*, in NEW ESSAYS ON THE LEGAL AND POLITICAL THEORY OF PROPERTY 36-37 (Stephen 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).

⁹⁴ And does not, in context, accurately reflect Blackstone’s own ideas. In fact, Blackstone devoted the 518 pages of his treatise following the hoary “despotic dominion” phrasing to qualifying that definition. See Williams, *supra* note 86, at 281.

⁹⁵ THE INSTITUTES OF JUSTINIAN bk. 2, tit. 1, pts. 1-6, at 65 (J. Thomas trans., 1975); see William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a*

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.”⁹⁶ The legal realists of the early twentieth century echoed this idea, characterizing property as an essentially social institution that links together various individuals in relationship to a given resource.⁹⁷

Theorists have articulated the social discourse of property in a variety of different ways. In this Article, I focus on four particular features that distinguish this approach.⁹⁸ 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, and instead sees property as a system of social relations in which a variety of actors have overlapping interests in things, and resists the notion that individual wealth maximization is property’s *telos*.⁹⁹ The social discourse’s iconic case is *State v. Shack*,¹⁰⁰ in which the New Jersey Supreme Court required an owner to permit social service providers onto his land in order to treat resident workers. The Court did not simply ignore the owner’s interests in so doing, but merely held that they were overborne by the importance of maintaining access to social services by resident workers.¹⁰¹ Some theories that lie 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

Substantive Environmental Value, 45 UCLA L. REV. 385 (1997) (citing Justinian’s code as font of public trust doctrine).

⁹⁶ MARC BLOCH, FEUDAL SOCIETY 113-16 (L.A. Manyon trans., 1970)); see also Williams, *supra* note 86, at 290-91 (discussing the variety of social obligations and entitlements with respect to land in the Middle Ages).

⁹⁷ See, e.g., Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 361 (1954).

⁹⁸ 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 of this view that are particularly relevant to this discussion.

⁹⁹ See Munzer, *supra* note 93 at 38-44 (cataloguing eight principles that reflect the core tenets of the view of property as a system of social relations).

¹⁰⁰ 277 A.2d 369 (N.J. 1971).

¹⁰¹ *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.”).

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.¹⁰² 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.¹⁰³

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.¹⁰⁴ By contrast, the social discourse of property does not prioritize any particular form of possession, instead acknowledging as the simultaneous presence of different kinds of property ownership, such as commonly held resources, public lands, and novel alternatives like limited common property regimes.¹⁰⁵ 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. At its peak, the movement convinced the Supreme Court to regard public assistance as a form of property entitlement.¹⁰⁶ Courts have since backed off this expansive view, but writers within the social discourse continue to press the boundaries of what constitutes property. Recent

¹⁰² See Kristen Carpenter, Sonia Katyal, & Angela Riley, *In Defense of Property*, 118 YALE L.J. 101 (forthcoming 2009) (discussing stewardship).

¹⁰³ See, e.g., National Historic Preservation Act, 16 U.S.C. § 470 (seeking to maintain historic properties by limiting development that would adversely affect them); see also generally Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

¹⁰⁴ See Harold Demsetz, *Toward a Theory of Property Rights*, 79 AM. ECON. REV. PROC. 347 (1967) (arguing that conversion of public or common to private property is almost always normatively attractive); cf. Richard A. Epstein, *What Light If Any Does the Google Print Dispute Shed on Intellectual Property Law?*, 7 COLUM. SCI. & TECH. L. REV. at 9-11 (2006) (conceding only “a small, and shrinking place, for some fair use defense” in copyright law).

¹⁰⁵ Eric T. Freyfogle, *Correcting the Half-Truths*, 59 PLANNING & ENVTL. L. 3, 7 (Oct. 2007) (observing the public/private character of property entitlements); Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129 (1998) (discussing limited common property regimes).

¹⁰⁶ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

work has, for example, sought to extend the application of property law to environmental services,¹⁰⁷ self-expression,¹⁰⁸ and racial identity.¹⁰⁹

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.¹¹⁰ 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.¹¹¹ To take a familiar example, dedication of roads for common use—even when they transect otherwise private tracts of land—enables commerce so that goods produced on those private lands can be taken to market.¹¹²

Finally, the social discourse of property calls attention to the non-market 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.¹¹³ National parks provide for shared experiences of

¹⁰⁷ James Salzman and J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 STAN. L. REV. 607, 614-16 (2000) (analyzing the role of currency selection in environmental trading markets).

¹⁰⁸ Wendy Gordon, *A Property Right in Self-Expression*, 102 YALE L.J. 1533 (1993).

¹⁰⁹ Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

¹¹⁰ See generally Harold Demsetz, *Toward a Theory of Property Rights*, 79 AM. ECON. REV. PROC. 347 (1967).

¹¹¹ See Carol Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J. L. & HUM. 37, 51 (1990) (observing that a property system itself is a public good).

¹¹² Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 756 (1986) (arguing that roads and watercourses function better as public than private resources in order to enable travel and commerce).

¹¹³ *Id.* at 75-80 (discussing the socializing effects of property); cf. Eduardo M. Penalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1911-12 (2005) (discussing

wonder that can create bonds between otherwise disparate members of society.¹¹⁴ Other writers who fit broadly within this social discourse stress the extent to which the experience of ownership can empower the dispossessed,¹¹⁵ or enhance freedom by enabling individuals to more fully realize their basic human capabilities.¹¹⁶ 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 limitations on owners' rights. The rule against perpetuities imposes temporal limits on an owner's ability to bequeath property.¹¹⁷ Nuisance laws have long constrained an owner's prerogative to engage in certain property uses that may prove harmful to his neighbors.¹¹⁸ Easements and covenants that run with the land require owners to put up with uses that have

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

¹¹⁴ Cf. Carol Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, 66 L. & CONTEMP. PROBS. 89, 109 (2003) (discussing *res divini iuris*, a Roman category of property that included sacred sites that were considered public in order to reflect their common importance to all citizens)

¹¹⁵ HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST BUT FAILS EVERYWHERE ELSE* (suggesting that capitalism's failure in developing countries could be reversed by investing the poor with property rights in their material possessions).

¹¹⁶ Amartya Sen, *Markets and Freedoms*, in AMARTYA SEN, *RATIONALITY AND FREEDOM* 501 (Belknap 2002) (discussing the capability of market-based property systems to enhance freedom by creating more individual autonomy).

¹¹⁷ See Uniform Statutory Rule Against Perpetuities, available at <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/usrap90.htm> (invalidating interests that vest later than twenty-one years after some life in being from the time of their creation). The Rule dates to *The Duke of Norfolk's Case*, 3 Ch. Cas. 1, 22 Eng. Rep. 931 (Ch. 1681).

¹¹⁸ Both public and private law trace their development to medieval England. In *William Aldred's Case*, for example, the plaintiff complained that his neighbor's pigsty caused "unhealthy odors . . . such that Aldred . . . could not come and go without being subjected to continuous annoyance." 9 Co. Rep. 57b, 77 Eng. Rep. 816 (K.B. 1611). Aldred prevailed.

been established by previous generations.¹¹⁹ 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.¹²⁰ 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, for example, trespassing on land held by a condominium association for its members).

The foregoing 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 counterpoint of the social discourse of property. In the next Part, I seek to 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 also 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*

¹¹⁹ The rule that covenants are enforceable against subsequent owners only under certain conditions also has its origins in the common law of the Middle Ages. See *Spencer's Case*, 5 Co. 16a, 77 Eng. Rep. 72 (1583).

¹²⁰ See Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 54-80 (2004) (compiling a similar compendium of restrictions on property owners' rights).

The previous Part showed that property is a capacious idea that includes the notion of ownership as exclusion as well as of 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 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 relationship as binary and exclusive: one individual (or limited group of individuals, or a corporation) owns an object to the exclusion of all others.¹²¹ 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—title-holders and non-title-holders alike—converge. If I own the copyright in a work of authorship 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 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

¹²¹ See Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (“[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.”); 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[.]”).

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. 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.¹²² The identification of society as the ultimate benefactor of IP regulation finds its roots in the Constitution’s relatively limited extension of Congressional authority to create “exclusive rights” only for “limited times”, and with the aim of furthering “progress of science and the useful arts”.¹²³ 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.¹²⁴

Since the eighteenth century, then, intellectual “property” has referred not only to privately owned information, but to the public domain—itself a form of property, albeit a public one—as well.¹²⁵ In fact, any coherent account of intellectual property has to constantly invoke private forms of ownership as well as the public forms with which they exist concurrently.¹²⁶ The specific expression contained in

¹²² Patent Act of 1790 (fourteen-year term); Copyright Act of 1790 (fourteen-year term plus possible additional fourteen-year term upon application).

¹²³ U.S. CONST., art. I, sec. 8, cl. 8.

¹²⁴ *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 511 (1917) (“[T]his court has consistently held that the primary purpose of our patent laws is not the creation of private fortunes for the owners of patents, but is ‘to promote the progress of science and the useful arts.’”).

¹²⁵ 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.

¹²⁶ Cf. Brett Frischmann, *Evaluating the Demsetzian Trend in Copyright Law*, 3 REV. L. & ECON. 649, 652-53 (2007) (stating that IP regimes create “*semicommons*—a complex mix of private property rights and commons”).

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

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 107.¹²⁷ 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.¹²⁸

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

sacred sites to the tribe members for whom those sites have particular significance. Access to each of these the religious sites is the product of agreements between the government and the churches. *See generally* Christopher MacLeod & Malinda Mayor, *In the Light of Reverence* (PBS Film, first aired Aug. 14, 2001).

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

¹²⁸ Here I want to stress that these examples—like the public domain itself—are instances of *public* property. The frequent use of the term “information commons” to refer to the public domain is somewhat misleading, because commons were subject to limited property rights. Village greens in early modern England, for example, were subject to limited exclusion rights (villagers could enter but outsiders could not) and limited use rights (some greens could be used exclusively for grazing, others only for growing crops). The public domain is thus not really a “commons” but public property: a largely unregulated space to which all are welcome, subject to other legal restraints. *See* Rose, *supra* note 113 at 92-104 (contrasting Roman property law categories *res communes* with *res publicae* to illustrate the point).

were necessary to the production of goods for the marketplace.¹²⁹ Similarly, the existence of the public domain generates socially optimal outcomes by assuring that sufficient cultural material remains available for the creation of future works. The time-limited character of exclusive patent and copyright privileges reflects the concern that allowing any inventor or creator absolute ownership would be counterproductive, and sits ill at ease with IP owners' claims of complete control over their work. This is particularly true because the full social value of creative or inventive work can only be realized by enabling its use by others, so that locking up all rights in a single owner for an indefinite period of time may preclude high-value uses that benefit society overall, rather than just a single actor.¹³⁰ Protected information reverts to the public domain both to allow the public to use that information in creating future work, and also to compensate the public for owners' partial appropriation from the public domain in the first instance.¹³¹ The limited nature of copyright and patent owners' prerogatives—comprising only a modest number of exclusive rights and subject to various user-oriented use privileges¹³²—during

¹²⁹ See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 720-23 (1986) (observing the “service to commerce” generated by inherently public property, and explaining that “here, the commons was not tragic, but comedic, in the traditional sense of a story with a happy outcome”). Admittedly, there is much debate over the efficiency of some public resources. The English village green and the related enclosure movement provided the central metaphor for one of the most famous critiques of public and common property (and the source of the word play in the title of the Rose essay cited above), Garret Hardin’s *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

¹³⁰ See Julie Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799, 1809 (2000) (observing that it is difficult to predict which creative work will advance progress, which militates in favor of time-limited exclusive rights).

¹³¹ See Litman, *supra* note 125 at 966 (“the very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea”); Spider Robinson, *Melancholy Elephants*, in MELANCHOLY ELEPHANTS 1, 16 (1985) (“Artists have been deluding themselves, for centuries, with the notion that they create. In fact they do nothing of the sort.”).

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

¹³² See Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT’MT L.J. 337, 338 (2001) (“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

the exclusive rights period further makes sure that there is enough public access to protected work to maintain a robust exchange in ideas.¹³³ The productivity of the IP system thus depends as much on availability of resources to the public as it does on incentives for private owners to invest in creation and invention. The duality of this efficiency story meshes better with the social discourse of the property, in which public and private resources depend on each other to maximize social wealth, than the ownership discourse of property, which stresses almost exclusively the efficiency of private ownership.

The final reason that the social discourse of property is a superior 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. But as the social discourse of property stresses, this is not the only kind of value generated by the institution. Possession can also enhance interpersonal community, generate civic pride, and foster cultural interchange.¹³⁴ Copyright and patent too generate value far in excess of the dollar value associated with the information goods whose production they encourage. Works of authorship are not valuable only because they are part of an exchange in which authors get royalties for sales of books, but because songs and literature provide a common language that allows us all to express ourselves more eloquently and

rights to reproduce, adapt, distribute to the public and publicly perform or display their works, subject to a host of statutory exceptions.”).

¹³³ See Frischmann, *supra* note 126 at 673 (arguing that the “leaks and limitations” that characterize copyright owners’ entitlements are critical to maintaining allocative efficiency); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1058 (2005) (arguing that total control for IP owners would undermine the efficiency of the copyright and patent systems).

¹³⁴ Gregory S. Alexander & Eduardo M. Penalver, *Properties of Community*, Cornell Legal Studies Research Paper No. 07-020, at 24-34 (draft 2008), available at http://ssrn.com/abstract_id=1025569 (arguing that enforcement of property law can enhance community by recognizing the obligations of the owners and the state to respect and facilitate the flourishing of others); Rose, *Comedy of the Commons*, *supra* note 129, at 767-68 (observing that common lands “have value precisely because they reinforce the solidarity and fellow-feeling of the whole community; thus the more members of the community who participate, even if only as observers, the better for all.”).

effectively.¹³⁵ The Copyright Act creates space for these non-market 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 literature¹³⁶) of protected works. Similarly, the value of invention lies not only in the sales or licensing of patented devices, but also in the contribution that innovations make to the store of collective scientific knowledge. 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.

Significantly, positive law does not find the public-regarding elements of patent and copyright at all inconsistent with their treatment as a form of property. The Copyright Act and the Patent Act create a regulatory scheme that reflects the basic ownership structure that arose out of common law real and personal property.¹³⁷ These statutes enshrine users' rights to use and transfer their goods, and to exclude others from it. IP can be bequeathed on death and attached following an adverse court settlement. The elements of patent and copyright that make it seem unlike land or chattels—most familiarly the limited terms of owners' rights—don't lead courts to conclude that they are not property, but that they are subject to limitations in the public interest that underlie our intellectual property law. These authorities all suggest that, contrary to what the ownership model presupposes, a property system animated largely by the idea of the public good lies in perfect harmony with the notion of private ownership in ideas.¹³⁸ As the Supreme Court observed, while the law

¹³⁵ See, e.g., Rebecca Tushnet, *Copy this Essay*, 114 YALE L.J. 535, 573 (2004) (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 Ritchie*).

¹³⁶ E.g., *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006) (permitting appropriation artist Jeff Koons to use copyright-protected photographs of fashion models in collages).

¹³⁷ Here, I am thinking of Thomas Grey's familiar, though somewhat informal, definition of property as entailing the rights to use, exclude, transfer, and possibly to destroy. Grey, *supra* note 80, at 69. On whether the last of these really is a meaningful constituent component of the property right, see Lior Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005).

¹³⁸ This does not mean, of course, that the balance of public and private interests in information goods lies at an optimal level, but that is a debate I'm not seeking to engage here.

extends creators and inventors exclusive rights, it “has never recognized an author’s right to absolute control of his work.”¹³⁹

The characteristics of intellectual property that I have just discussed are familiar, but I list them here to stress that the patent and copyright system is best described as a property system, albeit one featuring both private and public elements existing in a complex symbiosis. Yet each of the rhetorical approaches that we have seen—property romance, which its full-blooded embrace of the language of possession, and property anxiety, with its 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 fall victim to the same flawed assumption that “property” means only what the ownership discourse of property says it means: private ownership concentrated in firms or individuals, resulting in complete control of the owned object. Thus both property romance and property anxiety profoundly misunderstand the nature of property itself, which includes multiple different forms of possession as well as a variety of limits and obligations on owners. This is why the social discourse of property provides a more coherent account of how IP is property: it doesn’t simply shrink from regarding shared information resources as owned resources, but instead stresses that they are shared—not purely private—forms of property in which the public at large 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, of course, 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. That *Eldred* was not cast in this same light meant that the taking of the public entitlement approved in that case could not access the deeply felt emotions necessary to generate a *Kelo*-style backlash. But the *Kelo-Eldred*

¹³⁹ Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 432 (1984).

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.¹⁴⁰ The result is a classic public choice problem.¹⁴¹ 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 even if it represents the less optimal outcome.

Understanding IP through the social discourse of property sheds new light on this question. Consider a thought experiment. 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. The romantic message is simple and resonant. IP is property, and if you steal it, you're committing a legal and moral wrong.¹⁴² Property romance has

¹⁴⁰ Examples include the Copyright Term Extension Act of 1998, the Digital Millennium Copyright Act of 1998, and the Artists' Rights and Theft Protection Act of 2003.

¹⁴¹ See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965) (discussing tendency of special interests to dominate legislative processes); WILLIAM RIKER, *THE THEORY OF POLITICAL COALITIONS* (1962) (same).

¹⁴² See also Leslie Simmons, *A Perfect 10 Storm*, *The Hollywood Reporter*, Esq., Aug. 7-20, 2007, at 11 (quoting Perfect 10 online magazine owner Norman Zadeh as defending his multiple lawsuits against users by saying “[w]e’re simply trying to protect our property and the livelihood of our employees”); Doug Bedell, *Internet Piracy Enforcement Flounders with the Rise of MP3*, *Dallas Morning News*, July 27, 1999, at 1F (quoting former RIAA President Hillary Rosen describing her aim as protecting artists who are “having their property taken from them”).

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

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

proved, in this respect, spectacularly persuasive. As Peggy Radin has observed, “analogies to physical property and invasion of physical property [are] showstoppers of persuasion.”¹⁴³

My suggestion is that defenders of the public domain too should leverage the persuasive power of property rhetoric. The users’ rights approach should combat content industries’ property talk with *more* rather than less property talk, albeit 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 physical resources, can be thought of as property, but stress 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 relation, that conception includes not only private but also *public* property—something we are all entitled to access. Thus when content industries claim that “information is ours, and stealing it is wrong”, the best rhetorical countermove 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 which you are free to use.” This approach would manifest itself in legislative debates over the scope of IP rights,¹⁴⁴ litigation that touches on the same issue,¹⁴⁵ and

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

¹⁴³ Margaret Jane Radin, *Information Tangibility*, in *ECONOMICS, LAW, AND INTELLECTUAL PROPERTY: SEEKING STRATEGIES FOR RESEARCH AND TEACHING IN A DEVELOPING FIELD* 395, 400 (2002).

¹⁴⁴ So 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.

¹⁴⁵ Thus when judicial opinions say “thou shalt not steal”, *see* n.54 *supra*, 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.

public service messages designed to raise consciousness of the existence of the public domain and the importance of preserving it.¹⁴⁶

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' income and attenuate their incentives to create while producing almost no social utility gain. But the aggression with which content industries press their message threatens to overdeter. If people become convinced that all or even most information is private, they will lose sight of the fact that large swaths of our culture are publicly available resources, dedicated to common use specifically because they generate more utility when available to all.¹⁴⁷ 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.¹⁴⁸ The ability of owners and content industries to capture the rhetorical high ground in this debate depends in large part on their being the only side in the debate invoking property rhetoric. This results in a dialogue that pits property against not-property, and result is “ownership creep”—with nothing in popular culture to counteract content industries' claims, their ownership talk will tend to convince people

¹⁴⁶ Consider this ad as a counterpoint to the familiar one mention in n.142 *supra*: “You wouldn't let your government sell the Grand Canyon for use as a private garbage dump, would you? You wouldn't let your government give Yellowstone to a developer to create a shopping mall, would you? But this is just what the government is doing when it gives our treasured shared, cultural resources to private companies by extending copyright terms. Culture is a form of property that belongs to all of us, and to future generations, in common. Don't let the government give our property away for free to wealthy businesses.”

¹⁴⁷ See Epstein, *supra* note 9, at 127-28 (arguing that retroactive copyright term extension exacts more social costs than it generates private benefits).

¹⁴⁸ See, e.g., Nate Anderson, “Boy Scouts Get ‘Respect Copyrights’ Merit Badge,” *Ars Technica*, Oct. 20, 2006, available at <http://arstechnica.com/gadgets/news/2006/10/8044.ars> (describing approval by Boy Scouts of America of a merit badge designed to encourage respect for copyrights on terms provided by the Motion Picture Academy of America, and that encourages scouts to scour their families' computers for illegally downloaded files); David Kravets, “Nonprofit Delivers Filesharing Propaganda to 50,000 U.S. Students”, Aug. 21, 2008, available at <http://blog.wired.com/27bstroke6/2008/08/nonprofit-distr.html> (youth-oriented anti-infringement materials, wrongly stating that peer-to-peer filesharing is a state criminal offense).

that all information is proprietary (or at least that far more information is privately owned than actually is).¹⁴⁹ 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 wrongful. By using the language of possession in a full-blooded manner, stressing that the public's claim to shared cultural resources is a kind of enforceable property interest that merits 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.¹⁵⁰

Second, and related, 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 are theirs. The existence of well-defined entitlements in things is a prerequisite to consciousness of a property relationship with those things.¹⁵¹ 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 profs like Lawrence Lessig aside), the public is not acutely conscious that such entitlements exist. Nor are current rhetorical approaches likely to change this. Casting debates about entitlements in intellectual property as between property and not-property¹⁵² does not give a sense that the latter position stands for

¹⁴⁹ Cf. James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2006) (illustrating examples of ownership creep in IP law via substantive rather than rhetorical means).

¹⁵⁰ Cf. Marty Jezer, "Capture the Flag", *Commondreams.org*, available at <http://www.commondreams.org/views04/0806-03.htm> (last visited Feb. 9, 2008) (discussing how Democrats' overt assertions of patriotism and use of American-flag imagery in connection with their party's causes have attenuated the previously dominant view that Republican causes are intrinsically pro-American).

¹⁵¹ See David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139 (2008) (showing that clearly demarcated entitlements in public or private information goods 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 (2002) (discussing the role of clear boundaries in strategies for governing real property).

¹⁵² 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).

anything, and correspondingly fails to access the kinds of visceral reactions occasioned by the language of possession and ownership invoked by other side. 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. 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 widely unfamiliar. 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.¹⁵³ 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.¹⁵⁴

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 things in the world that we cannot have to

¹⁵³ See Elizabeth Kolbert, “Human Nature”, THE NEW YORKER, May 28, 2007, http://www.newyorker.com/talk/comment/2007/05/28/070528taco_talk_kolbert (characterizing the emergence of an environmental consciousness in the 1960s brought on to a large extent by Rachel Carson's writing and activism).

¹⁵⁴ 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 152, at 230-47 (calling for an “environmentalism for information”). This movement is undoubtedly helpful insofar as it seeks to create consciousness of public entitlements in information. My point in this Article supplements the approach of cultural environmentalism by urging that it (and similar movements) adopt a more full-blooded embrace of property rhetoric in raising public awareness of shared cultural resources.

abstractions like information.¹⁵⁵ 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 reaction of the content industries to P2P filesharing and other forms of digital infringement. Owners and their representatives invariably have outrage at these infringements, and express that outrage in terms of wrongful deprivations of property.¹⁵⁶ 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 matter of copyrights and patents are products of someone’s creative and inventive faculties, and so may well be tied in some essential sense to the self.¹⁵⁷ 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.”¹⁵⁸ 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,

¹⁵⁵ 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 Penalver, *Is Land Special? The Unjustified Preference for Landownership in Takings Law*, 31 *ECOLOGICAL L.Q.* 227 (2004).

¹⁵⁶ See TAN 47-53 *supra* (cataloguing IP owners’ use of property language to articulate their concerns about attenuations of copyright and patent).

¹⁵⁷ See Margaret Radin, *Property and Personhood*, 34 *STAN. L. REV.* 952, ___ (1982) (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.

¹⁵⁸ *E.g.*, Rod McKuen, *Flight Plan for 10 October, 2000*, available at <http://www.mckuen.com/flights/101000.htm> (“[M]y songs are like my kids and I want them treated right[.]”).

experience shows otherwise. Consider the public backlash that ensued in 1996, when ASCAP sent cease-and-desist notices to the Girl Scouts concerning their singing campfire songs like “Puff the Magic Dragon” and “God Bless America”.¹⁵⁹ The Scouts had believed (wrongly, as it turned out¹⁶⁰) 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 entitlement.¹⁶¹ Certainly part of this 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 entrenching on a preexisting public entitlement.¹⁶² The idea of singing well-known songs around a

¹⁵⁹ “Birds may sing, but campers can’t unless they pay up”, SOUTH COAST TODAY, Aug. 23, 1996, *available at* <http://archive.southcoasttoday.com/daily/08-96/08-23-96/b02li056.htm>.

¹⁶⁰ Most of the songs at issue actually were copyright-protected, which meant that ASCAP’s claim was perfectly valid. As a representative from ASCAP said, the Girl Scouts “pay for paper, twine, and glue for their crafts—they can pay for their music, too.” *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.

¹⁶¹ The threats to sue the Scouts led to a huge public outcry that turned into a PR disaster for ASCAP. 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. Thalai Walker & Kevin Fagan, *Girl Scouts Change Their Tunes*, SAN FRANCISCO CHRONICLE, Aug. 23, 1996 (quoting ASCAP’s licensing vice president as saying “We got a big black eye from this.”), *available at* <http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/1996/08/23/MN14140.DTL>. 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, <http://cyber.law.harvard.edu/terribletowel.htm>.

¹⁶² Similar indignation has accompanied attempts to perform the song “Happy Birthday”, which most people consider a standard public entitlement, but for which ASCAP seeks to charge a license fee whenever contacted about it. *See, e.g.*, Lawrence Lessig, “That Same Old Song”, WIRED ONLINE, July 13, 2007, *available at* <http://www.wired.com/wired/archive/13.07/posts.html?pg=7>.

Some writers have suggested that “Happy Birthday” is in fact no longer copyrighted, Robert Brauneis, *Copyright and the World’s Most Popular Song*, GWU Legal Studies Research Paper No. 1111624 (draft 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1111624, but regardless of the song’s legal status, the point remains that asking people to treat “Happy Birthday” as privately proprietary rather than a free element of shared culture causes a visceral sense of injustice.

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’re 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.¹⁶³

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.¹⁶⁴ 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 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. 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 (often with police complicity).¹⁶⁵ Similarly, local residents in Boulder, Colorado protested vociferously when one of their neighbors had their land acquired by adverse possession, even though the adverse possession claim posed no threat to their own title.¹⁶⁶

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

¹⁶³ 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 (W.J. Black ed., 1947) (satirizing the enclosure movement and characterizing public-to-private redistribution of commons as a form of theft).

¹⁶⁴ See Rose, *supra* note 111 at 43-45 (cataloguing different kinds of preference models that include but are not limited to the standard rational utility maximizer).

¹⁶⁵ See Richard Epstein, *The Allocation of the Commons: Parking on Public Roads*, 31 J. LEGAL STUD. 515, 521-32 (2002).

¹⁶⁶ See John Aguilar, “Hard Feelings on Hardscrabble Drive”, *DAILY CAMERA*, Nov. 19, 2007, available at <http://www.dailycamera.com/news/2007/nov/19/protest-draws-hundreds-hard-feelings-on-drive/>. 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. TRANS. R. SOC. LOND. 1763, 1767 (2004).

strongly if the federal government sought to sell the Grand Canyon to a private company for use as a huge 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.¹⁶⁷ In response, donations poured in from sources in- and outside the state, 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.¹⁶⁸ 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. Indian groups wanted the monument removed due to its purportedly offensive account of pioneer history, but this effort met with nationwide objections by those who derived value from the symbolic value of the monument's presence.¹⁶⁹

We commonly 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

¹⁶⁷ See <http://www.preservationnation.org/travel-and-sites/sites/western-region/californias-state-parks.html> (describing budget-related threats to California state parks).

¹⁶⁸ <http://www.savestateparks.org/supporters/>

¹⁶⁹ The city of San Francisco ended up keeping the Pioneer Monument, but moving it to a less conspicuous location. 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 anger and support from countless people who will never set foot in Montgomery. See 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", *available at* <http://www.thefreelibrary.com/Commandment+from+the+court:+Alabama+chief+justice+Roy+Moore%27s...-a0108267234> (Sept. 1, 2003).

imagination. But even if it were true that tangible—especially real—property has more of a hold on the popular mind than its intangible counterparts, 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 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.¹⁷⁰ By leveraging the romantic power of the idea of possession in the service of the public domain, the public may grow to regard their interests in intangible goods with something like the covetous reverence that it does physical property.

CONCLUSION: INSIDE AND OUTSIDE PROPERTY, AGAIN

Hanoch Dagan once observed that “[f]riends of the public domain are typically suspicious of property-talk.”¹⁷¹ 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. This move has caused property anxiety to emerge in friends of the public domain, who have not unreasonably assumed that more property represents a threat to their interests. This initial descriptive point frames a 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

¹⁷⁰ Cf. Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. Pa. L. Rev. 927 (2006) (arguing that “[s]ocial movements ... construct the semantic normative climate in which people talk about the great constitutional issues of the day[, and] play an important role in reorienting law to shifting social understandings so that legal and social institutions remain in dynamic relation to one another.”).

¹⁷¹ Hanoch Dagan, *Property and the Public Domain*, 18 Supp. YALE J. L. & HUM. 84, 84 (2006).

stresses the presence of public and common resources as well as the capacity of property to generate non-market goods. In fact, the social discourse of property provides a far better language in which to talk about IP than the ownership discourse. This second descriptive point 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 also to foster a general sense that attenuation of the public domain is an affront to shared ownership entitlements, encouraging respect for and stewardship of common cultural resources.

Beyond this central thesis, I also seek to engage 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.¹⁷² One major strain of property scholarship lies within the Demsetzian tradition, which presumes that property systems trend toward greater private control of resources. This property tradition, inspired by Coase¹⁷³ 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.¹⁷⁴ Such instrumentalist claims about the value of private possession necessarily presuppose strong property rights—and in particular, exclusion rights¹⁷⁵—that inhere in private individuals or firms. Related libertarian defenses of the ownership discourse of property

¹⁷² These few paragraphs are meant as a satellite-level overview rather than anything like the exhaustive literature review that would really do justice to these schools of thought.

¹⁷³ E.g., Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (Oct. 1960).

¹⁷⁴ A classic account in this vein is Richard Epstein's *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1986). See also Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1359 (1982).

¹⁷⁵ See sources cited in n.121, *supra*.

emphasize the extent to which state-backed private property rights provide individuals with a bulwark against government incursions on liberty.¹⁷⁶

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.¹⁷⁷ Margaret Radin has suggested 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.¹⁷⁸ 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.¹⁷⁹ 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.¹⁸⁰ Still others have stressed the extent to which ownership can enhance social

¹⁷⁶ MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 7-21 (1962); F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 139-41 (1960).

¹⁷⁷ Pierre-Joseph Proudhon, *What Is Property?* (1840) (famously introducing the aphorism "la propriété, c'est le vol!" or, roughly, "property is theft"). This extreme critique lacks many contemporary adherents, though some Indian writers have espoused something close to this view. See, e.g., PETER MATHIESSEN, *INDIAN COUNTRY* 118 (1994) (quoting Jimmie Durham, Eastern Band of Cherokees, expressing the view that land cannot and should not be privately possessed).

¹⁷⁸ Margaret J. Radin, *Market-Inalienability*, 100 *HARV. L. REV.* 1849, 1951, 1903 (1987) (resisting the universal commodification of objects "as the sole discourse of human life" and suggesting instead the inalienability of some things, "grounded in noncommodification of things important to personhood"); see also generally Margaret J. Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982).

¹⁷⁹ Of course, even a brief consideration of the limits implicit and explicit in real and personal property law reveal the shortfalls of the descriptive aspect of property absolutism. See Eric Freyfogle, *Context and Accommodation in Modern Property Law*, 41 *STAN. L. REV.* 1529, 1556 (1989) (describing the idea of absolute property ownership as a "myth" that fails to account for the fact that "entitlements are becoming less and less absolute" and stressing that "ownership has always been a privilege granted by society, and revocable") (quoting WILLIAM KITTREDGE, *Owning It All* 62-67 (1987)); Williams, *supra* note 86, at 280-83 (1998) ("Many commentators have noted the gap between the political rhetoric of absolute property rights and the practice of limited property rights.").

¹⁸⁰ Rose, *supra* note 112, at 713, 723.

and communal bonds,¹⁸¹ and have highlighted the capacity of property to further social justice.¹⁸²

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.¹⁸³ The intellectual property literature, 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).¹⁸⁴ 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,¹⁸⁵ 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.¹⁸⁶ This view stems

¹⁸¹ Eduardo Penalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1894 (2005) (highlighting property's capacity to reinforce the bonds of the society in which the property is situated).

¹⁸² Jed Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1242 (advocating a "freedom-promoting" conception of property).

¹⁸³ Some writers would contest the view that non-exclusive forms of property count as property, but even these writers stake their positions in contrast to the substantial literature that takes a contrary view of what property is. See Merrill, *supra* note 121, at 730.

¹⁸⁴ James Boyle, *The Opposite of Property*, 66 L. & CONTEMP. PROBS. 1, 8 (2003) (describing the public domain as "the 'outside' of the intellectual property system").

¹⁸⁵ E.g., Mark Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 895-904 (1996) (reviewing JAMES BOYLE, *SOFTWARE, SHAMANS, AND SPLEENS*) (lamenting the "proPERTIZATION" of intellectual property); Carrier, *supra* note 62, at 6 (equating the "proPERTIZATION" of intellectual property with "the expansion of the duration and scope of initial rights to approach unlimited dimensions").

¹⁸⁶ 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 BROWN, *WHO OWNS NATIVE CULTURE?* (2004). Recent writing has suggested that this resistance is premised on an inaccurately narrow view of what property means. See Carpenter, et al., *supra* note 102.

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.”¹⁸⁷ And the impoverished view of property that prevails in 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’ status as a form of property. Elsewhere, I have argued that resistance to property can obscure positive strategies for preserving the public domain.¹⁸⁸ 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. 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.

¹⁸⁷ Carol M. Rose, *Property in All the Wrong Places?* (book review) 114 YALE L.J. 991, 1021 (2005). See also Penalver, *supra* note 181 at 1894.

¹⁸⁸ See Fagundes, *supra* note 151.