Is Copyright Property?

ADAM MOSSOFF*

In his article, *Liberty versus Property? Cracks in the Foundations of Copyright Law*,[1] Richard Epstein offers a Lockean justification for intellectual property rights generally, and copyright specifically. Epstein's thesis is profoundly important and basic: *All* legal property rights, whether tangible or intangible, are born of important policy considerations. In proving this, he surveys the justification and development of property rights in the West, and reveals with great clarity that many of the traditional (and tread-worn) policy issues concerning the definition of *tangible* property rights are eerily similar to the issues implicated in the now-raging debate concerning the definition of intellectual property rights, especially copyright in digital content.

Alas, Epstein's insight may fall on deaf ears. For the peer-to-peer (P2P) file swappers and their advocates in think tanks and academia, the problem with Epstein's thesis is reflected in the terms of his title: *Liberty versus Property*. For these people, the Internet's unique or *exceptional* characteristics—whether in its end-to-end (E2E) infrastructure or in its transaction-cost-lowering effects—changes the fundamental policy equation.[2] Accordingly, these "Internet exceptionalists"[3] have come to

* Assistant Professor of Law, Michigan State University College of Law. J.D., University of Chicago Law School; M.A., Columbia University; B.A., University of Michigan. This Essay is based on a paper originally presented at the June 2003 conference, *Promoting Markets in Creativity: Copyright in the Internet Age*, in Washington, D.C. The conference was organized by the Progress & Freedom Foundation and the National Center for Technology and Law at the George Mason University School of Law. The Author would like to thank Daniel D. Barnhizer, Brian Kalt, and Peter Yu for their helpful comments on earlier drafts of this Essay. Andrew Saperstein also provided valuable research assistance.

1. 42 SAN DIEGO L. REV. 1 (2005).
2. *See* LAWRENCE LESSIG, THE FUTURE OF IDEAS 23–48 (2001) (discussing the

view the debate in terms of only one side of this juxtaposition—liberty.[4] In their minds, "digital copyright," and "intellectual property" generally, is an oxymoron.[5] The digital realm is about freedom—in every respect, from its architecture, to its ethos, to its implications for politics[6] (as Californians discovered with a successful recall election in September 2003 spawned by websites providing information on signing and collecting petitions for the recall campaign[7]). They maintain that the

---

architecture of the Internet, its E2E nature, and noting some of the regulatory implications of this structural design); John Peter Barlow, *Cyberspace Declaration of Independence* (Feb. 8, 1996), *at* http://homes.eff.org/~barlow/Declaration-Final.html (declaring that, on the Internet, "whatever the human mind may create can be reproduced and distributed infinitely at no cost").

3. This is a protean term that does not have a precise definition. It covers a wide variety of positions, including individuals advocating for (1) the abolition of intellectual property rights in digital content, *see, e.g.*, John Perry Barlow, *The Economy of Ideas*, WIRED (March 1993), and (2) the rolling back of intellectual property rights generally given what we have learned about the nature of innovative work in our new digital world, *see, e.g.*, Lawrence Lessig, *On My Bad Grades in Software: An Appeal*, *at* http://www.lessig.org/blog/archives/cooper.shtml (last visited Feb. 20, 2005) (proposing a ten-year copyright term for software code). Given his advocacy rhetoric, *see infra* note 26 and accompanying text, Lessig is sometimes thought to support position (1), but he ardently maintains that he is in favor of *some* intellectual property rights in digital content—within the "balancing" framework that he proposes as the policy foundation for these rights. *See infra* note 30 and accompanying text. Further complicating efforts at defining *Internet exceptionalism*, the digital world continues to evolve in unforeseen ways (who could have predicted the rise of the blog in 2003 and 2004 to such social and political prominence), and thus the views of the various players continue to morph accordingly. As used in this Essay, therefore, this term is limited to the positions described herein.

4. Barlow, *supra* note 2 (declaring that the denizens of the Internet "must declare our virtual selves immune to [state] sovereignty" and that "[w]e will spread ourselves across the Planet so that no one can arrest our thoughts").

5. Dan Gillmor, a somewhat obstreperous activist in favor of Internet exceptionalism, has remarked:

> The copyright industry talks about "intellectual property"—a grossly misleading expression that turns history and logic upside down.
>
> Property, by tradition and law, is physical. The idea of "intellectual property" is a fairly recent invention by the people who believe they should be able to own ideas, and totally control their use, with the help of a compliant Congress.

Dan Gillmor, *We Must Engage the Copyright Debate*, *at* http://www.siliconvalley.com/mld/siliconvalley/3842508.htm (Aug. 11, 2002). *But see infra* note 38 (discussing factual inaccuracy of Gillmor's criticism).

6. *See generally* Lawrence Lessig, *The Internet Under Siege*, FOREIGN POLICY (Nov.–Dec. 2001), at 56 (discussing how the architecture and ethos of the Internet provide a unique opportunity for promoting creativity and political liberty).

7. In a spring 2003 article on Governor Gray Davis's declining popularity, the *New York Times* reported on the early recall effort by "a small group of antitax crusaders and conservative Republicans," and it also noted—ominously, in retrospect—that "the recall effort has been largely centered on drumming up support on the Internet and conservative talk radio shows . . . ." Dean E. Murphy, *California Recall Effort Clouds Davis's Future*, N.Y. TIMES, Apr. 27, 2003, at 28; *see also* http://www.rescuecalifornia.com/petitions/ ("Recall of Failed Governor Joseph Graham Davis: Petitions and

enforcement of so-called "traditional" property entitlements on the Internet is, at best, misplaced, and, at worst, dangerous to the freedom and creative potential of this new realm.[8] Their despair in response to the Sonny Bono Copyright Term Extension Act,[9] the Digital Millennium Copyright Act,[10] and the Supreme Court's decision in *Eldred v. Ashcroft*[11] is palpable.[12] Siva Vaidhyanathan decries extending copyright

Signatures Collection Succeeded—Recall Vote Succeeded") (2004); http://www.recallgraydavis.com/ (recall campaign supported by former California Assemblyman Howard Kaloogian) (last visited Feb. 11, 2005).

8. *See, e.g.*, Siva Vaidhyanathan, *Copyright as Cudgel*, CHRON. HIGHER EDUC., Aug. 2, 2002, *at* http://chronicle.com/free/v48/i47/47b00701.htm (condemning "the Digital Millennium Copyright Act as reckless, poorly thought out, and with gravely censorious consequences").

9. Pub. L. No. 105-298, 112 Stat. 2827–2828 (1998) (amending 17 U.S.C. §§ 302 and 304 by extending copyrights terms, both prospectively and retroactively).

10. Pub. L. No. 105-304, 112 Stat. 2860 (1998). The Digital Millennium Copyright Act (DMCA) extended copyright protections to the Internet in two important ways. First, it defined secondary liability standards for ISPs, Usenet hosts and websites when their services are used by copyright infringers. *See* 17 U.S.C. § 512. Second, it proscribed programmers from accessing digital code that was copyrighted or expressed a copyrighted work. *See* 17 U.S.C. § 1201.

11. 537 U.S. 186 (2003) (upholding the constitutionality of the Copyright Term Extension Act).

12. *See, e.g.*, Jonathan Zittrain, *The Copyright Cage*, LEGAL AFFAIRS (July–Aug. 2003), *at* http://www.legalaffairs.org/issues/July-August-2003/feature_zittrain_julaug03.html (noting that the author "hate[s] the effects of copyright on a digital revolution . . . . [and] hate[s] that creativity is metered and parceled to its last ounce of profit"); David Post, *Some Thoughts on Copyright Extension*, THE VOLOKH CONSPIRACY, *at* http://volokh.com/2003_01_19_volokh_archive.html (posted Jan. 19, 2003) (noting that he "was disappointed in the Court's decision in *Eldred v. Ashcroft*," that the DMCA "is a disgrace," and that "the politics of copyright is deeply, profoundly, screwed up"); Jack M. Balkin, *Mickey in Chains, Part II, or Why the Court Got it Wrong in* Eldred v. Ashcroft, BALKINIZATION, *at* http://balkin.blogspot.com/2003_01_12_balkin_archive.html (posted Jan. 15, 2003) (stating that *Eldred* "is simply a disastrous opinion for free speech, and the Court should be ashamed of the shoddy job it's done"); Dan Gillmor, *Hacking, Hijacking Our Rights*, SILICONVALLEY.COM, *at* http://www.mercurynews.com/mld/siliconvalley/business/columnists/dan_gillmor/3751660.htm?1c (July 27, 2002) (stating that copyright forces are winning and that "[t]hese are discouraging times"); JESSICA LITMAN, DIGITAL COPYRIGHT 192 (2001) (noting that "the future is murky" and that she has become "more cynical").

However, recent court successes by defendants fending off plaintiffs' copyright infringement claims have given Internet exceptionalists some grounds to be more optimistic at the close of 2004. *See, e.g.*, Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 522 (6th Cir. 2004) (rejecting DMCA claim raised against company that provided means for consumers to reuse toner cartridges); Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd., 380 F.3d 1154 (9th Cir. 2004) (rejecting vicarious liability claims against P2P file swapping network providers, Grokster, KaZaa, and Morpheus), *cert. granted*, 125 S. Ct. 686 (2004); Chamberlain Group, Inc. v. Skylink Tech., Inc., 381 F.3d 1178 (Fed. Cir. 2004) (rejecting DMCA claim by garage door manufacturer against manufacturer of universal remote control); Online Policy Group v.

terms and applying copyright to novel forms of expression in digital media because this is "unjustifiably locking up content that deserves to be free."[13] Or, as Lawrence Lessig bluntly puts it: "Ours is less and less a free society."[14]

With growing alacrity, the Internet exceptionalists are thus attempting to frame the public debate solely in terms of freedom, liberty, creativity, our "common culture," and the public domain. No one seems to epitomize this better than the prominent tech commentator and blogger, Doc Searls, who lamented the *Eldred* decision, but came away from the experience having learned an important lesson: The fundamental issue in the policy debate is neither political nor legal, but "conceptual."[15] Searls realized that they lost *Eldred* because proponents of digital copyright—of copyright generally—have successfully defined their legal entitlements as *property*, which makes Searls and others who believe in the "public domain" and the "commons" sound like they are, well, for lack of a better term, "Communist."[16] Searls later wrote that they "need to figure a way around the *Property Problem*," because "we lose in the short run as long as copyright (and, for that matter, patents) are perceived as simple property. Our challenge is to change that."[17] Some do not even like the term "commons" because it "itself is a 'property' metaphor."[18] "[W]e must change the terms of the debate,"[19] Vaidhyanathan has intoned, and thus recognize that "[c]opyright should be about policy, not property."[20]

Diebold, Inc., 337 F. Supp. 2d 1195 (N.D. Cal. 2004) (rejecting DMCA claim by Diebold against college students who placed online information concerning potential problems in Diebold's computerized voting system); *see also* Robert P. Merges, *A New Dynanism in the Public Domain*, 71 U. CHI. L. REV. 183, 185 (2004) (discussing the various private ordering mechanisms favoring the public domain that have developed in response to "the most egregious excesses of the [IP] system").

13. Siva Vaidhyanathan, *After the Copyright Smackdown: What Next?*, *at* http://www.salon.com/tech/feature/2003/01/17/copyright/ (Jan. 17, 2003).

14. Lawrence Lessig, *Free Culture*, O'REILLY NETWORK, *at* http://www.oreillynet.com/lpt/a/2641 (keynote presentation at the Open Source Convention, July 22, 2002). Lessig repeats this point in his published work, where he posits that increasing controls over digital technology and copyrighted works present a "constitutional question" that he phrases as: "Are we, in the digital age, to be a free society?" LESSIG, *supra* note 2, at 11.

15. Doc Searls, *Going Deep*, *at* http://www.aotc.info/archives/000160.html#000160 (last visited Jan. 21, 2003) (copy on file with author).

16. *Id.*

17. Doc Searls, *Saving the Net: Who Owns What?*, LINUX J., *at* http://www.linuxjournal.com/article.php?sid=6989 (July 22, 2003) (emphasis added).

18. Lawrence Lessig, *Free the Air*, *at* http://www.lessig.org/blog/archives/001248.shtml (posted May 31, 2003) (reporting on and expressing agreement with Yochai Benkler's position).

19. SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS 12 (2001).

20. *Id.* at 15. This is an omnipresent theme within Vaidhyanathan's work. Elsewhere, he has written: "We make a grave mistake when we choose to engage in discussions of copyright in terms of 'property.' Copyright is not about 'property' as commonly understood. It is a specific state-granted monopoly issued for particular

There are two ways in which one can interpret the Internet exceptionalists' complaint about the "Property Problem" and their injunction that "copyright is policy, not property": A strong sense and a weak sense. Before discussing these two senses, though, a brief remark about the scope of this Essay is in order. This Essay will describe how the property theory that Epstein explicates in *Liberty versus Property* might respond to the specific claims advanced by the Internet exceptionalists. Accordingly, its purpose is not to offer a complete account of why digital copyright is property. That is not possible in an Essay that offers only an abbreviated, descriptive account of one aspect of the debate, especially given the admittedly *heretical* nature of these remarks to the Internet exceptionalists and their web-surfing allies. The justification of the property theory itself is in Epstein's article, and in other articles already written or yet to be produced.[21]

In its strong sense, the Internet exceptionalists' thesis quickly devolves into a truism about property rights as such. If it is true—as it must be—that copyright is policy, then it is equally true that *all* property rights are policy. In proving this point in his article, Epstein prefers utilitarian analysis, and he has spent much of his professional life attempting to show the ways in which the incremental development of property rights in the West represents the slow (and unending) march to identify utility-maximizing rules for our social and political institutions. Yet, even if one does not wish to jump on the utilitarian train that Epstein is calling us all aboard, it is easy to see that *every* tangible property entitlement has arisen from a crucible of moral, political, and economic analyses, and thus implicates the same questions about utility, personal dignity, and freedom that now dominate the debates over digital copyright. The preeminent property cases that every law student studies in the first year of law school are exemplars of this basic truth.[22]

---

policy reasons." Vaidhyanathan, *supra* note 8.

21. *See, e.g.*, Richard A. Epstein, *Intellectual Property: Old Boundaries and New Frontiers*, 76 IND. L.J. 803 (2001); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990); Ayn Rand, *Patents and Copyrights*, *in* CAPITALISM: THE UNKNOWN IDEAL 130–34 (1967). *See also* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988) (discussing, in part, the justificatory role of labor theories of property for intellectual property entitlements).

22. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (discussing acquisition of title to land by the European settlers from the American Indians); Pierson v. Post, 3 Cai. R. 174 (N.Y. Sup. Ct. 1805) (addressing the requirements for claiming property in wild animals).

When Internet exceptionalists thus maintain that "[c]opyright is not about 'property,' . . . [i]t is a specific state-granted monopoly issued for particular policy reasons,"[23] then they must also maintain that no legal rights in any tangible things are *property*. Everything that everyone owns—tangible or otherwise—represents only state-granted legal monopolies issued to individuals for particular policy reasons. As Epstein rightly points out, at a fundamental level of analysis, "property and monopoly . . . are the same side of the same coin."[24] Accordingly, in this strong sense, the Internet exceptionalists' complaint about extending copyright to digital media is, at the same time, neither informative nor instructive—unless one's goal is to restructure universally the concepts and legal rules for *all* property entitlements in American society.

It is unsurprising then that the Internet exceptionalists' rhetoric has produced the politically charged label of *Communist*. When Dan Gillmor publishes a webzine article attacking the *Eldred* decision under the heading, "Supreme Court Endorses Copyright Theft," writing that the Supreme Court decision has sanctioned "a brazen heist," and asking his readers, "Who got robbed? You did. I did," one hears the rallying call: Copyright is theft![25] When one hears Lessig's similar complaint that the Copyright Term Extension Act is a "theft of our common culture,"[26] one hears again the rallying call: Copyright is theft! As Doc Searls aptly points out, it is no surprise that Gillmor's and Lessig's readers hear the echoes of the nineteenth-century socialists' self-described battle cry: "Property is theft!"[27]

We are not compelled, however, to adopt only the strong sense of the Internet exceptionalists' rhetoric. There is also a weak sense to their claim that copyright is policy, not property; namely, that copyright is fundamentally different from tangible property, and, as best illustrated in the context of digital media, does not deserve the same moral or legal status typically afforded to our more traditional property entitlements. This is hardly a radical claim, and there is substantial evidentiary support for this proposition in the American copyright and patent scheme. As the Supreme Court has repeatedly stated: The constitutional grant of power to Congress to protect copyrights and patents "reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance

---

23. Vaidhyanathan, *supra* note 8.
24. Epstein, *supra* note 1, at 23.
25. Dan Gillmor, *Supreme Court Endorses Copyright Theft*, SILICONVALLEY.COM, *at* http://weblog.siliconvalley.com/column/dangillmor/archives/000730.shtml (Jan. 15, 2003).
26. Lessig, *supra* note 14.
27. PIERRE-JOSEPH PROUDHON, WHAT IS PROPERTY? 13 (Donald R. Kelley & Bonnie G. Smith eds., trans., 1994) (1840).

in the 'Progress of Science and useful Arts.'"[28]

From such judicial and legislative statements, the Internet exceptionalists make an important change to Epstein's juxtaposition. It is not "liberty versus property," but rather "liberty versus *monopoly*." And, they conclude, the stifling effects of extending the copyright monopoly to digital media substantially outweigh the negligible benefit (if any) of promoting innovation. Here, the Internet exceptionalists adopt the same utilitarian metric employed by Epstein, arguing that "[b]efore the [copyright] monopoly should be permitted, there must be reason to believe it will do some good—for society, and not just for the monopoly holders."[29] Reflecting his desire that we interpret the Internet exceptionalists' claims in this weak sense, Lessig asks (somewhat rhetorically but obviously in frustration): "Does calling for balance make one a communist?"[30]

In this weak sense, therefore, the claim that "copyright is policy, not property," is simply shorthand for the proposition that we must achieve and maintain balance in the utility calculation of "liberty vs. copyright monopoly." There are two supporting premises for this proposition that Internet exceptionalists sometimes intermingle: The first is historical, and the second is analytical. On the historical side, Internet exceptionalists maintain that copyrights and other intellectual property rights have *always* been viewed as monopolies issued by the state according to a strict utility calculus. Again, this is not a radical claim. Thomas Jefferson, an avowed defender of the natural right to property, believed that "[i]nventions . . . cannot, in nature, be a subject of property," and that "an exclusive right" is granted to inventors by "[s]ociety" solely "as an

28. Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146 (1989) (quoting U.S. CONST. art. 1, § 8, cl. 8); *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (stating that the "monopoly privileges that Congress may authorize" under the Constitution serve "an important public purpose" in "motivat[ing] the creative activity of authors and inventors"); Graham v. John Deere Co., 383 U.S. 1, 6 (1966) (noting, in the context of patent law, that the Constitution precludes Congress from "enlarg[ing] the patent monopoly without regard to the innovation, advancement or social benefit gained thereby").

29. Lawrence Lessig, *May the Source Be With You*, WIRED (Dec. 2001), *at* http://www.wired.com/wired/archive/9.12/lessig.html (arguing against the protection of software code under copyright "monopolies").

30. Lawrence Lessig, *The Limits of Copyright*, INDUSTRY STANDARD (June 19, 2000), *at* http://www.lessig.org/content/standard/0,1902,16071,00.html. More recently, Lessig writes: "The property right that is copyright is no longer the balanced right that it was, or was intended to be. The property right that is copyright has become unbalanced, tilted toward an extreme." LAWRENCE LESSIG, FREE CULTURE 173 (2004).

encouragement to men to pursue ideas which may produce utility . . . ."[31]

The historical record, however, is not as one-sided as the Internet exceptionalists would like us to believe. Since the enactment of the Statute of Anne in 1709,[32] the first modern copyright law, the justification for copyright has comprised *two* general normative theories. The first is utilitarianism, and the second is natural rights theory, particularly the labor theory of property and the social contract doctrine at the core of John Locke's political philosophy.[33] The labor theory of property usually is given short shrift by modern copyright scholars, but it certainly played a justificatory role in the historical copyright debates. As Representative Gulian Verplanck stated in defense of a bill that became the Copyright Act of 1831: "[T]he work of an author was the result of his own labor. It was a right of property existing before the law of copyrights had been made."[34] State laws protecting intellectual property rights prior to the 1787 Federal Convention also reflected a Lockean influence. New Hampshire, to name but one example, enacted legislation to protect copyrights and other forms of intellectual property because "there being no property more peculiarly a man's own than that which is produced by the labour of his mind."[35] Moreover, the evolution and creation of new types of intellectual property rights in the nineteenth century, such as trademarks and trade secrets, followed the contours of a labor theory of property.[36] The initial definition and protection of trade secrets as property entitlements, for instance, derived its justification from the courts' belief that such rights were similar to other property rights born of valuable labor and already protected by the law.[37]

---

31. THOMAS JEFFERSON, *Letter to Isaac McPherson (August 13, 1813)*, *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 576–77 (Adrienne Koch & William Peden eds., 1993).

32. 8 Ann., c. 19 (1709) (Eng.).

33. *See* Eldred v. Ashcroft, 537 U.S. 186, 212 n.18 (2003) (noting the "complementary" relationship between the utilitarian and labor-desert theories in copyright law).

34. Thomas B. Nachbar, *Constructing Copyright's Mythology*, 6 GREEN BAG 2d 37, 40 (2002) (quoting 7 REG. DEB. 424 (1831)).

35. *Act for Encouragement of Literature and Genius* (1783), *in* COPYRIGHT ENACTMENTS: LAWS PASSED IN THE UNITED STATES SINCE 1783 RELATING TO COPYRIGHT 8 (1973). Massachusetts and Rhode Island adopted the exact same language in their own respective copyright statutes in 1783. *Id*. at 4, 9; *see also* Adam Mossoff, *Locke's Labor Lost*, 9 U. CHI. L. SCH. ROUNDTABLE 155, 164 (2002) (explaining how New Hampshire's Act for the Encouragement of Literature reflected a Lockean proposition that was of normative import to Americans in the late eighteenth century).

36. *See* Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 415–24 (2003) (discussing the genesis in the nineteenth century of trade secret and trademark rights as intellectual property doctrines).

37. *See* Peabody v. Norfolk, 98 Mass. 452, 457–58 (1868) (protecting trade secrets as nonexclusive intellectual property rights because of their similarity to "good will," which is protected by the law when a "man establishes a business and makes it valuable by his skill and attention").

It is a profound oversimplification to declare that intellectual property rights, including copyright, have *always* been conceived *solely* as "monopolies" doled out by the state according to a utilitarian calculus that weighs social and scientific progress against the stifling effects and deadweight losses attributable to typical government-created monopolies. The proposition that "copyright is a property right" is not a novel form of political rhetoric invented by Jack Valenti sometime in the last twenty years in order to advance the interests of Hollywood before Congress.[38] In casting the history of intellectual property rights in this way, an interesting and multifaceted historical record is flattened out in order to create a picture of what the Internet exceptionalists believe copyright and other intellectual property rights should be today. As one critic has noted, this is not history, but rather the construction of a myth.[39]

Why the Internet exceptionalists retell the history of intellectual property rights in this way reflects their underlying conception of the nature of these *rights*. As noted earlier, they believe that intellectual property rights generally are merely *monopolies*. In other words, copyrights and patents comprise only monopoly privileges handed out to authors and inventors by Congress under the constitutional grant of authority to Congress that it "promote the Progress of Science and useful Arts."[40] This is the analytical side of the weak interpretation of "copyright is policy, not property," and, once again, this is hardly a radical claim, as reflected in the contemporary Supreme Court's repeated references to copyright and patent rights as "monopolies."[41]

---

38. Valenti was President and CEO of the Motion Picture Association of America. *See* Frank Field, FURDLOG, *at* http://msl1.mit.edu/furdlog/index.php?wl_mode=more&wl_eid=310 (last updated June 12, 2003) (criticizing the claim that copyright is property as merely a modern "political agenda"); s*ee also* Gillmor, *supra* note 5 (offering a similar criticism of "intellectual property" as merely a self-interested political ploy by the modern "copyright industry").

These criticisms are factually inaccurate. Copyrights were identified as "property" in state statutes in the early 1780s. *See supra* note 35. In 1824, Daniel Webster proposed patent legislation in the House of Representatives, declaring in his floor speech that "he need not argue that the right of the inventor is a high property; it is the fruit of his mind—it belongs to him more than any other property . . . and he ought to be protected in the enjoyment of it." 41 ANNALS OF CONG. 934 (1824). Patents were later identified as "industrial property," a precursor to "intellectual property," in the Paris Convention of 1883, which was ratified by the U.S. Senate and signed by President Grover Cleveland in 1887. *See* Convention for the Protection of Industrial Property, 25 Stat. 1372 (1883).

39. *See generally* Nachbar, *supra* note 34.

40. U.S. CONST. art. I, § 8, cl. 8.

41. *See supra* note 28 (citing cases).

This definition of intellectual property solely in terms of a utility-based monopoly, as opposed to a type of property, is actually the result of an impoverished concept of property that has dominated our political discourse in the twentieth century. At the turn of the twentieth century, legal scholars and judges redefined "property" as a set of "social relations"[42]—what later became known as a "bundle" of rights.[43] With this narrow focus on the purely *social role* of property, it was but a short step to focus on the one *social right* in the bundle of rights that constitutes our modern understanding of property: The right to exclude. In fact, the Supreme Court would eventually declare that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[44] As one prominent property scholar put it recently, the right to exclude is the *sine qua non* of a property right.[45]

This narrow definition of property as the right to exclude works well for tangible property entitlements, but it fails miserably to capture our intangible property entitlements. In the world of tangible property, there are fences and boundary lines that *physically* exclude non-owners. There is also ontological exclusivity: Two people cannot occupy the same piece of land at the same time but in different ways. Two farmers who each attempted to till the same piece of soil—one trying to grow corn and the other wheat—would soon come to blows as to who may do what with the land.[46] Accordingly, the *fact* of physical exclusion serves as an objective baseline for defining the *right* to exclude.

For intellectual property rights, the problem with reducing property to the right to exclude is readily apparent. There is no natural exclusion of intellectual property entitlements. Inventions, books, and computer code can be copied willy-nilly without taking the original physical product away from the inventor or author. (In the economist's terms, intellectual property is a "public good" given its nonrivalrous and nonexhaustive characteristics.)[47] Unlike that one acre of land over which the two farmers are pummeling each other, the P2P file swapper can trade music

---

42. Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 361–63 (1954).

43. Andrus v. Allard, 444 U.S. 51, 66 (1979).

44. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

45. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998).

46. As one natural rights theorist succinctly put it: A conflict over goods "shows the falsity of the old saying: 'Mine and thine are the causes of all wars.' Rather it is that 'mine and thine' were introduced to avoid wars." SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM 541 (C.H. Oldfather & W.A. Oldfather trans., 1934) (1688) (the title translates as *On the Law of Nature and Nations*).

47. DONALD S. CHISUM ET AL., PRINCIPLES OF PATENT LAW 62–63 (3d ed. 2004).

files without impinging on the original author's right to listen to his own song or on another person's right to listen to the copy that he rightfully has purchased. The right to exclude in intellectual property entitlements exists by legal fiat. It is solely a creation of the law with no natural counterpart in the actual facts of how people interact in the world. Thus, the exclusive rights granted to copyright and patent holders appear arbitrary—they are only legal figments of our collective social imagination. And these rights certainly do not fit the definition of *property*, which, as we are constantly reminded, is naturally exclusive.

When one throws into this policy mix the unique characteristics of digital technology, especially the Internet, it becomes clear that intellectual property "monopolies" should be restrained in our new digital world. There is no natural exclusion in the digital domain, and the creation of "artificial" barriers simply restricts free movement and stifles decision-making. Even if there were some type of objective baseline justifying exclusive copyright entitlements before the invention of the Internet, there certainly is none now. The P2P users of Napster (before its reincarnation as a pay-per-download MP3 service), and now Morpheus and KaZaa, cheaply and easily copy files from one to another with nothing stopping them except their bandwidth allotment and the storage capacity on their hard drives—or the cease and desist letter from the Recording Industry Association of America. While bandwidth restrictions are somehow *real* to the P2P user, the cease and desist letter is not. And this makes sense only because people define "property" today solely in terms of exclusion. Doc Searls is correct: The problem *is* conceptual, but the real problem is that we are defining property in such a way that copyright and other intellectual property entitlements cannot be anything other than artificial monopolies, enforced at the policy whim of Congress.

It is at this fundamental level of analysis that Epstein's article is most insightful. He reveals that the analytical framework that explains how physical property rights have been defined applies equally to intellectual property rights; the difference between the two types of property rights is not a difference in *kind*, but only one of *degree*.[48] As with chattels or fishing rights, when one is faced with a different *context*, one must

48. *See also* Solveig Singleton, *IP as Conflict Resolution: A Micro View of IP*, 42 SAN DIEGO L. REV. 45, 48 (2005) (noting from a utilitarian perspective that the differing incentives between "physical property and IP" are "not a difference of kind but of degree").

define one's property rules accordingly. The legal rules that make sense for dividing up and using farmland should not be applied deductively to fish or wild game, or vice-versa. This does not mean that these rights are not property rights. It means that they are only a different *type* of property right—but a property right nonetheless. To put it bluntly, if not in an oversimplified way, digital copyright is to the author and computer programmer today what fishing rights were to the whalers and fishermen of yesteryear.[49]

Although Epstein prefers to recast natural rights theory in solely consequentialist terms, there is a significant and substantive element of the theory, particularly the Lockean version preferred by Epstein, which is not fully captured in this retelling. The preeminent natural rights theorists—Hugo Grotius, Samuel Pufendorf, and John Locke—worked with a concept of property whose roots went far back into the Western canon, to the ancient Greek philosophers and the Roman lawyers.[50] The principal focus of this tradition was the exact opposite of our contemporary view of property: They were concerned not only with how property functioned in complex social and economic relationships, but *how* property arose in the first place, and *what* this told us about the nature of property as such.[51] This explains the focus of these theorists on the analytical fulcrum creating property entitlements: The acquisition, labor or creative work that brings something into human possession and use.[52] And this provenance informed the natural rights theorists that the core or substance of property is the *action* that one takes to create and maintain the property.[53] Thus, the classic definition of property as the right to use, possess and dispose of one's possessions.[54]

---

49. *See* Ghen v. Rich, 8 F. 159 (D. Mass. 1881) (discussing rules for resolving two fishermen's competing property claims to a whale); s*ee also* JAMES M. ACHESON, THE LOBSTER GANGS OF MAINE (1988) (discussing, in part, how lobstermen have created a system of property rights without reference to the legal system).

50. *See generally* Mossoff, *supra* note 36, at 377–95 (discussing the "integrated theory of property" advanced by Grotius, Pufendorf and Locke, and the dominance of this theory of property within the Western canon).

51. *Id.*

52. *Id.*

53. William Blackstone writes:

> Property, both in lands and moveables, being thus originally acquired by the *first taker*, which taking amounts to a declaration that he intends to appropriate the thing to *his own use*, it remains in him, by the principles of universal law, till such time as he does some other act which shows an intention to abandon it . . . .

2 WILLIAM BLACKSTONE, COMMENTARIES *9 (emphases added).

54. *See, e.g.*, ARISTOTLE, RHETORIC 39 (W. Rhys Roberts trans., 1954) (350 B.C.E.) (stating that a thing "is 'our own' if it is in our power to dispose of it or keep it"). In 1625, Grotius approvingly translated Aristotle's definition as: "The definition of ownership . . . is to have within one's power the right to alienation." HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 260 (Francis W. Kelsey trans., 1925) (1625) (the title

This concept of property dominated the American understanding of property in the eighteenth and nineteenth centuries. It is revealed in the New Hampshire Supreme Court's explanation in 1872 that "[i]n a strict legal sense, land is not 'property,' but the subject of property. The term 'property,' . . . in its legal signification . . . 'is the right of any person to possess, use, enjoy, and dispose of a thing.'"[55] Or, as James Madison wrote in 1792, "property" means more than just "land, or merchandise, or money," this concept has a "larger and juster meaning, [as] it embraces everything to which a man may attach a value and have a right."[56] Property is the right to acquire, use, and dispose of the things that one has created through one's labor. It is this concept of property that precipitated the virtual truism in American society that every person has a right to enjoy the fruits of one's labors.

It is also this concept of property—which focuses on the substantive relationship between a person and the thing that he has labored upon or created—that explains and justifies the protection of intellectual property rights, regardless whether these rights exist in tangible books or computer code. A person's right to control the disposition of his creation, and thereby enjoy the fruits—the profit—of his labors, is central to the legal definition and protection of property entitlements.[57] As the New York Court of Appeals stated in 1856: "Property is the right of any person to *possess*, *use*, *enjoy* and *dispose* of a thing. . . . A man may be deprived of his property in a chattel, therefore, without its being seized or physically destroyed, or taken from his possession."[58] In the context of tangible property rights, the courts have never demanded that a person be deprived *physically* of his property as a necessary prerequisite for finding a violation of property rights. Stealing the fruits of one's labors or indirectly interfering with the use of the property is sufficient; in other

translates as *The Law of War and Peace*). In agreement with the Roman law, Pufendorf characterizes property as the right to "use, abuse and destroy [a possession] at our pleasure." SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 130 (James Tully ed., Michael Silverthorne trans., 1991) (1673).

55. Eaton v. B. C. & M. R.R., 51 N.H. 504, 511 (1872).

56. James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, *reprinted in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 186 (Marvin Meyers ed., rev. ed. 1981).

57. *See* Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 283 (Ct. App. 1993) (holding, in part, that a man has a property right in his sperm because he has "decision making authority as to the use of his sperm for reproduction," and this control over its *use* and *disposition* is an "interest [that] is sufficient to constitute 'property'").

58. Wynehamer v. People, 13 N.Y. 378, 433 (1856) (emphases added).

words, it is sufficient that one lose the ability to use, control or dispose of the values that one has created.[59] It is this concept of property that explains why copyright is in fact *property*, rather than monopoly privileges meted out to authors at the leisure of the state's utility calculation.

As opposed to the excessively narrow definition of property today, the concept of property at work in natural rights theory is sufficient in breadth and scope to explain and justify myriad property entitlements in a variety of contexts—tangible and intangible. As noted earlier, it served as the analytical baseline for defining and protecting the new types of valuable intellectual property that arose during the industrial revolution, such as trademarks and trade secrets.[60] In the context of copyright, it was unclear at the turn of the century how our legal rules would apply to the amazing new inventions of the day, such as phonorecords and player pianos.[61] Several decades later, the legal rules of copyright faced another revolution with the invention of radio and television.[62] With each inventive leap forward, the legal protections evolve as well, *because* the author deserves to control the use and disposition of his property.

The past evolution of copyright law is notable because we are in the midst of another revolution today—the digital revolution. The impact of the digital revolution is as far reaching as was the industrial revolution of the nineteenth century, but it is important to realize that we are still in the midst of this revolution. It is not yet clear how and in what ways intellectual property rights should be best protected in the new digital domain, but the evolution of intellectual property rights is as necessary today as it was during the industrial revolution. It would be wrong to condemn outright our early attempts to define copyright entitlements for digital content, just as it would have been wrong to condemn the early attempts at defining trademarks or the evolving rules of copyright at the

---

59. Nuisance doctrine is a long-standing example of this basic principle in property law. As opposed to trespass, which requires a physical entry on a person's property, nuisance requires only that there be a "substantial and unreasonable" interference with "the use and enjoyment" of one's property. W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 13, at 70 (5th ed. 1984).

60. *See supra* note 36 and accompanying text.

61. In 1908, the Supreme Court held that piano rolls used in mechanized piano players were not copies of the music, because the rolls were not literal reproductions of the written musical score that could be read by another person. *See* White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 18 (1908). In 1909, Congress responded to *White-Smith* by extending copyright protection to phonorecords. *See* H.R. REP. NO. 2222, at 9 (1909). The exclusive right to control the reproduction of copies of copyrighted works in "phonorecords" is retained in the 1976 Copyright Act. *See* 17 U.S.C. § 106(1) (1995).

62. Copyright owners have the right to control public performances and reproductions in "motion pictures" and "other audiovisual works." *See* 17 U.S.C. §§ 106(4)–(5).

end of the nineteenth century. A legal doctrine in transition may be criticized for its various fits and starts, but the difficulties inherent in the transition are not sufficient grounds for junking the doctrine itself.[63]

63. One online petition drafted by Lawrence Lessig, and which is no longer accessible, called for Congress to roll back copyright protections to those set forth more than two hundred years ago in the first copyright act of 1790. *See* Reclaim Copyright Law Petition to United States Congress, *at* http://www.petitiononline.com/progress/petition.html (last visited June 4, 2003) (copy on file with author). In *Free Culture*, Lessig emphasizes his point about the extremity of the copyright laws today by comparing them to the protections secured under the 1790 copyright act. LESSIG, *supra* note 30, at 130–39 & 170–73.