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## Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson

Justin Hughes

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# ARTICLES

## COPYRIGHT AND INCOMPLETE HISTORIOGRAPHIES: OF PIRACY, PROPERTIZATION, AND THOMAS JEFFERSON

JUSTIN HUGHES\*

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## I. INTRODUCTION

Because we learn from history, we also try to teach from history. Persuasive discourse of all kinds is replete with historical examples—some true and applicable to the issue at hand, some one but not the other, and some neither. Beginning in the 1990s, intellectual property scholars began providing descriptive accounts of a tremendous strengthening of copyright laws, expressing the normative view that this trend needs to be arrested, if not reversed. This thoughtful body of scholarly literature is sometimes bolstered with historical claims—often casual comments about the way things were. The claims about history, legal or otherwise, are used to support the normative prescription about what intellectual property law should be.

One normative approach to arrest the growing strength of copyright has been through "constitutionalizing" copyright. This approach produced meaty theoretical ideas with practical implications, but failed to capture the judicial imagination<sup>1</sup> and largely ran aground on the *Eldred v. Ashcroft* and

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1. Scholars like Pamela Samuelson and Fred Yen still see life in the realm of constitutional challenges to copyright law. See Pamela Samuelson, *The Constitutional Law of Intellectual Property After Eldred v. Ashcroft*, 50 J. COPYRIGHT SOC'Y 547 (2003); Alfred C. Yen, *Eldred, the First Amendment, and Aggressive Copyright Claims*, 40 HOUS. L. REV. 673 (2003).

*MGM Studios Inc. v. Grokster, Ltd.* decisions.<sup>2</sup> In contrast to this constitutional critique, many legal scholars have recently written about the increasing “proPERTIZATION of intellectual property”<sup>3</sup>—this is both a descriptive account and a normative critique that describes recent developments as unwisely moving copyright toward a property paradigm. Whereas the constitutional critique of copyright provided specific prescriptions, the proPERTIZATION critique may now be cresting because it has failed to present clear alternatives to what it criticizes and, in some sense, the critique boils down to one of intellectual life’s most familiar lessons: *be careful that the terminology you use does not become the master of your thinking process.*

This Article explores three historical claims made in the service of the proPERTIZATION critique, showing that these claims are factually much weaker than the way they are represented. It then delves deeper into both what is claimed by and what motivates the proPERTIZATION of copyright literature. Along the way there may be a few surprises for the reader, such as the fact that John Locke himself advocated a copyright term of life plus seventy years in 1694, or that legal scholars have generally missed the

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2. *MGM Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005); *Eldred v. Ashcroft*, 537 U.S. 186 (2003). Peter Jaszi puts it extremely politely: “Although progressive U.S. copyright lawyers may anticipate and advocate the birth of a substantial constitutional copyright jurisprudence, both in general and with respect to ‘fair use,’ there are no recent signs that their hopes are likely to be fulfilled in the foreseeable future.” Peter Jaszi, *Public Interest Exceptions in Copyright: A Comparative and International Perspective* 3 (2005), [http://correctingcourse.columbia.edu/paper\\_jaszi.pdf](http://correctingcourse.columbia.edu/paper_jaszi.pdf). I have put it less diplomatically: “You want the best indicator of how an American court will decide a major intellectual property case in the Internet era? Look for the amici or parties’ brief with the dozens of law professors—those theories are how the court will not decide the case.” Justin Hughes, *Of World Music and Sovereign States, Professors and the Formation of Legal Norms*, 35 *LOY. U. CHI. L.J.* 155, 157 (2003).

3. The phrase occurs repeatedly in the literature. See, e.g., Shubha Gosh, *Globalization, Patents, and Traditional Knowledge*, 17 *COLUM. J. ASIAN L.* 73, 75 (2003) (“Scholars have criticized the increased proPERTIZATION of intellectual property to the detriment of the public domain and non-market values.”); Michael J. Madison, *Legal-Ware: Contract and Copyright in the Digital Age*, 67 *FORDHAM L. REV.* 1025, 1143 n.76 (1998) (“[G]rowth in ‘proPERTIZATION’ of intellectual property rights is driving increases in transactional practice.” (citing Robert P. Merges, *Intellectual Property and the Costs of Commercial Exchange: A Review Essay*, 93 *MICH. L. REV.* 1570, 1571–72 (1993))); Randal C. Picker, *From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the ProPERTIZATION of Copyright*, 70 *U. CHI. L. REV.* 281 (2003) (surveying cases from the “roughly 100-year path that has taken us from the age of Edison to the age of encryption and the proPERTIZATION of copyrighted works”); Matthew C. Staples, *Kelly v. Arriba Soft Corp.*, 18 *BERKELEY TECH. L.J.* 69, 69 (2003) (placing the Kelly case “in the context of the larger debate regarding the increasing proPERTIZATION of intellectual property”); Albert Sieber, Note, *The Constitutionality of the DMCA Explored: Universal City Studios, Inc. v. Corley & United States v. Elcom Ltd.*, 18 *BERKELEY TECH. L.J.* 7, 37 (2003) (“This position is consistent with the increased proPERTIZATION of intellectual property over time.”).

ways copyright became more doctrinally like property in the twentieth century.

Part II presents three historical claims commonly seen in literature about intellectual property—these concern the newness of the word “piracy,” Thomas Jefferson’s views on intellectual property, and the history of the phrase “intellectual property.” Part III shows how common, casual assertions by scholars about each of these claims are not well supported by the historical record. The goal is not to convince you that the claims are all wrong, but that the historical record appears insufficiently researched for these claims to be made boldly in the legal literature.

One might reasonably ask: Why bother? If these are just offhand historical claims that are ancillary to larger normative accounts, perhaps everyone should be granted their rhetorical flourishes. One reason is that the historian or the scientist is trained to research, to explain, and, we hope, to get to the bottom of things. The lawyer—hence, most legal academics—prepares just enough precedent to convince. And that *may* produce one of the little oddities about legal scholarship. Instead of researching and citing primary materials, intellectual property scholarship frequently refers *only* to other legal scholarship for evidence of nonlegal data.<sup>4</sup> As I will show, the practice of citing only legal scholarship for evidence of nonlegal data means that a few casual but incomplete historical claims by a few respected legal scholars can get replicated through the system—and beyond. And this has a rather twisted effect: a wonderfully heartening development—nonspecialists engaged in a more open, more popular discourse about copyright—gets accidentally co-opted into repeating these historically doubtful claims.

More importantly, these incomplete historical claims, particularly the claim about the recent vintage of the phrase “intellectual property,” are in service of the broader propertization critique—that copyright is now being conceived of in property terms, in contrast to its historic (and correct) treatment as a limited set of exclusive rights granted for purposes of market regulation. Part III shows that modern copyright has been conceived of as “property” or “literary property” since its inception at the beginning of the

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4. See, e.g., Dan L. Burk & Mark Lemley, *Is Patent Law Technology Specific?*, 17 BERKELEY TECH. L.J. 1155, 1192 & n.160 (2002) (citing one court case and four law review articles for the proposition that “as a matter of computer science . . . [t]hose who actually work in the industry know that coming up with an idea for a computer program is rather less than half the battle”). For another professor who has done this, see Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 783 n.28 (2003) (citing a law review article for the nonlegal proposition that “distant dollars [in time] are worth less”).

eighteenth century. Even if “intellectual property” was a recent concept, no one has provided a serious explanation of how “intellectual property” leads to the propertization of copyright in a way that “property” and “literary property” did not in the eighteenth, nineteenth, and twentieth centuries.

Parts IV and V turn to a deeper analysis of the propertization critique, both as to what scholars claim and what might motivate these claims. Part IV concludes that “propertization” may be a doctrinally infelicitous way to describe the recent strengthening of the exclusive rights granted by copyright law while, nonetheless, exploring the different causal mechanisms by which “property” could cause that strengthening of copyright. The concern over the influence of the property construct takes several distinct forms, the three most prominent being concern about natural rights views of property, concern about real property views of property, and concern about law and economics theory. Each of these strands of the property critique has made valuable observations, but none has established a good causal link between “intellectual property” or “property” and the substantial strengthening of copyright law in the past thirty years. This part of the Article suggests a few ways we could advance the propertization critique through more fine-toothed study of the materials available to us.

Part V becomes more speculative, offering, first, some observations on what to do about “piracy” rhetoric, and, second, some thoughts on what motivates the scholarly discourse of the propertization of copyright. I propose that the propertization critique of copyright comes partly from a basic instinctual reaction against the “boundary problem” endemic to copyright. Of course, copyright has long had fuzzy boundaries, at least since “expression” was expanded to cover more than the literal words, symbols, or images of a work.

If that is true, why the discomfort now with the ambiguous boundaries of each and every copyright? Most scholars would pin the problem on modern technologies, which allow unprecedented levels of reproduction, manipulation, and distribution of fixed expression. But the issue is deeper: our society’s increased wealth has made more and more of us into “symbol manipulators,” either by vocation or as pastime. At modern copyright’s inception, the realm of expression was only sparsely populated; it is now filled with tens of millions of people, dramatically increasing the conflicting pressures to provide expressive space and award expressive property. The solutions to this problem are limited, but one of the most tenable may be to use the property construct itself to create clearer boundaries and, thereby, more certain areas of expressive space.

## II. CASUAL CLAIMS ABOUT COPYRIGHT HISTORY

Claims about history or intimations about current events in their historical context can be used to strengthen an argument, but such claims can also be used to entertain—to lighten or vary an otherwise methodical discussion—or even just to show a writer’s broad contextual knowledge.

A good example is how those writing about intellectual property often like to mention Thomas Jefferson’s thoughts on the subject. In 1788, Jefferson sent a letter to James Madison in which Jefferson vigorously opposed all forms of government-sanctioned monopolies, including patents. In this letter, Jefferson recognized that a monopoly for a limited time might be an “incitement[] to ingenuity,” but he concluded that “the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression.”<sup>5</sup> That latter passage is quoted widely among those opposed to strong intellectual property, whom for convenience this Article refers to as the “low protectionists” or “IP restrictors.”<sup>6</sup> Also widely quoted in these schools of thought is Jefferson’s 1813 letter to Isaac McPherson in which Jefferson derided any notion that inventors have a “natural and even a hereditary right” to their inventions. In an oft-quoted passage, Jefferson writes:

It would be curious then, if an idea, the fugitive fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property. If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea . . . . Inventions then cannot in nature, be a subject of property.<sup>7</sup>

As James Boyle notes, this 1813 letter “has become very famous in the world of the digerati,”<sup>8</sup> precisely for these apparent anti-intellectual property statements. John Perry Barlow quotes this passage up to the point shown above and then declares that our intellectual property system

5. Letter from Thomas Jefferson to James Madison (July 31, 1788), in 5 *THE WORKS OF THOMAS JEFFERSON* 424, 428 (Paul Leicester Ford ed., 1904).

6. The term is from Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property As Constitutional Property*, 112 *YALE L.J.* 2331, 2332 (2003).

7. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 6 *THE WRITINGS OF THOMAS JEFFERSON* 175, 180–81 (H.A. Washington ed., 1857). Another favorite statement from this letter: “He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.” *Id.* (quoted in LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 84 (2004)).

8. James Boyle, *The Public Domain: An Environmentalism for Information* 23 (2005) (unpublished manuscript, on file with the author).

“defeats the original Jeffersonian purpose of seeing that ideas were available to everyone regardless of their economic station.”<sup>9</sup> Relying on one or both of these letters, “the IP Restrictors have pointed out that Jefferson opposed [the Copyright Clause in the Constitution] because he was opposed to monopolies of any type.”<sup>10</sup> These sorts of references to Jefferson are common currency, yet as discussed below in Part III, this is a remarkably incomplete view of our third president’s thinking on this subject.<sup>11</sup>

More subtle and arguably less objectionable is the occasional mention of words like “piracy” and “theft.” It appears that many people believe that the use of “theft” and “piracy” to describe copyright infringement is a recent rhetorical flourish by the copyright industries—rhetoric intended to tilt the conversation in their favor. This appears in subtle statements in the literature<sup>12</sup> and more blunt statements like that made by Robert Heverly:

Counterfeiting involves attempting to pass off an unauthorized product as the legitimate, authorized original good as produced by the owner. The copyright industry has dubbed this activity “piracy,” and it includes any “unauthorized” copying of protected works.<sup>13</sup>

9. John Perry Barlow, *The Economy of Ideas*, WIRED, Mar. 1994, at 84, available at <http://www.wired.com/wired/archive/2.03/economy.ideas.html>. Mark Lemley also quotes this letter for the same purpose in Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1031 (2005) [hereinafter Lemley, *Free Riding*].

10. Schwartz & Treanor, *supra* note 6, at 2377.

11. For a more extensive discussion of Jefferson’s views, see Adam Mosoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. (forthcoming 2007).

12. Sometimes this is done expressly. See, e.g., Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 896 (1997) [hereinafter Lemley, *Romantic Authorship*] (reviewing JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* (1996)). Lemley writes: “Intellectual property cases and arguments are replete with references to infringement as ‘theft,’ which it assuredly is not, at least in the traditional meaning of that word”). Sometimes this is done obliquely, as when an author puts quotation marks around piracy, such as Alan Story did in mentioning news “[a]rticles on so-called copyright ‘piracy’ in [developing] countries.” Alan Story, *Burn Berne: Why the Leading International Copyright Convention Must Be Repealed*, 40 HOUS. L. REV. 763, 765 (2003). As stated later in this Article, if the quotation marks are intended to say that the use of the word is new, then it falls into the historical claim. If the quotation marks are only “scare quotations” and the point is to sensitize us to the use of the word, then that is completely justified. See *infra* notes 46–47 and accompanying text. See also Laurie Stearns, Comment, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CAL. L. REV. 513 *passim* (1992) (arguing that “infringement” is morally neutral, while other terms—like “plagiarism”—carry much more moral weight). Stearns’s claim has such wide currency that even those generally defending copyright sometimes concede it. See, e.g., BÉNÉDICTE CALLAN, *PIRATES ON THE HIGH SEAS: THE UNITED STATES AND GLOBAL INTELLECTUAL PROPERTY RIGHTS* (1998), available at <http://www.ciaonet.org/book/callan/index.html>.

13. Robert A. Heverly, *The Information Semicommons*, 18 BERKELEY TECH. L.J. 1127, 1173 (2003).



Similarly, in a 2003 online discussion, one copyright professor commented that he had been “chafing for some time about BSA [Business Software Alliance] popularization of the word ‘piracy’ as substitute for copyright infringement.”<sup>14</sup> While it is definitely true that the content industries like to use “theft” and “piracy” to describe unauthorized reproduction and distribution,<sup>15</sup> there is nothing new about this terminology. If “piracy” tilts the conversation, Part III will describe how the conversation has been tilted for a long time.

In a similar free spirit but with much greater frequency and emphasis, commentators have noted that “intellectual property” is a relatively new term. As with “piracy,” the implication is that this term has been foisted upon us by industry conglomerates or international bureaucrats. Mark Lemley, Siva Vaidhyanathan, Neil Netanel, Larry Lessig, David Nimmer, myself, and various other scholars and “reports” have all either implied or said this expressly. Lemley writes that “[p]atent and copyright law have been around in the United States since its origin, but only recently has the term ‘intellectual property’ come into vogue.”<sup>16</sup> Vaidhyanathan calls the term intellectual property “fairly young.”<sup>17</sup> Netanel is a bit more blunt: “The copyright industries regularly employ the rhetoric of private property

14. Online Posting (Nov. 29, 2004) (on file with author).

15. The Recording Industry Association of America’s website is quite vivid about this use of “piracy”:

*Old as the Barbary Coast, New as the Internet*—No black flags with skull and crossbones, no cutlasses, cannons, or daggers identify today’s pirates. You can’t see them coming; there’s no warning shot across your bow. Yet rest assured the pirates are out there because today there is plenty of gold (and platinum and diamonds) to be had. *Today’s pirates operate not on the high seas but on the Internet, in illegal CD factories, distribution centers, and on the street.*

Recording Industry Association of America, Anti-Piracy, <http://www.riaa.com/issues/piracy/default.asp> (last visited May 30, 2006). The website continues that “[e]ach year, the industry loses about \$4.2 billion to piracy worldwide—‘we estimate we lose millions of dollars each day to all forms of piracy.’” *Id.* The Motion Picture Association of America’s website language is equally broad. “Manufacturing, selling, distributing, or making copies of motion pictures without the consent of the copyright owners is illegal. . . . Movie pirates are thieves, plain and simple. . . . ALL forms of piracy are illegal and carry serious legal consequences.” John Horn, *Avast, Ye Pirates! The Rating Board Is Accused of Copying a Critical Work*, L.A. TIMES, Jan. 25, 2006, at E1. The Business Software Alliance, in contrast, tends to consistently refer to “software piracy.” Business Software Alliance, Anti-Piracy Information, <http://bsa.org/usa/antipiracy/> (last visited May 30, 2006).

16. Lemley, *Romantic Authorship*, *supra* note 12, at 895. The statement is repeated verbatim in Lemley, *Free Riding*, *supra* note 9, at 1033.

17. SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS 11 (2001). See also FREE EXPRESSION POLICY PROJECT, “THE PROGRESS OF SCIENCE AND USEFUL ARTS”: WHY COPYRIGHT TODAY THREATENS INTELLECTUAL FREEDOM 4–5 (2003) (discussing aggressive assertions of copyright control over the last quarter century), available at <http://www.fepproject.org/policyreports/copyright2d.pdf>.

to support their lobbying efforts and litigation.”<sup>18</sup> Netanel also points out that Congress’s first copyright statute (in 1790) established only a few rights for a few categories of works, and therefore reasons that the Founding Fathers’ vision of copyright was a “decidedly limited grant [that] hardly exemplifies the copyright industries’ current private property rhetoric.”<sup>19</sup>

#### A. “INTELLECTUAL PROPERTY” AND THE SCHOLARLY HOUSE OF MIRRORS

Before turning to the historical record, it is useful to look at the closed society in which legal scholars make these statements, in particular those statements about the phrase “intellectual property” (“IP”). While the Lemley, Vaidhyathan, and Lessig comments are all directed at the subject matter of intellectual property generally, the focus seems to be on the protection of copyrighted works. Professor Lemley’s thought that IP is more in vogue now than in the past is fair enough—and cannot be disproved without a definition of “vogue.” In his 1997 article, Lemley’s supporting footnote to this idea cites only the 1967 formation of the World Intellectual Property Organization (“WIPO”) and the rechristening of the American Bar Association (“ABA”) section.<sup>20</sup> To be fair, when Lemley repeated the assertion in a 2005 article, he acknowledged that the phrase “intellectual property” can be found further back, and cited one circuit court case from 1845.<sup>21</sup> Craig Joyce made a similar assertion in 2005, recognizing the same 1845 case, but still claiming that intellectual property as a term “gained general circulation only after WIPO’s creation.”<sup>22</sup>

18. Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 22 (2003).

19. *Id.* at 23.

20. Lemley, *Romantic Authorship*, *supra* note 12, at 896 n.123. The ABA Section on “Patents, Copyrights, and Trademarks” was renamed the Intellectual Property Section. Lemley also points to a French volume, A. NION, *DROITS CIVILS DES AUTEURS, ARTISTES ET INVENTEURS* (1846) (referring to “propriété intellectuelle”), as proof of earlier use of the term *in Europe*, but then says “[t]hese uses [like the title to Nion’s volume] do not seem to have reflected a unified property-based approach to the separate doctrines of patent, trademark, and copyright, however.” *Id.* It is not clear what Lemley means. The *Nion* volume proves just the opposite in both its title and content: “propriété intellectuelle” is being used to describe the work of authors, artists, and inventors. As for trademarks, even to this day there are ways to slice the pie that do not count them as intellectual property.

21. Lemley, *Free Riding*, *supra* note 9, at 1033 n.4. (citing *Davoll v. Brown*, 7 F. Cas. 197, 199 (C.C.D. Mass. 1845) (No. 3662) (calling intellectual property “the labors of the mind” and concluding they were “as much a man’s own . . . as what he cultivates, or the flocks he rears”).

22. Craig Joyce, “A Curious Chapter in the History of Judicature”: *Wheaton v. Peters and the Rest of the Story (of Copyright in the New Republic)*, 42 HOUS. L. REV. 325, 328 n.3 (2005).

But by 2005, the tasty “vogue” idea from 1997 was already coursing through the system. Professor Vaidhyanathan wrote the following in his 2001 book *Copyrights and Copywrongs*:

The phrase intellectual property is fairly young. Mark Lemley writes that the earliest use of the phrase he can find occurs in the title of the United Nation’s World Intellectual Property Organization, first assembled in 1967. Soon after that, the American Patent Law Association and the American Bar Association Section on Patent, Trademark, and Copyright Law changed their names to incorporate “intellectual property.”<sup>23</sup>

No supporting evidence beyond Lemley’s examples and no other references are given.

Vaidhyanathan was then cited by Larry Lessig in his 2004 book *Free Culture* when Lessig said in a footnote that “[t]he term *intellectual property* is of relatively recent origin.” Professor Lessig’s *Free Culture* footnote also cited to a footnote from his 2001 book, *The Future of Ideas*, which is a touch less guarded (“[t]he term is of recent origin”), but gives more evidence that “recent origin” actually means late nineteenth century.<sup>24</sup> Understood that way, “recent origin” is both pretty accurate and something I have said myself *without sufficient evidence*.<sup>25</sup> But Lessig’s 2004 footnote sits there with no easy explanation about what “recent” means—making it free to float into some blog or digerati essay. If the reader knew “recent” meant one hundred or more years ago, it would be less meaningful in our concerns about overproptertization of information today.

Meanwhile, Richard Stallman has taken Lemley’s 1997 statement outside the legal scholarship and turned it into a post-1967 “fad.” Stallman wrote the following on the GNU site:

It has become fashionable to describe copyright, patents, and trademarks as “intellectual property”. This fashion did not arise by accident—the term systematically distorts and confuses these issues, and its use was and is promoted by those who gain from this confusion. Anyone wishing to think clearly about any of these laws would do well to reject the term.

One effect of the term is a bias that is not hard to see: it suggests thinking about copyright, patents and trademarks by analogy with property rights

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23. VAIDHYANATHAN, *supra* note 17, at 11–12.

24. LESSIG, *supra* note 7, at 28 n.7. The footnote cites only to VAIDHYANATHAN, *supra* note 17, at 11, and LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 293 n.26 (2001).

25. I, too, recently wrote in a footnote that “[a]s many have noted, the whole notion of ‘intellectual property’ is a post-eighteenth century construct.” Justin Hughes, *How Extra-Copyright Protection of Databases Can Be Constitutional*, 28 DAYTON L. REV. 159, 161 n.5 (2003). While that remains factually accurate, I was wrong to imply anything contrary to the evidence described here.

for physical objects. . . . [U]se of this term leads legislators to change them to be more so. Since that is the change desired by the companies that exercise copyright, patent and trademark powers, these companies have worked to make the term fashionable.

According to Professor Mark Lemley, now of the Stanford Law School, the widespread use of the term “intellectual property” is a fad that followed the 1967 founding of the World “Intellectual Property” Organization, and only became really common in the past few years. (WIPO is formally a UN organization, but in fact it represents the interests of the holders of copyrights, patents and trademarks.)<sup>26</sup>

Similarly, a Free Expression Policy Project report cites Vaidhyanathan, who relied solely on Lemley, and “notes that the term ‘intellectual property’ is ‘fairly young,’ having originated with the UN’s World Intellectual Property Organization (WIPO) in 1967.”<sup>27</sup> Thus, the viral power of a statement by a respected academic.

## B. THE ROLE OF THESE HISTORICAL CLAIMS

But it is important to see that comments about intellectual property being “recent” or a “fad” or in “vogue” are more than passing observations. The claim that “intellectual property” is a new concept has both a *causal* role and an *evidentiary* role in scholarly narratives. Some argue that the phrase *causes* judges and policymakers to treat copyright as property with rigid, if not absolutist, rights. Stewart Sterk seems to argue along these lines when he says “general acceptance of the ‘intellectual property’ label has spawned analogies to the protections afforded other forms of property—particularly real property.”<sup>28</sup> But the “recent” appearance of “intellectual property” is also used as *evidence* that judges and policymakers are treating copyright like real and/or chattel property. The causal and evidentiary roles of the phrase “intellectual property” are important enough that both Lessig and Lemley have presented charts showing the tremendous growth of the phrase “intellectual property” in federal case law.<sup>29</sup>

By the lights of these charts, there has been a massive paradigm shift in how judges think about copyright (and patent), evidenced by the phrase

26. Richard M. Stallman, *Did You Say “Intellectual Property”? It’s a Seductive Mirage*, GNU (2004), <http://www.gnu.org/philosophy/not-ipr.xhtml>.

27. FREE EXPRESSION POLICY PROJECT, *supra* note 17, at 5.

28. Stewart Sterk, *Intellectualizing Property: The Tenuous Connections Between Land and Copyright*, 83 WASH. U. L.Q. 417, 420 (2005).

29. See Lemley, *Free Riding*, *supra* note 9, at 1033; LESSIG, *supra* note 24, at 294.

“intellectual property” but possibly caused by it as well. We will return to these issues again and again.

### III. TAKING COPYRIGHT HISTORY (MORE) SERIOUSLY

The claims commentators have made about the notion of “intellectual property”—whether casting it as a causal force or enlisting it as evidence of a conceptual shift—are incomplete and a little loose. More importantly, any such claim loses much of its strength unless it is accompanied by an argument that is completely absent from these scholars’ writings.

The irrelevance of the phrase “intellectual property” vis-à-vis copyright comes from the *robust history* of copyright being referred to as “property” or “literary property.” No one has explained clearly why referring to copyrights as “intellectual property” is more dangerous for “spawn[ing] analogies to the protections afforded . . . real property”<sup>30</sup> than referring to copyright as “literary property” or just “property.”<sup>31</sup> In fact, it seems to be that “property” is the culprit. For example, after describing the increasing use of “intellectual property,” William Fisher asks “[w]hy does the popularity of the term matter?” and answers “[s]pecifically, the use of the term ‘property’ to describe copyrights, patents, trademarks, etc. conveys the impression that they are fundamentally ‘like’ interests in land or tangible personal property.”<sup>32</sup> But if “property” is the troublesome concept/word, then the rise of “intellectual property” to describe copyright—in lieu of “property” or “literary property”—has little bearing on the “propertization” of copyright. My assertion is twofold: (1) the claim that copyright has only recently been “intellectual property” is a much weaker proposition factually than as presented by these writers; and (2) regardless, the point is not very useful to their arguments, given that copyright has been recognized as “property” for 200 or more years.

Along the way to point (2), we will see that Thomas Jefferson’s views about intellectual property were more nuanced than is often presented and

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30. Sterk, *supra* note 28, at 420.

31. In his footnotes, Mark Lemley writes that “[t]hese uses do not seem to have reflected a unified property-based approach to the separate doctrines of patent, trademark, and copyright,” but it is not at all clear how (limiting our concerns to copyright) a “unified property” moniker produces any more trouble for our reasoning than did calling copyrights “literary property” or just “property.” See Lemley, *Romantic Authorship*, *supra* note 12, at 896 n.123; Lemley, *Free Riding*, *supra* note 9, at 1033 n.4.

32. William W. Fisher III, *Geistiges Eigentum—ein ausufernder Rechtsbereich: Die Geschichte des Ideenschutzes in den Vereinigten Staaten*, in *EIGENTUM IM INTERNATIONALEN VERGLEICH* 265 (Vandenhoeck & Ruprecht 1999), translated in *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States* 22, <http://cyber.law.harvard.edu/people/ffisher/iphistory.pdf>.

that any claim that “piracy” is a term newly foisted upon us to describe copyright infringement simply ignores the historical record. Indeed, the history of copyright shows literary “piracy” having conceptual currency before the concept of copyright itself crystallized. And all of this evidence is available from a very modest reading of easily available materials.

None of this historical material changes the fact that we should be vigilant in controlling and patrolling concepts like “piracy” and “property.” We can and should debate how the words should be used; if we generally agree on proper usages, we should insist on rigorous adherence to those uses.

#### A. COPYRIGHT AS “INTELLECTUAL PROPERTY”

Let us start with the statement that “[t]he phrase ‘intellectual property’ is fairly young.”<sup>33</sup> Expressly following Lemley, Vaidhyathan tells us the phrase’s earliest use “occurs in the title of the United Nation’s World Intellectual Property Organization, first assembled in 1967.”<sup>34</sup> When you think about that carefully, however, there is something *prima facie* odd about a story that traces “intellectual property” back to the formation of the WIPO. The story supposes that a multilateral treaty would be written<sup>35</sup> and an international agency established with a wholly new name *that no one was familiar with*.<sup>36</sup> In fact, WIPO’s predecessor international agency was called the “United International Bureaus for the Protection of Intellectual Property.” It was commonly known by its French acronym, BIRPI.<sup>37</sup> BIRPI was formed in 1893, as a combination of two small agencies that had been

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33. VAIDHYANATHAN, *supra* note 17, at 11–12 (2001).

34. *Id.* You might say that Vaidhyathan is just repeating Lemley, but there is some ramification here, just as when President Bush said “[t]he British government has learned that Saddam Hussain recently sought significant quantities of uranium from Africa” in the 2003 State of the Union speech. President George W. Bush, State of the Union Address (Jan. 28, 2003) (transcript available at <http://www.cnn.com/2003/ALLPOLITICS/01/28/sotu.transcript/>).

35. Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1770, available at [http://www.wipo.int/treaties/en/convention/trtdocs\\_wo029.html](http://www.wipo.int/treaties/en/convention/trtdocs_wo029.html).

36. To illustrate, consider the example of the “United Nations,” which was not a moniker created out of whole cloth to replace the League of Nations. “The name ‘United Nations’ was devised by United States President Franklin D. Roosevelt and was first used in the ‘Declaration by United Nations’ of 1 January 1942, during the Second World War, when representatives of 26 nations pledged their Governments to continue fighting together against the Axis Powers.” Origins of the United Nations, <http://www.un.org/Overview/origin.html> (last visited June 9, 2006). During World War II, the allies had sometimes been referred to officially as the “United Nations.”

37. In French, the agency was called “les Bureaux internationaux réunis pour la protection de la propriété intellectuelle.” See WIPO, General Information, The Beginning, [http://www.wipo.int/about-wipo/en/gib.htm#P29\\_4637](http://www.wipo.int/about-wipo/en/gib.htm#P29_4637) (last visited July 30, 2006).

established to administer, respectively, the Berne and Paris Conventions.<sup>38</sup> Thus, “intellectual property” was a conscious, nineteenth-century category created to subsume both “literary property” (Berne) and “industrial property” (Paris).

If this were the sole evidence, it would be fair to think that the concept of “intellectual property” had its origins principally or uniquely in continental legal systems, and was eventually imported into Anglo-American jurisdictions. In the extreme version of that story, the “importation” does not occur until WIPO is created in 1967. But “intellectual” and “property” were already being alloyed in American jurisprudence and commentary in the nineteenth century; this process picked up steam in the 1930s and 1940s. As Lemley and Joyce separately acknowledged in 2005, the first appearance of the phrase “intellectual property” in a reported American case seems to be an 1845 circuit court decision.<sup>39</sup> No one has uncovered any evidence that this 1845 usage touched off puzzlement. And there is a simple reason: as we will see, the courts and legislatures had regularly discussed copyrighted works as “property” throughout the seventeenth, eighteenth, and early nineteenth centuries, with the adjectival concepts of “artistic,” “literary,” and “intellectual” orbiting around the property notion.

Outside the courts, an 1878 book defending the patent system was given the title *Thoughts on the Nature of Intellectual Property and Its Importance to the States*.<sup>40</sup> A decade later, Henry Van Dyke’s 1888 tract calling for extension of copyright to foreign authors used the phrase “intellectual property” *without initial discussion or definition*.<sup>41</sup> During the same period, the Supreme Court mentioned “intellectual property” for the first time in its opinions. In the 1873 case of *Mitchell v. Tilghman*,<sup>42</sup> the Court quotes from a letter: “I must be content with wishing that Mr. Tilghman should have the courage to defend his intellectual property, that

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38. *Id.*

39. *Davoll v. Brown*, 7 F. Cas. 197, 199 (C.C.D. Mass. 1845) (No. 3662). *Davoll* states: Only thus can ingenuity and perseverance be encouraged to exert themselves in this way usefully to the community; and only in this way can we protect intellectual property, the labors of the mind, productions and interests as much a man’s own, and as much the fruit of his honest industry, as the wheat he cultivates, or the flocks he rears.

40. NATHANIEL S. SHALER, *THOUGHTS ON THE NATURE OF INTELLECTUAL PROPERTY AND ITS IMPORTANCE TO THE STATE* (Boston, J.R. Osgood & Co. 1878), cited in BRUCE W. BUGBEE, *GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW* 3–4 (1967).

41. HENRY VAN DYKE, *THE NATIONAL SIN OF LITERARY PIRACY* 14–15 (New York, C. Scribner’s Sons 1888). Van Dyke first uses the phrase in a translation of the German phrase “der Schutz des Geistigen Eigenthums,” but does not define the phrase, and then uses it in reference to literature in America.

42. *Mitchell v. Tilghman*, 86 U.S. (19 Wall.) 287 (1873).

is to say, his honor.”<sup>43</sup> This could be read to equate “intellectual property” with “honor,” but the case concerns a patented process and, in context, the letter seems to actually equate Mr. Tilghman’s patented process with the gentleman’s honor.<sup>44</sup> In any event, while these are not the words of any Justice, the letter itself is evidence of the phrase’s popular use—and the Court shows no need to explain that use.

Just a few years later—in 1890—Samuel Warren and Louis Brandeis’s seminal work on privacy put forward, among its many ideas, the notion that “legal doctrines relating to *infractions* of what is ordinarily termed the common-law right to intellectual and artistic property, are, it is believed, but instances and applications of a general right to privacy.”<sup>45</sup> Apparently “artistic property” or “intellectual property” were assumed by the authors to be terms that would be readily understood to refer to a person’s writings. Brandeis used the phrase again in his vigorous, pro-information freedom dissent to the 1918 case *International News v. Associated Press*, in which he referred to the “established rules governing literary property” and the plaintiff’s arguments about “uncopyrighted intellectual and artistic property.”<sup>46</sup> Again, Brandeis made those references without using scare quotations. In the 1937 case *Waring v. WDAS Broadcasting*, the Pennsylvania Supreme Court wrote of how “the birth of the printing press made it necessary for equity to inaugurate a protection

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43. *Id.* at 349.

44. The language quoted above comes closely after another passage that reads: “If the Messrs. Tilghman wish to draw any profit from their patent, they ought to prosecute him for infringement as soon as possible. Let them think of it seriously.” *Id.* at 348–49.

45. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890) (emphasis added). Warren and Brandeis argued for a more profound understanding of common law copyright than property—that is, “property” was the established construct they were working against:

No other has the right to publish his productions in any form, without his consent. This right is wholly independent of the material on which, the thought, sentiment, or emotions is expressed. It may exist independently of any corporeal being, as in words spoken, a song sung, a drama acted. Or if expressed on any material, as a poem in writing, the author may have parted with the paper, without forfeiting any proprietary right in the composition itself. . . . The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.

*Id.* at 199, 205.

46. *Int’l News v. Associated Press*, 248 U.S. 215, 256 (1918) (Brandeis, J., dissenting).



for literary and intellectual property.”<sup>47</sup> Thus, by the 1930s and 1940s—decades before WIPO was founded—there were plenty of lawyerly references to “intellectual property.”

With no claim that this is anything near an exhaustive survey, the point is that it is simply incomplete historiography for scholars to make assertions that “intellectual property” pops up for the first time in the late twentieth century, and/or to cite only an 1845 circuit court decision as a rare outlier when, in fact, the phrase appeared much more often. We now turn to the phrase’s obvious antecedents.

### B. THREE CENTURIES OF COPYRIGHT AS “LITERARY PROPERTY,” OFTEN SUBJECT TO “THEFT” AND “PIRACY”

The quotations above hint at a broader truth: American legal minds in the late nineteenth and early twentieth centuries were using “literary,” “artistic,” and “intellectual” virtually interchangeably to refer to a kind of “property” in expressive works. As this section will show—and as the Second Circuit noted in 1904—“[t]he recognition of the doctrine of a distinctive literary property has existed from very early times.”<sup>48</sup> Unless we can be shown how a special grip on the mind comes from “intellectual property” or the combination of copyright and patents under one umbrella, this long history of calling copyright “property” must be acknowledged. (There is a parallel history of calling patents “industrial property” or “property.”) As detailed here, our Founders legislated in an environment where copyrights were commonly understood to protect “property,” “legal property,” or “literary property.”<sup>49</sup>

The question of whether copyrights were property had been debated by seventeenth- and eighteenth-century English jurists and writers, albeit in a jumble of other issues. Through those debates the view that copyright was property steadily strengthened. While the issue might not have been totally resolved by the time of the American Revolution, the colonists-cum-revolutionaries may have missed some of the nuances of the English debate—and appear to have landed more squarely on the copyright-is-

47. *Waring v. WDAS Broad.*, 194 A. 631, 632 (Pa. 1937). The court unquestionably viewed copyright as establishing property rights:

The law has never considered it necessary for the establishment of property rights in intellectual or artistic productions that the entire ultimate product should be the work of a single creator; such rights may be acquired by one who perfects the original work or substantially adds to it in some manner.

*Id.* at 635.

48. *Werckmeister v. Am. Lithographic Co.*, 134 F. 321, 324 (2d Cir. 1904).

49. Perhaps the most thorough historical account comes from BUGBEE, *supra* note 40 *passim*.

property side. In that sense, the recent scholarly debate about the “proPERTIZATION” of copyright recapitulates this seventeenth- and eighteenth-century debate—with modern scholars seemingly cautioning modern judges and policymakers not to do what seventeenth- and eighteenth-century judges and policymakers have already done.

### 1. Piracy, Property, and the Statute of Anne

Most students of copyright are familiar with how the Statute of Anne arose in 1710 from the licensing system of the Stationer’s Company. Organized in 1557 by royal prerogative,<sup>50</sup> this guild provided the British Crown with a form of soft censorship, and the members of the guild with a coordinated monopoly, in which each publisher respected the others’ claims to exclusive publishing rights in particular works through an official registry. The guild’s monopoly position was legally guaranteed, first by Star Chamber decrees promulgated from 1556 through 1637, and then, with the Star Chamber’s abolition in 1640, by parliamentary ordinances and statutes repeatedly renewed until the last statute expired in 1694.<sup>51</sup>

It is worth noting that during this pre-Statute of Anne period, “piracy” was widely used to describe unauthorized printing of books. Adrian Johns traces “piracy” as a description of unauthorized copying to John Fell, the Bishop of Oxford who resuscitated the fledgling Oxford University Press after the Restoration.<sup>52</sup> According to Johns’s exhaustive study of book publishing in England, *The Nature of the Book*, piracy had a “technical meaning” in the seventeenth century: “a pirate was someone who indulged in the unauthorized reprinting of a title recognized to belong to someone else by the formal conventions of the printing and bookselling community.”<sup>53</sup> Beyond this technical meaning, piracy “soon came to stand for a wide range of perceived transgressions of civility emanating from print’s practitioners.”<sup>54</sup>

In other words, instead of “copyright” being the legal term and “piracy” being loaded rhetoric from late twentieth-century Washington

50. MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 35–36 (1993) [hereinafter ROSE, *AUTHORS AND OWNERS*].

51. See E.J. MACGILLIVRAY, *A TREATISE UPON THE LAW OF COPYRIGHT IN THE UNITED KINGDOM AND THE DOMINIONS OF THE CROWN, AND IN THE UNITED STATES* 4 (1902); EATON S. DRONE, *A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES* 54–67 (Boston, Little Brown 1879). Throughout this text, Stationer’s Company and Stationer’s Guild are used interchangeably.

52. ADRIAN JOHNS, *THE NATURE OF THE BOOK* 32 (1998).

53. *Id.*

54. *Id.*

lobbyists, it appears that “piracy” preceded the modern concept of copyright. This seems curious—we might expect a firm concept of property to come first. But it is really not surprising: we commonly use “piracy” or “theft” in circumstances where the legal concept of property is lacking, but we still sense that something “belongs” to someone through some mechanism—whether legal, ethical, or social. It is in this fashion that “piracy” still retains its definition as plagiarism—the taking of someone’s words or ideas as if they are your own<sup>55</sup>—and people discussing modern operating system interfaces might say “[t]hey are all based on the same technology stolen from Xerox.”<sup>56</sup> Nonetheless, “piracy” seems to function as a rhetorical tool, implicitly advocating a normative agenda in favor of some kind of property or ownership, whether it is modern fashion designers complaining about “style piracy”<sup>57</sup> or John Addison lamenting in pre-1710 circumstances that the author “has no Property in what he is willing to produce, but is exposed to Robbery and Want”<sup>58</sup>—effectively using “robbery” as a trope to advocate property rights for authors.

As for the rise of modern copyright with the Statute of Anne and continuing in the eighteenth century, we are all indebted to the historical research of Mark Rose, as well as the work of Ray Patterson, Catherine Seville,<sup>59</sup> John Feather,<sup>60</sup> Brad Sherman and Lionel Bently. In his book, *Authors and Owners*, Rose traces the origins of Anglo-American copyright

55. See, e.g., WordNet, <http://wordnet.princeton.edu/perl/webwn?s=piracy> (last visited July 13, 2006) (giving the first definition of “piracy” as “hijacking on the high seas or in similar contexts; taking a ship or plane away from the control of those who are legally entitled to it” and as the second definition “the act of plagiarizing; taking someone’s words or ideas as if they were your own”).

56. As I overheard in a café while writing this article.

57. *Fashion Originators’ Guild, Inc. v. FTC*, 312 U.S. 457, 461 (1941). *Fashion Originators’ Guild* states:

Petitioners call this practice of copying unethical and immoral, and give it the name of “style piracy.” And although they admit that their “original creations” are neither copyrighted nor patented, and indeed assert that existing legislation affords them no protection against copyists, they nevertheless urge that sale of copied designs constitutes an unfair trade practice and a tortious invasion of their rights.

*Id.* *Millinery Creators’ Guild v. FTC*, 109 F.2d 175, 177 (2d Cir. 1940) (“The Guild emphasizes the immorality of style piracy, and urges that it is an abuse which honest and respectable merchants may permissibly combine to eliminate.”); *Johnny Carson Apparel, Inc. v. Zeeman Mfg. Co.*, No. C75-544A, 1977 U.S. Dist. LEXIS 12269, at \*7 (N.D. Ga. Dec. 20, 1977) (“More commonly known as ‘style piracy,’ copying successful clothing designs simply gives rise to no right of action.”). In these cases, even the private action against “style piracy” is condemned, but the point is that the phrase “style piracy” reverberates—and is easily comprehended—even by those who profoundly disagree that it has legal implications of any sort.

58. ROSE, *AUTHORS AND OWNERS*, *supra* note 50, at 36–37.

59. See generally CATHERINE SEVILLE, *LITERARY COPYRIGHT REFORM IN EARLY VICTORIAN ENGLAND* (1999).

60. See generally JOHN FEATHER, *PUBLISHING, PIRACY, AND POLITICS: AN HISTORICAL STUDY OF COPYRIGHT IN BRITAIN* (1994).

and sees the individuated “author” and the “literary property” concept emerging hand-in-hand in the seventeenth and eighteenth centuries.<sup>61</sup> Against a licensing system founded on royal prerogative, the “author” who owned “property” arose as the competitor—and replacement—justification for exclusive publishing rights.<sup>62</sup> The author-property duo flourished within a friendly intellectual milieu emphasizing the links between liberty and property.<sup>63</sup>

The emergence of the property concept was slow, occasionally suffered setbacks, and probably was not always obvious—to them or to us. For example, in 2001 David Nimmer discusses the period when book publishing was controlled by the Stationer’s Guild as follows:

At that time, there was no such thing as intellectual “property.” Rather, the term “propriety” defined the state of mind of all concerned. The upshot is that those who usurped the priority contained in the official registry were guilty of a gross breach of propriety.<sup>64</sup>

Nimmer cites to Vaidhyanathan’s *Copyrights and Copywrongs*, as well as Adrian Johns’s *The Nature of the Book*. But I think we are on thin ice with this sort of distinction, particularly using it to claim that “there was no such thing as intellectual ‘property’” in seventeenth-century states of mind.

Our modern word “propriety” comes from the Middle English word “proprietie,” which comes from the Old French word “propriété,”<sup>65</sup> which means—in old and modern French—both “property” and “correctness” or “suitability.”<sup>66</sup> In 1693, the Licensing Act—the system Nimmer describes—was due for renewal. In the House of Lords, a group of eleven peers objected to any renewal on the grounds that the privileges being

61. But Rose’s work is surprisingly uncited in the literature. For example, Lemley’s *Free Riding* article cites to one page of Rose’s *AUTHORS AND OWNERS*, *supra* note 50—for the proposition that Blackstone drew a parallel between author’s rights and property—without citing to the abundant discussion in the rest of the book. Lemley, *Free Riding*, *supra* note 9, at 1034 n.7.

62. See generally ROSE, *AUTHORS AND OWNERS*, *supra* note 50.

63. *Id.*

64. David Nimmer, *Copyright in the Dead Sea Scrolls*, 38 *HOUS. L. REV.* 1, 140 (2001).

65. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1819 (1993).

66. For a modern definition of propriété, see J. BALEYTE ET AL., *DICTIONNAIRE JURIDIQUE, FRANÇAIS-ANGLAIS, ANGLAIS-FRANÇAIS* 236 (4th ed. 1998). For the seventeenth-century meaning of propriété, see ANTOINE FURETIERE, *DICTIONNAIRE UNIVERSEL CONTENANT GENERALEMENT TOUTS LES MOTS FRANCOIS TANT VIEUX QUE MODERNES & LES TERMES DE TOUTES LES SCIENCES ET DES ARTS* (1690) (troisième tome, P-Z), which offers separate definitions of propriété, including “vertu particuliere et qualite quee la nature a donne a tous les corps” and “en terme de Droit, signifie le fonds, le domaine [domaine], la seigneurie de quelque chose, don’t on est maitre absolu, qu’on peut vendre, engager, ou en disposer a son plaisir.”

given to publishers “destroy[] the Properties of Authors in their Copies.”<sup>67</sup> In Rose’s view, “[i]t is impossible to say whether in speaking of the ‘properties of authors,’ the lords were thinking more in terms of propriety . . . or in terms of property in an economic sense.”<sup>68</sup> In contrast, John Feather’s historical research led him to conclude that the “copies” registered during the seventeenth century at the Stationer’s Company “were, logically enough, being treated as pieces of property.”<sup>69</sup> Indeed, during this period, John Locke himself proposed that the Stationer’s Company members have a form of property. In a 1694 memorandum to Edward Clarke, a member of Parliament, Locke opposed renewal of the Licensing Act with perpetual publishing rights. Instead, he wrote, “it may be reasonable to limit their *property* to a certain number of years after the death of the author, or the first printing of the book, as, suppose, fifty or seventy years.”<sup>70</sup> (Yes, in 1694 John Locke proposed a life plus seventy years term of protection.<sup>71</sup>)

The drafting of the Statute of Anne has elements reflecting both the property concept’s emergence and arguable pushback against the concept. As originally submitted, the title of the bill was *A Bill for the Encouragement of Learning and for Securing the Property of Copies of Books to the Rightful Owners Thereof*.<sup>72</sup> The title followed from a petition by the London booksellers that would have expressly vested “property” in them.<sup>73</sup> According to Rose, “property” was dropped from the title to

67. ROSE, AUTHORS AND OWNERS, *supra* note 50, at 32.

68. *Id.* Rose also says, of the immediate pre- and post-Statute of Anne period, “[t]hus matters of propriety became entangled with matters of property.” *Id.* at 81. Indeed, the liaison between “property” and “propriety” continued in the nineteenth and twentieth centuries. Rose observes that in their seminal work on privacy, Warren and Brandeis turned to copyright cases concerning unpublished letters—a sensible strategy because “copyright cases from the earliest days had mingled matters of privacy with matters of property.” *Id.* at 140.

69. FEATHER, *supra* note 60, at 18.

70. 1 LORD PETER KING, THE LIFE OF JOHN LOCKE 375, 387 (London, Henry Colburn, 1830). My gratitude to Mark Rose for identifying this little cited memo of Locke’s. Rose cites this as a memorandum to Edward Clarke, but Peter King’s introduction of the memorandum does not make that clear. King does verify that the date is probably 1694. *Id.* at 375. See Mark Rose, *Nine-tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 LAW & CONTEMP. PROBS. 75, 78 (Winter/Spring 2003) [hereinafter Rose, *Nine-tenths of the Law*].

71. The Memorandum is also available at Justin Hughes, [http://justinhughes.net/Locke\\_copyright\\_memo.html](http://justinhughes.net/Locke_copyright_memo.html) (last visited July 31, 2006).

72. Carla Hesse, *The Rise of Intellectual Property, 700 B.C.–A.D. 2000: An Idea in the Balance*, DAEDALUS, Spring 2002, at 26–45, available at <http://www.amacad.org/publications/spring2002/hesse.pdf>.

73. ROSE, AUTHORS AND OWNERS, *supra* note 50, at 42 (the parliamentary records for the Statute of Anne begin with the London booksellers submitting a petition for a bill “securing to them the Property of Books, bought and obtained by them”).

address concerns about perpetual property rights and the operative legal verb was changed from “securing” to “vesting” to avoid claims that the legislation was only “securing,” which already existed under common law.<sup>74</sup> To the modern eye, much of the Statute appears to be written in a chattel property discourse. In both title and text, it refers to “Copies” of “Books,” such as when it gives rights to Authors “who hath not Transferred to any other the Copy or Copies of such Book or Books.”<sup>75</sup>

Superficially, this could be used to dispute the claim that the Statute established property rights in a class of *intangibles*. But the Statute was written in language that the affected citizens (authors, printers, and booksellers) would understand. The reference to “Book” is at least partly, if not principally, in an incorporeal sense—a use that echoes today when a religious person refers to “the Good Book.” For example, the Statute refers to “Share or Shares” of “Books”—which surely are not volumes torn apart—and cites the harm caused to authors when Printers “Printed, Reprinted, and Published Books and other Writings without the consent of the Authors.”<sup>76</sup> (This is the same “Writings” that migrated to Article 1, Section 8, Clause 8 of our Constitution.)

Indeed, through the 1800s “book” was the term in both English and American law for what we now call the incorporeal “literary work.” In the period 1775–1810, English courts expressly loosened their understanding of a “book” in English copyright law to include single pages of music, single-page letters, pamphlets, and so forth.<sup>77</sup> In 1843, English copyright law was amended, but only to codify the expanded notion of a “book,” not yet to replace it with the idea of a “work.”<sup>78</sup> “Work” did not replace “book” as the object of English copyright law until much later. American courts

74. *Id.* at 46–47.

75. Statute of Anne, 1710, 8 Ann., c. 19 (Eng.), available at <http://www.copyrighthistory.com/anne2.html>. My thanks to David Nimmer for forcing me to elaborate on this point.

76. *Id.* See also Michael W. Carroll, *The Struggle for Music Copyright*, 57 FLA. L. REV. 907, 951–54 (2005).

77. See Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 FORDHAM L. REV. 575, 600–04 (2004) (and cases cited therein).

78. See, e.g., DRONE, *supra* note 51, at 140. English law also expanded the scope of copyright’s coverage by specific legislative acts, such as The Prints Copyright Act (1777) and The Sculpture Copyright Act (1814). See generally MACGILLIVRAY, *supra* note 51, at 303–79 (containing an appendix that includes English copyright acts in the eighteenth and nineteenth centuries).

similarly embraced a broad understanding of “book”<sup>79</sup> until “work” appeared in the 1909 statute.<sup>80</sup>

While the final language of the Statute of Anne may have shown parliamentary resistance to the “claims that literary property was the same as that of houses and other estates,”<sup>81</sup> Rose recognizes the Statute as a significant event in the “propertization” of authorial claims:

The Statute of Anne, then, did not settle the theoretical questions behind the notion of literary property. Still, it did represent a significant moment in a process of cultural transformation . . . . The passage of the statute marked the divorce of copyright from censorship and the reestablishment of copyright under the rubric of property rather than regulation.<sup>82</sup>

Although “Property” was removed from the title, section II of the Statute of Anne provided that “whereas many Persons may through Ignorance offend against this Act, unless some Provision be made, whereby the Property in every such Book, as is intended by this Act to be secured to the Proprietors or Proprietors thereof,”<sup>83</sup> penalties under the Act would not be enforced unless a book’s title was recorded with the Stationer’s Company. The Statute as passed also refers to “Proprietors” of the rights granted at several points.<sup>84</sup>

In contrast to Rose’s conclusion that the Statute represented the “reestablishment of copyright under the rubric of property,” Patterson argues that the Statute of Anne was essentially “a trade-regulation statute”—one that was “enacted to bring order to the chaos created in the book trade by the lapse in 1694 of . . . the Licensing Act of 1662”<sup>85</sup> and was “directed to the problem of monopoly in various forms.”<sup>86</sup> Patterson makes his case principally by appeal to the statute’s text and sees as the

79. For example, in the 1829 case of *Clayton v. Stone*, the court considered a claim to copyright in a newspaper and concluded that “[a] book within the statute need not be a book in the common and ordinary acceptation of the word . . . it may be printed only on one sheet as the words of a song or the music accompanying it.” 5 F. Cas. 999, 1000 (C.C.S.D.N.Y. 1829) (No. 2872).

80. Copyright Act, ch. 320, 35 Stat. 1075, 1075–76 (1909). Section 1 of the 1909 Act recited the rights held by a copyright owner, in parallel to section 106 of the 1976 Act. Section 1 defined each right in terms of “the copyrighted work.” *Id.*

81. ROSE, *AUTHORS AND OWNERS*, *supra* note 50, at 47.

82. *Id.* at 48.

83. Statute of Anne, 1710, 8 Ann., c. 19 (Eng.), available at <http://www.copyrighthistory.com/anne2.html>.

84. *Id.*

85. LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 143 (1968).

86. *Id.* at 150.

“radical change” of the Statute “not that it gave authors the right to acquire a copyright . . . but that it gave that right to all persons.”<sup>87</sup>

For my limited purposes, it is not necessary to enter into the debate over whether the Statute of Anne was a “trade regulation” or “privatization.”<sup>88</sup> Applying more modern notions to shed light on older laws is always interesting and often useful, but the point here is less nuanced: the property concept figured in the bill’s original title and text—and survived into the binding statute. If the Statute of Anne was trade regulation, it was trade regulation through private mechanisms that were widely understood to be property. (Whether this eighteenth-century concept of property is different from ours is considered below.)

In the decades after 1710, the literary property concept continued to gain traction, including during the debates to expand copyright coverage and lengthen its term in the 1730s.<sup>89</sup> In 1734, the booksellers presented a petition to Parliament to amend the Statute of Anne speaking of “the Property of the Authors of such Books.”<sup>90</sup> The petition was referred to a parliamentary committee that reported back to the House, again describing what Authors held as “Property.”<sup>91</sup> Both this and a similar legislative attempt to gain longer copyright protection in 1736 failed in the House of Lords.<sup>92</sup> The point is neither that these efforts failed nor that the booksellers were hypocritically claiming to advance authors’ interests, but that the right held by authors was characterized as property. In fact, although the booksellers’ petition failed in 1734, during that very same year Parliament passed “The Engraving Copyright Act,”<sup>93</sup> which extended copyright protection to engravings and was captioned “[a]n Act for the Encouragement of the Arts of Designing, Engraving, and Etching historical and other Prints, by vesting the Properties thereof in the Inventors and Engravers, during the Times therein mentioned.” In short, “vesting” continued instead of “securing,” and “property”—a word edited out of the Statute of Anne—came blazing back into parliamentary acceptance. In a

87. *Id.* at 145.

88. See Shubha Gosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387, 389–90 (2003) (interpreting copyright law as a kind of privatization of the sovereign’s/government’s role in cultural production).

89. ROSE, *AUTHORS AND OWNERS*, *supra* note 50, at 52–58. John Feather locates “literary property” as first appearing in 1707. FEATHER, *supra* note 60, at 56.

90. PATTERSON, *supra* note 85, at 154.

91. *Id.*

92. *Id.* at 155–56.

93. Engraving Copyright Act, 1734, 8 Geo. 2, c. 13 (Eng.), *reprinted in* MACGILLIVRAY, *supra* note 51, at 303–05; and DRONE, *supra* note 51, at 643–45.



1740 opinion, the Lord Chancellor concluded that the Statute of Anne “ought to receive a liberal construction, for it is very far from being a monopoly, as it is intended to secure the property of books in the authors themselves.”<sup>94</sup> By 1743, the King’s Bench court would state without controversy that the Statute of Anne protected “[l]iterary property.”<sup>95</sup> By 1765, Blackstone’s Commentaries declared “original literary compositions” to be the “property” of the author.<sup>96</sup>

Shortly thereafter came the two great events in English copyright law between the Statute of Anne and the American Revolution: the *Millar v. Taylor* (1769) and *Donaldson v. Beckett* (1774) cases. Our view of copyright as property in the eighteenth century can be distorted by these cases. In *Millar v. Taylor*,<sup>97</sup> Lord Mansfield squared off against Justice Joseph Yates over whether: (1) authors had a pre-publication common law right to their works; and (2) whether the Statute of Anne eliminated any such common law rights by replacing them with the statutory system.<sup>98</sup> Three of the four judges in *Millar* concluded that the common law right existed—and had not been extinguished by the Statute of Anne. This result solidified the London booksellers’ monopoly: if the bookseller had purchased the author’s common law rights, those rights continued in perpetuity and could be used to restrain unauthorized competitors. Justice Aston and Lord Mansfield, voting in the majority, emphasized a person’s

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94. *Gyles v. Wilcox*, (1740) 26 Eng. Rep. 489, 490 (Ch.). The Lord Chancellor was responding to the argument that the statute promoted monopolies and deserved a narrow construction. He writes: I am quite of a different opinion, and that it ought to receive a liberal construction, for it is very far from being a monopoly, as it is intended to secure the property of books in the authors themselves, or the purchasers of the copy, as some recompence for their pains and labour in such works as may be of use to the learned world.

*Id.* at 490.

95. *Tonson v. Collins*, (1746) 96 Eng. Rep. 180, 192 (K.B.) (“Literary property is now protected by 54 Geo. 3, c. 156, which see, ante, 309 n(f).”). There is a particularity in this passage in the English Reports because “54 Geo. 3, c. 156” is the citation for the amendment of the Statute of Anne in 1814. See MACGILLIVRAY, *supra* note 51, at 3–9.

96. WILLIAM BLACKSTONE, 3 COMMENTARIES 405. (“There is still another species of property, which . . . being grounded on labor and invention is more properly reducible to the head of occupancy than any other. . . . And this is the right, which an author may be supposed to have in his own literary compositions.”). There is a strange anomaly between the St. George Tucker edition of Blackstone’s *Commentaries* and the *Commentaries* available on Yale’s Avalon project. The St. George Tucker version continues that an author “seems to have clearly a right to dispose of that identical work as he pleases, and any attempt to vary the disposition he has made of it, appears to be an invasion of that right.” *Id.* But the Yale Avalon version finishes this sentence as “any attempt to take it from him, or vary the difposition lie has made of it, is an invafion of his right of property.” Avalon Project at Yale Law School, <http://www.yale.edu/lawweb/avalon/blackstone/bk2ch26.htm> (last visited July 29, 2006).

97. *Millar v. Taylor*, (1769) 98 Eng. Rep. 201 (K.B.).

98. *Id.* at 206.

property rights.<sup>99</sup> As Patterson writes, “in *Millar v. Taylor*, the concept of copyright was clearly understood as embracing the author’s whole property interest in his work.”<sup>100</sup>

Five years later, *Millar* was reversed by the House of Lords in *Donaldson v. Beckett*<sup>101</sup> “but this climactic case, too, was framed in terms of property theory.”<sup>102</sup> While his case against Taylor was pending, Millar had died and the copyrights he held were sold at auction in 1769. Thomas Beckett and his partners purchased the copyright of a series of poems by James Thomson, but any exclusive rights to these poems under the Statute of Anne had ended in 1757.<sup>103</sup> When Alexander Donaldson, an Edinburgh publisher, started selling at least one of the Thomson poems (“The Seasons”), Beckett sought and obtained a permanent injunction against Donaldson. Donaldson then appealed to the House of Lords. The law Lords took up the issue of authorial common law rights versus the Statute of Anne in order “to obtain a final determination of this great question of literary property.”<sup>104</sup>

The law Lords voted 10-1 that an author does have a pre-publication “sole right of first printing and publishing” and 7-4 that absent parliamentary intervention, the rights would continue in perpetuity even after authorized publication.<sup>105</sup> By a much slimmer majority, 6-5, the law Lords also decided that the Statute of Anne took away any authorial right that would exist at common law and limited the author’s rights and remedies to the statutory provisions. Professor Patterson has analyzed the *Millar* and *Donaldson* decisions carefully, arguing that Justice Aston and Lord Mansfield’s position in *Millar* (“in elucidating the concept of copyright [they] made the concept inclusive of all the author’s rights”) forced the House of Lords in *Donaldson* to address the issues as five

99. *Id.* at 220 (Justice Aston judged it is unquestionable “[t]hat a man may have property in his body, life, fame, labours, and the like; and in short, in anything that can be called his.”); *Id.* at 224 (Lord Mansfield wrote: “I do not know, nor can I comprehend any property more emphatically a man’s own, may, more incapable of being mistaken, than his literary works.”).

100. PATTERSON, *supra* note 85, at 171. *See also* Rose, *Nine-tenths of the Law*, *supra* note 70, at 80 (“The legal struggle in which Mansfield and Yates were antagonists was thus only indirectly a struggle over knowledge and public domain. It was essentially an argument over the theory of property.”).

101. *Donaldson v. Beckett*, (1774) 98 Eng. Rep. 257 (H.L.). *Donaldson v. Beckett* was preceded by *Hinton v. Donaldson*, 1 Hailes Dec. 535 (Sess. Cas. 1773), which had declared that there was no common law copyright in Scotland.

102. Rose, *Nine-tenths of the Law*, *supra* note 70, at 80.

103. PATTERSON, *supra* note 85, at 172.

104. *Beckett*, 98 Eng. Rep. at 257.

105. *Id.* at 257–58.

distinct but partially duplicative questions in order to cover all possible claims to perpetual protection that the booksellers might make as assignees of author's rights.<sup>106</sup>

It is *possible* to read the lesson of these two cases as one in which the property construct failed. The same year *Donaldson* was decided, Samuel Johnson wrote that “[t]here seems . . . to be in authours a stronger right of property than that by occupancy; a metaphysical right, a right, as it were, of creation.” But Johnson went on to note that “the consent of nations . . . and indeed reason and the interests of learning” were against perpetual protection for authors and that each author should have only an “adequate reward . . . an exclusive right to his work for a considerable number of years.”<sup>107</sup> One could read Johnson as advocating an “exclusive right” that is property or as advocating an exchange in which property is traded for a “reward” upon publication (exclusive rights). Justice Yates—whose side triumphed in *Donaldson*—personally believed that prior to publication, the author had a property right in his work, but upon publication “he lays it entirely open to the public.”<sup>108</sup> In other words, using a real property metaphor, Yates believed that the common law property right was completely lost upon publication. Similarly, Lord Camden’s speech in *Donaldson*—presumed to be influential in the result—did much to establish the rhetoric of, and justification for, a robust public domain.<sup>109</sup> One can read Camden’s speech as a triumph *against* copyright as property, but only if property is equated with perpetual protection. If that is the equation, one could argue that the Statue of Anne, combined with the *Donaldson* court’s confirmation of copyright as purely a creature of statute, curtailed the notion of copyright as property and established copyright as a (nonproperty) right.

But that is simply not how English jurists or parliamentarians understood it. In their view, the author’s rights could be “property” even if

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106. PATTERSON, *supra* note 85, at 177. See MACGILLIVRAY, *supra* note 51, at 6–8, for a discussion of the five distinct questions before the law Lords in the case.

107. JAMES BOSWELL, BOSWELL’S LIFE OF JOHNSON 546–47 (R.W. Chapman ed., Oxford Univ. Press 1953) (1791).

108. *Millar v. Taylor*, (1769) 98 Eng. Rep. 201, 234 (K.B.) (Yates, J., dissenting).

109. Given that *Donaldson v. Beckett* generally ended the prospect of perpetual copyright in Anglo-Saxon countries, it is hard to disagree with Mark Rose’s conclusion that the case was “the single most important event in the establishment of the public domain.” Rose, *Nine-tenths of the Law*, *supra* note 70, at 87. Perpetual copyright protection continued for copyrights held by certain English and Scottish universities under The Copyright Act (University Copyright), 1775, 15 Geo. 3, c. 53, *reprinted in* MACGILLIVRAY, *supra* note 51, at 307–09; and DRONE, *supra* note 51, at 647–51. Perpetual copyright also existed at different times in several countries, including, at least, Portugal, Denmark, and Norway. See Hughes, *supra* note 4, at 785 n.36.

of limited duration.<sup>110</sup> Even Justice Yates, writing in dissent in *Millar*, believed that the Statute of Anne had “vested a new right in authors, for a limited time: and whilst that right exists, they will be established in the possession of their property.”<sup>111</sup> And not only did Parliament characterize copyright as “property” in its 1734 inclusion of engravings within the statute, but Parliament also repeatedly used “property” to characterize copyright when amending the copyright law—in 1766 (amending the engraving act), 1775 (universities copyright), 1777 (The Prints Copyright Act), 1814 (The Sculpture Copyright Act), and 1833 (The Dramatic Copyright Act).<sup>112</sup>

By the time *Beckford v. Hood*<sup>113</sup> came before the King’s Bench in 1798, the property concept seemed to have solidified its role in English copyright thinking. The question before the court in *Beckford* was whether common law remedies were available for an author to protect the statutory rights granted under the Statute of Anne. All four judges characterized this as a question of property rights:

Chief Judge Lord Kenyon:

“I cannot think that the Legislature would act so inconsistently as to confer a right, and leave the party whose property was invaded, without redress. . . . On the fair construction of this Act, therefore I think it vests the right of property in the authors of literary works, for the times therein limited, and that consequently the common law remedy attaches, if no other be specifically given by the Act.”<sup>114</sup>

Judge Ashhurst:

“I entirely concur with my Lord that, the Act having vested the right of property in the author, there must be a remedy in order to preserve it. . . . [It was] not intended by the Legislature to oust the common law right to prosecute by action any person who infringes this species of

110. As John Feather notes in his historical survey, “[a]fter *Becket v. Donaldson* there could no longer be any doubt about the legal basis of copyright as a property, or about the time during which it subsisted . . . .” FEATHER, *supra* note 60, at 95. See also PATTERSON, *supra* note 85, at 77 (“The evidence available to us clearly indicates that the stationers recognized the author’s property rights.”).

111. *Millar*, 98 Eng. Rep. at 245 (“The Legislature indeed may make a new right. The Statute of Queen Ann. has vested a new right in authors, for a limited time: and whilst that right exists, they will be established in the possession of their property.”).

112. Amendments were made to the caption and/or the statutory language of the acts. MACGILLIVRAY, *supra* note 51, at 305–14; DRONE, *supra* note 51, at 645–58.

113. *Beckford v. Hood*, (1798) 101 Eng. Rep. 1164 (K.B.).

114. *Id.* at 1167–68.

property, which would otherwise necessarily attach upon the right of property so conferred.”<sup>115</sup>

Judge Grose:

“The principle question is whether within the periods during which the exclusive right of property is secured by the statute to the author, he may not sue the party who has invaded his right for damages up to the extent of the injury sustained and of this I conceive there can be no doubt.”<sup>116</sup>

Judge Lawrence:

“I entirely concur with the opinions delivered by my brethren, upon the principal point . . . that the property was given absolutely to the author, at least during the term.”<sup>117</sup>

If Parliament had waffled on the idea of copyright as property in 1710, as the decades passed, the English bench and subsequent sessions at Westminster were not so equivocating.<sup>118</sup>

Charles Palmer Phillip’s 1863 treatise on English copyright would still separate its analysis into “copyright-before-publication” and “copyright-after-publication,” but both were unequivocally viewed as property. As to copyright-before-publication, “[i]ts basis is property; a violation of it is an invasion of property, and it depends entirely upon the Common Law.”<sup>119</sup> As to copyright-after-publication, “[t]he nature of this right is that of personal property”<sup>120</sup> and “[d]oubtless, an infringement of statutory copyright may be unintentional, nevertheless it is an unlawful invasion of property.”<sup>121</sup> E. J. MacGillivray’s 1903 treatise on English copyright law

115. *Id.* at 1168. In *Beckford*, Judge Ashhurst stated that in *Donaldson v. Beckett*, he “was one of those who thought that the invention of literary works was a foundation for a right of property independently of the Act of Queen Ann.” *Id.* But he recognized that the question before the *Beckford* court was purely statutory. *Id.*

116. *Id.* at 1168.

117. *Id.* at 1168. Michael Carroll’s thoughtful treatment of how music publishing came into English copyright also uncovered places where composers or music publishers treated musical compositions as “property.” For references to primary and secondary sources, see Carroll, *supra* note 76, at 930 n.133, 950, 953.

118. Although Patterson has a different focus in his account of this period, he agrees that the general understanding of copyright in England shifted greatly between 1710 and 1774, and that by 1737, the language in the booksellers’ proposal before Parliament “indicate[d] that copyright had by this time come to be thought of as embracing the whole property of a book.” PATTERSON, *supra* note 85, at 157.

119. CHARLES PALMER PHILLIPS, *THE LAW OF COPYRIGHT IN WORKS OF LITERATURE AND ART AND IN THE APPLICATION OF DESIGNS* 2 (London, V. & R. Stevens, Sons & Haynes 1863).

120. *Id.* at 55.

121. *Id.* at 142.

also concludes that “[t]he Act of Anne created for the first time a statutory property in books.”<sup>122</sup>

In short, as Mark Rose writes, “[t]he eighteenth century common lawyers had a much easier time thinking about copyrights in terms of property rights—either pro or con—than they did in thinking about how to formulate the claims of civil society.”<sup>123</sup> As historian Carla Hesse notes, an accurate historical account recognizes that “in the eighteenth century . . . the language of ‘ideas’ and ‘property’ first came into contact and first forged a legal bond.”<sup>124</sup> To the degree that current legal scholarship about the recent “prophetization” of copyright has neglected this history, it has missed much.

## 2. Copyright as Literary Property in the New “United States”

Given the word choices that emerged in New World legislation, our ancestors may not have picked up on all the subtleties of the debate in England and tended toward a property view of copyright. In March 1783, when the Continental Congress first took up the question of copyright, it appointed a committee “to consider the most proper means of cherishing genius and useful arts . . . by securing to the authors or publishers of new books their property in such works.” That committee, which included James Madison, was “referred sundry papers and memorials on the subject of literary property.”<sup>125</sup>

The sundry “papers and memorials” may have included a 1782 pamphlet from Thomas Paine in which he recognized that literature had been “a disinterested volunteer in the service of the Revolution,” but now that the United States was enjoying peace, it was time to recognize that “the works of an author are his legal property” and that the young country needed “sufficient laws . . . to prevent depredation on literary property.”<sup>126</sup> It is reasonable to assume that the papers included the petitions of Noah Webster, who began his well-known campaign for state copyright laws the same year as Paine’s tract. In supporting Webster, Princeton professor Samuel Stanhope Smith wrote an open letter to legislators, urging that

122. MACGILLIVRAY, *supra* note 51, at 4.

123. Rose, *Nine-tenths of the Law*, *supra* note 70, at 85.

124. Hesse, *supra* note 72, at 26.

125. 24 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 326 (Gaillard Hunt ed., 1922). See also THORVALD SOLBERG, COPYRIGHT ENACTMENTS OF THE UNITED STATES 1783–1906, at 11 (1906) [hereinafter SOLBERG, COPYRIGHT ENACTMENTS].

126. Thomas Paine, *Introduction to Letter to the Abbe Ryanal, on the Affairs of North America; In Which the Mistakes in the Abbes Account of the Revolution of America are Corrected and Cleared Up* (1782), in 8 LIFE AND WRITINGS OF THOMAS PAINE 180, 182 (Daniel Edwin Wheeler ed., 1908).

“[m]en of industry or of talent in any way, have a right to the property of their productions; and it encourages invention and improvement to secure it to them by certain laws, as has been practiced in European countries with advantage.”<sup>127</sup> Another petitioner, Joel Barlow, similarly wrote that “[t]here is certainly no kind of property, in the nature of things, so much his own, as the works which a person originates from his own creative imagination . . . .”<sup>128</sup>

American activists petitioning the Continental Congress were not significantly different in their word choices from DaFoe, Addison, Blackstone, and Locke in their comments 20–100 years earlier.<sup>129</sup> But the results were arguably clearer on the issue of “property.” The April 1783 report that emerged from the congressional committee referred to “the protection and security of literary property,” although the resolution proper did not.<sup>130</sup> At that point, the stage shifted to the states, who moved quickly to meet the resolution.

In terms of copyright as property, what followed next is important, particularly in contrast to any resistance or hesitancy Parliament had shown seventy-five years earlier. The preamble to Massachusetts’s 1783 act declared that “no property [is] more peculiarly a man’s own than that which is produced by the labour of his mind.” This statement was reiterated verbatim in Rhode Island the same year.<sup>131</sup> Books were declared to be the “sole property” or “exclusive property” of their authors in the statutes of Massachusetts (1783), Maryland (1783), and New Hampshire (1783).<sup>132</sup>

127. NOAH WEBSTER, A COLLECTION OF PAPERS ON POLITICAL, LITERARY, AND MORAL SUBJECTS 173–74 (1843).

128. Bruce Bugbee located the Barlow letter in the archives of the Continental Congress. The letter was written to Elias Boudinot, a New Jersey representative who was President of Congress in 1783. BUGBEE, *supra* note 40, at 111.

129. For DaFoe’s and Addison’s popular press writing advocating property rights for authors during the debates over the Statute of Anne, see ROSE, AUTHORS AND OWNERS, *supra* note 50, at 36–40. Rose notes how some of the newspaper articles written by these authors became “Lockean” in the way they perceived authors, labor, and property in creative works. *Id.* at 40.

130. The resolution stated:

Resolved, That it be recommended to the several states, to secure to the authors or publishers of any new books not hitherto printed, being citizens of the United States, and to their . . . executors, administrators and assigns, the copyright of such books for a certain time, not less than fourteen years from the first publication; and to secure to the said authors, if they shall survive the term first mentioned, and to their . . . executors, administrators and assigns, the copyright of such books for another term of time not less than fourteen years, such copy or exclusive right of printing, publishing, and vending the same, to be secured to the original authors, or publishers . . . by such laws and under restrictions as to the several states may seem proper.

JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 125, at 326–27.

131. *Id.* at 19.

132. *Id.* at 14 (Mass.), 16 (Md.), 18 (N.H.).

The statutes of Maryland and North Carolina (1783) both referred to themselves as acts to protect “literary property.”<sup>133</sup> In 1785, James Madison was again on hand in the Virginia House of Delegates when the copyright issue was taken up. The legislature ordered “that Messrs. Madison, Page and Tyler, do prepare and bring in” a copyright bill.<sup>134</sup> The bill was apparently drafted overnight, presented the next day *by Madison*, and stated that books were the “exclusive property” of their authors.

When describing what the Founders must have intended with the Patent and Copyright Clause, Professor Netanel does not mention any of this history.<sup>135</sup> However, we could still make a case that Netanel is correct in arguing that the Founders did not intend to embed a property concept in Article I, Section 8, Clause 8. Perhaps the property notions in the newly minted states were swept away and replaced with an economic regulatory model by a tough-minded Constitutional Convention. Arguably, the best evidence to support this theory is the proposals actually made to the Convention concerning patents and copyrights.

In August 1787, both James Madison and Charles Pinckney submitted proposals to the Constitutional Convention concerning the powers Congress should have vis-à-vis what we now call intellectual property. They proposed that Congress have the powers to:

“secure to literary authors their copy rights for a limited time” (Madison)

“encourage by proper premiums & provisions, the advancement of useful knowledge and discoveries” (Madison)

“grant patents for useful inventions” (Pinckney)

“secure to Authors exclusive rights for a certain time” (Pinckney)<sup>136</sup>

According to Bruce Bugbee’s research from the 1960s, “[t]he weight of the limited evidence available points to Charles Pinckney as the immediate source of the proposed Federal power to issue patents.”<sup>137</sup> But Dotan Oliar argues that Madison also made a patent power proposal in August 1787 (“[t]o secure to the inventors of useful machines and

133. *Id.* at 15 (Md.), 25 (N.C.).

134. BUGBEE, *supra* note 40, at 121.

135. Netanel, *supra* note 18 *passim*.

136. 4 THE WRITINGS OF JAMES MADISON: 1787, THE JOURNAL OF THE CONSTITUTIONAL CONVENTION II, 229–30 (Gaillard Hunt ed., 1903) (noting that for August 18, 1787, Mr. Madison’s submission of “powers as proper to be added to those of the General Legislature”); *Id.* at 230 (listing Mr. Pinckney’s proposals). *See also* BUGBEE, *supra* note 40, at 127 (reporting this as being August 17, but Madison’s Journals clearly indicate August 18).

137. BUGBEE, *supra* note 40, at 127.



implements the benefits thereof for a limited time”).<sup>138</sup> There seems no dispute that credit for the “Federal copyright authority . . . must be assigned to both Madison and Pinckney,”<sup>139</sup> and Oliar makes a convincing case from the limited record that “the two were highly coordinated in making their proposals.”<sup>140</sup> In these four (or five) proposals, one can see most of the constituent elements of the Copyright and Patent Clause. These proposals were accepted by the Convention and referred to the “Committee of Detail” to be incorporated into the draft of the Constitution then being prepared.<sup>141</sup> The language that emerged from that committee is the constitutional provision we now view with wonder.

Bugbee notes that from the time of these August 1787 proposals “the word ‘property’ was not to reappear until 1793.” For Bugbee—who wrote in the period before intellectual property scholarship was so politically charged—the word property was “strangely neglected” for that brief period.<sup>142</sup> This is a genuine point on which we should focus. Instead of being “strange,” perhaps Netanel and others are correct: the neglect was majestic and visionary, an effort by Madison to clean the conceptual house of “property.” Assuming that is true, did Madison succeed? Aside from this inference-from-absence, there is little or nothing to show that the other Founders suddenly had an understanding of copyright *contrary* to “property,” especially because the phrase was repeatedly used until 1787 by state legislatures, public figures, and individuals lobbying the Founders.

Some small details warrant attention because they further indicate that the Founders missed any antiproperty subtleties in the debates that had occurred back in England. First, the Patent and Copyright Clause gives Congress the power to “secure” exclusive rights, not “vest” them—the opposite language choice from that made in the Statute of Anne and more

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138. Dotan Oliar, *The Origins and Meaning of the Intellectual Property Clause* 17 (2004), [http://cyber.law.harvard.edu/ip/oliar\\_ipclause.pdf](http://cyber.law.harvard.edu/ip/oliar_ipclause.pdf). Oliar compares Madison’s Journal Record for August 18, 1787, with the official Convention Journal and Madison’s Edited Journal, and concludes that Madison’s Journal (which includes his patent proposal) is more accurate and “is the best-kept record from the Convention.” *Id.* at 19.

139. BUGBEE, *supra* note 40, at 127.

140. Oliar, *supra* note 138, at 25. But Oliar does cite to Patterson’s early statement that Madison’s and Pinckney’s respective proposals were “apparently arrived at independently.” See PATTERSON, *supra* note 85, at 193.

141. BUGBEE, *supra* note 40, at 126. See also 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, IN THE CONVENTION HELD AT PHILADELPHIA, IN 1787, at 440 (Jonathan Elliot ed., Wash. 1845).

142. BUGBEE, *supra* note 40, at 129.

in keeping with recognition of preexisting rights.<sup>143</sup> The choice of “secure” as the verb had also been made in the 1783 Continental Congress resolution calling on the states to establish copyright. We should not make much of this point—47 years later in *Wheaton v. Peters*,<sup>144</sup> the Court rejected the argument that “secure” indicated a preexisting right.<sup>145</sup> Nonetheless, if the word choice indicates anything, it tends to indicate comfort with a natural rights conception of copyright.

Second, the only time the Patent and Copyright power is mentioned in the *Federalist Papers*, Madison writes that “copyright of authors has been solemnly adjudged in Great Britain to be a right at common law,”<sup>146</sup> suggesting that he was cognizant of the results in *Millar* and *Donaldson*. Recall that in *Donaldson*, a majority of the law Lords believed that an author had a common law right that would have continued after publication *but for* the Statute of Anne. If Madison understood this, his statement suggests that he believed authors in America had preexisting common law rights which could be reshaped and replaced by statutory rights granted by the legislative body (state or federal).<sup>147</sup>

Finally, there is really no evidence that Madison was trying to deter copyrights from being understood as property. His handiwork in the Virginia House of Delegates indicates just the opposite. Indeed, Madison’s comfort with the idea of “literary property” is apparent in a little-known pamphlet he issued just before the Constitutional Convention, *Vices of the Political System of the United States*. In it, Madison argued that the central government needed greater power because the “national dignity, interest,

143. “Secure” comes from Madison’s proposal and “implies the recognition of copyright as a pre-existing right.” PATTERSON, *supra* note 85, at 193.

144. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

145. The Court described this argument from Daniel Webster on behalf of *Wheaton* as follows: In behalf of the common law right, an argument has been drawn from the word *secure*, which is used in relation to this right, both in the constitution and in the acts of congress. This word, when used as a verb active, signifies to protect, insure, save, ascertain, &c. The counsel for the complainants insist that the term, as used, clearly indicates an intention, not to originate a right, but to protect one already in existence.

*Id.* at 660–61. The Court responded that the verb “refers to inventors, as well as authors, and it has never been pretended by any one, either in this country or in England, that an inventor has a perpetual right, at common law, to sell the thing invented.” *Id.* at 661.

146. THE FEDERALIST NO. 43 (James Madison).

147. Patterson concurs with this interpretation of Madison’s *Federalist* writing. PATTERSON, *supra* note 85, at 194. Curiously, in *Wheaton v. Peters*, the majority rejected the transmission of this common law right from English law to Pennsylvania law on the grounds that when Pennsylvania was founded, the common law right had not yet been enunciated by the English courts. *Wheaton* 33 U.S. (8 Pet.) 591. Craig Joyce rightly criticizes this. Joyce, *supra* note 22, at 380–81 (arguing that a common law right to copyright would not cease to exist everywhere simply because no person had yet asserted the right in Pennsylvania).

and revenue” suffered from lack of uniform laws “concerning naturalization & literary property.”<sup>148</sup>

In his careful comparison of the Patent and Copyright Clause, the then-existing state laws, and the Statute of Anne, Oliar concludes that the state laws (where references to literary property are rich) had a greater effect on the framing of the Clause than the Statute of Anne.<sup>149</sup> This is further reason to believe that the absence of “property” from the Clause is not significant evidence that the Framers intended to excise the property concept from their admittedly instrumental vision for patents and copyrights.

### C. WHERE IS THOMAS JEFFERSON WHEN YOU NEED HIM?

While Madison was the advocate of creating patents and copyright—and seems to have been comfortable in viewing copyright as “literary property”—it was Thomas Jefferson who expressly opposed Madison’s program in his 1788 letter quoted above.<sup>150</sup> But the argument that Jefferson’s views informed the constitutional power to create intellectual property is clearly wrong. Moreover, if we objectively survey all of Jefferson’s writings, we find that his views on what we now call intellectual property were, to be generous, “nuanced” or perhaps “fluid.”

It is widely acknowledged that Jefferson was not at the Constitutional Convention. He was a “Founding Father” who was not a “Framer”<sup>151</sup>—this, by itself, should largely curtail the use of Jefferson as “a reliable source of the meaning of Article I of the Constitution.”<sup>152</sup> Indeed, historians for the period agree that Jefferson had very little influence over the

148. JAMES MADISON, VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES, *reprinted in* 1 THE FOUNDERS’ CONSTITUTION 167 (Philip B. Kurland & Ralph Lerner eds., 1987).

149. Oliar, *supra* note 138, at 30–32 (concluding that the Statute of Anne was only a “third-order source” in the drafting of the Patent and Copyright Clause).

150. *See supra* note 5 and accompanying text.

151. *See* ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 4 (2002).

152. Too often those who appeal to Thomas Jefferson are given a polite “extra turn” on this point. For example, see Marci A. Hamilton, *A Response to Professor Benkler*, 15 BERKELEY TECH. L.J. 605, 614 n.35 (2000) (“I will leave aside for now the question whether Jefferson, who was not even in the country at the time of the Convention, is a reliable source of the meaning of Article I of the Constitution.”).

Convention<sup>153</sup>—he was three thousand miles away and “each letter he wrote or received took six to eight weeks to cross the Atlantic.”<sup>154</sup> Jefferson himself felt so isolated from political events in the United States that he wrote early in his ambassadorial posting that he “might as well be in the moon.”<sup>155</sup>

Jefferson’s July 1788 letter to Madison came ten months after the Convention had accepted Madison and Pinckney’s proposals to empower Congress to establish copyrights and patents, and eight months after the Constitution had been finalized and sent to the states. Indeed, nine states had already ratified the Constitution—the last fact which Jefferson said he “sincerely rejoice[d]” in the same letter. In effect, Jefferson was objecting to what was already a *fait accompli*. When Madison responded to Jefferson, in a letter dated October 17, 1788, he hardly backed down, but rather pressed his view that “monopolies” for the “encouragements to literary works and ingenious discoveries” were justified.<sup>156</sup> Jefferson’s objections came late, came from the periphery of the debate, and were completely ineffectual, but all this continues to elude many.<sup>157</sup>

153. In his chapter “Considering the American Constitution,” Jefferson scholar and defender Dumas Malone paints a picture of Jefferson reacting to—rather than shaping—constitutional developments in the 1780s. See 2 DUMAS MALONE, *JEFFERSON AND HIS TIME* 153–79 (1951). Michael Knox Beran writes of Jefferson that “[h]e was, it is true, an ocean away from the fast-moving currents of American politics, and he could not have participated directly in the constitutional debates even if he had wished to. But his Paris posting cannot entirely explain his indolence in the middle years of the 1780s.” MICHAEL KNOX BERAN, *JEFFERSON’S DEMONS: PORTRAIT OF A RESTLESS MIND* 83 (2003). Beran goes on to state that Jefferson “had contributed almost nothing to the previsionary labors that went into the momentous act of constitution making” and that “[h]e left his friend Madison to do what he himself could not.” *Id.* at 84. See also R.B. BERNSTEIN, *THOMAS JEFFERSON* 71 (2003) (describing Jefferson as “realiz[ing] that he was missing another experiment in government” by being the Ambassador to Paris during the Constitutional Convention and that he did not receive copies of the proposed Constitution until “weeks after the Convention finished its work”); NOBLE E. CUNNINGHAM, *IN PURSUIT OF REASON: THE LIFE OF THOMAS JEFFERSON* 96 (1987) (calling Jefferson “a distant spectator of those important developments in America that culminated in the drafting of the new Constitution of 1787 and its closely contested ratification completed in the summer of 1788”).

154. BERNSTEIN, *supra* note 153, at 72.

155. Letter from Thomas Jefferson to Francis Hopkinson (Jan. 13, 1785), in 7 *THE PAPERS OF THOMAS JEFFERSON* 602 (Julian P. Boyd et al. eds., 1953).

156. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), [http://www.constitution.org/jm/17881017\\_tj.htm](http://www.constitution.org/jm/17881017_tj.htm).

157. Consider this example from Robert Thibadeau. After quoting Jefferson’s 1813 letter to Isaac McPherson and Article I, Section 8, Clause 8 of the 1787 Constitution, Thibadeau writes:

It seems fair to say that during the 1780s, Jefferson was consistent in his belief that patent monopolies were more trouble than they were worth. In a 1787 letter to Jeudy de l'Hommande, he projected similar views to his "countrymen":

Tho' the interposition of government in matters of invention has it's [sic] use, yet it is in practice so inseparable from abuse, that they [my countrymen] think it better not to meddle with it. We are only to hope therefore that those governments who are in the habit of directing all the actions of their subjects by particular law, may be so far sensible of the duty they are under of cultivating useful discoveries, as to reward you amply . . . .<sup>158</sup>

The 1787 and 1788 letters are also consistent with Jefferson's oft-quoted 1813 letter to Isaac McPherson,<sup>159</sup> in which Jefferson derided any notion that inventors have a "natural and even a hereditary right" to their inventions and that "inventions then cannot, in nature, be a subject of property." Jefferson pointed out that other countries seemed to be "as fruitful as England in new and useful devices" without patent law, but the

The historical records around these quotes reveals [sic] quite a lot, but I find it is hard to get perfectly clearly into the mind of Thomas Jefferson on this and perfectly clearly into the role that Jefferson had in that line in the Constitution. However, I am going to argue that he did play a critical role and that he had a clear view that Intellectual Property must only be protected for a time and not be either allowed simply to be in the public domain, nor given ownership through life and successive generations. In other words, while Jefferson was not acting alone in the constitutional provision, he was one of the key procreators of the modern understanding of Intellectual Property.

Robert Thibadeau, *Thomas Jefferson and Intellectual Property Including Copyrights and Patents* (Aug. 28, 2004), <http://rack1.ul.cs.cmu.edu/jefferson/>. The above passage is a good example of a person animated by a completely legitimate concern—present-day expansion of intellectual property rights—adopting a completely bogus historiography. *See also* Christopher Kelty, *A Primer in Modern Intellectual Property Law* (Apr. 23, 2004), <http://cnx.rice.edu/content/ml1795/latest/>. Kelty writes that the Patent and Copyright Clause was, "like the rest of the constitution, extensively [sic] debated by the framers," and that

Perhaps one of the most famous statements about intellectual property comes from Thomas Jefferson. Jefferson's 1813 letter to Isaac McPherson has been very widely quoted in the context of debates about the role of intellectual property. In it, he explains why he considers it unreasonable to consider ideas to be property.

*Id.* Of course, the Patent and Copyright Clause was NOT extensively debated and Jefferson's 1813 letter provides *no* interpretive insights into the Clause.

158. Letter from Thomas Jefferson to Jeudy de l'Hommande (Aug. 9, 1787), in 12 *THE PAPERS OF THOMAS JEFFERSON* 11 (Julian P. Boyd et al. eds., 1955).

159. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 6 *THE WRITINGS OF THOMAS JEFFERSON* 175, 180 (H.A. Washington ed., 1857). Jefferson further writes to McPherson, "He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me." *Id.*

point is that this 1813 letter is more nuanced than the way it is often quoted.<sup>160</sup>

As James Boyle rightly points out, the 1813 letter is often quoted selectively, which hides two things. First, Jefferson's comments on inventions were written in the context of saying *all* property ownership "is the gift of social law, and is given late in the progress of society." The entire passage reads as follows:

It is agreed by those who have seriously considered the subject, that no individual has, of natural right, a separate property in an acre of land, for instance. By an universal law, indeed, whatever, whether fixed or movable, belongs to all men equally and in common, is the property for the moment of him who occupies it; but when he relinquishes the occupation, the property goes with it. Stable ownership is the gift of social law, and is given late in the progress of society. It would be curious then, if an idea, the fugitive fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property. If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it.<sup>161</sup>

Jefferson's point in the 1813 letter applied to all property generally: ownership of all the PCs, BMWs, and homes of Silicon Valley is a social construct and not a natural right. Inventions cannot "in nature" be the subject of property, but neither could Montecello.<sup>162</sup> Jefferson goes on in this 1813 letter to say that ideas are *even less* susceptible to natural right property claims because, in modern parlance, they are not subject to rivalrous consumption:

160. As James Boyle notes, "Those who quote the passage sometimes stop here, which is a shame, because it leaves the impression that Jefferson was unequivocally against intellectual property rights. But that would be an overstatement." James Boyle, *The Public Domain: The Second Enclosure Movement and the Construction of the Public Domain*, 66 *LAW & CONTEMP. PROBS.* 33, 53 (2003).

161. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 6 *THE WRITINGS OF THOMAS JEFFERSON* 175, 180 (H.A. Washington ed., 1857). Charles Miller notes that "Jefferson was conscious of society's right to regulate property, that property rights are not natural rights, is suggested by his adopting the language of pursuit of happiness but not the language of property in composing the Declaration of Independence." CHARLES A. MILLER, *JEFFERSON AND NATURE: AN INTERPRETATION* 201 (1988). Indeed, Jefferson was so adamant that property was not a natural right, he also recommended that the word be removed from the French Declaration of the Rights of Man and Citizen. Letter from Thomas Jefferson to the Marquis de Lafayette (July 10, 1789), in 15 *THE PAPERS OF THOMAS JEFFERSON* 230 (Julian P. Boyd & Charles T. Cullen eds., 1958).

162. Letter from Thomas Jefferson to the Marquis de Lafayette (July 10, 1789), in 15 *THE PAPERS OF THOMAS JEFFERSON* 230 (Julian P. Boyd and Charles T. Cullen eds., 1958).

[An idea's] peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from any body.<sup>163</sup>

In short, Jefferson in this letter doubts natural rights to property of any sort and was "even more doubtful about rights associated with ideas."<sup>164</sup> But even in this letter, as he poetically lays out the nonrivalrous nature of ideas, Jefferson gives grudging recognition that "an exclusive right" to the profits from an invention may be "an encouragement to men to pursue ideas which may produce utility." Once the society has decided to reward exclusive rights of some particular shape and form, neither inventors nor users have grounds for "claim or complaint."

Even less attention is given by low protectionist commentators to Jefferson's other comments on intellectual property.<sup>165</sup> For whatever reason, Jefferson drafted an intellectual property provision for the Constitution that he sent to Madison. In an August 1789 letter, Jefferson

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163. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 6 THE WRITINGS OF THOMAS JEFFERSON 175, 180-81 (H.A. Washington ed., 1857).

164. MILLER, *supra* note 161, at 203.

165. For examples of law review and popular literature citing Jefferson's 1788 letter to Madison and/or his 1813 letter to Isaac McPherson without discussing the 1807 letter to Oliver Evans, or the 1789 letter to Madison, see Barlow, *supra* note 9; John F. Duffy, *Symposium Overview: A New Role for the FCC and State Agencies in a Competitive Environment?: The FCC and the Patent System: Progressive Ideals, Jacksonian Realism, and the Technology of Regulation*, 71 U. COLO. L. REV. 1071, 1133 (2000) (discussing Jefferson's opposition to granting the federal government a constitutional power to operate a patent system); Alan L. Durham, "Useful Arts" in the Information Age, 1999 BYU L. REV. 1419, 1430 (describing Jefferson as "well known for expressing doubts" about the patent system); Paul J. Heald & Suzanne Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause As an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1150 (discussing Jefferson's "skepticism" about protecting intellectual property); Dan ThuThi Phan, Note, *Will Fair Use Function on the Internet?*, 98 COLUM. L. REV. 169, 175 n.31 (1998) (noting Jefferson's view that monopolies should be restricted). The statements made by these writers are correct and, to be fair, none claim to give a complete exposition of Jefferson's views. But that is exactly the concern.

proposed that the constitutional language provide “[m]onopolies may be allowed to persons for their own productions in literature & their own inventions in the arts, for a term not exceeding \_\_\_ years but for no longer term & no other purpose.”<sup>166</sup>

Jefferson filled out his views shortly thereafter in a letter to Madison wherein he suggested nineteen years as the term of protection for patents and copyrights. Jefferson argued to Madison that the term should be *longer* than the proposed fourteen years, based on his actuarial calculations and what we might now call “justice between generations.”<sup>167</sup> Jefferson’s two proposals could have been simple realpolitick: if he had reconciled himself to Madison’s insistence on an intellectual property provision in the Constitution, Jefferson would have wanted the provision least prone to expansion. Once the provision was included, Jefferson could not help but attach it to his own vision of justice and social development. Thus, the nineteen-year term proposal cannot count as Jefferson embracing intellectual property—it shows only that his views were not so adamant as to foreclose political dealing.

While Jefferson may not have flip-flopped per se, he definitely elaborated on his views *or* reframed his position in certain letters, perhaps for whomever the recipient was. These Jeffersonian comments get little or no play among the low protectionists. For example, rarely—if ever—does recent intellectual property scholarship quote Jefferson’s very positive 1790 comment about patent law, written when he was the Cabinet officer most closely concerned with the granting of patents:

An act of Congress authorizing the issuing patents for new discoveries has given a spring to invention beyond my conception. Being an instrument in granting the patents, I am acquainted with their discoveries. Many of them are indeed trifling, but there are some of great consequence which have been proved by practice, and others which if they stand the same proof will produce great effect.<sup>168</sup>

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166. Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), in 5 *THE WORKS OF THOMAS JEFFERSON* 493 (Paul Leicester Ford ed., 1904).

167. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 *THE PAPERS OF THOMAS JEFFERSON* 397 (Julian P. Boyd et al. eds., 1958) (urging Madison to secure the exclusive right for nineteen instead of fourteen years).

168. Letter from Thomas Jefferson to Benjamin Vaughan (June 27, 1790), in 16 *THE PAPERS OF THOMAS JEFFERSON* 579 (Julian P. Boyd ed., 1959).



In 1790, Jefferson was Secretary of State, that is, the officer charged with receiving patent applications.<sup>169</sup> This letter might reflect a simple truth: we all need to justify our jobs, none more than those working in government. But seventeen years later, in an 1807 letter to Oliver Evans, then-President Jefferson praised the patent system on the grounds that “ingenuity should receive liberal encouragement” and described the “utility that society derives from an invention.”<sup>170</sup> This letter arguably even had a tinge of a normative statement separate from efficiency consideration: “Certainly an inventor ought to be allowed a right to the benefit of his invention for a certain time . . . Nobody wishes more than I do that ingenuity should receive a liberal encouragement.”<sup>171</sup>

Low protectionist writers who rely on the 1788 and 1813 letters seem to assume that the words of a consummate politician, now dead 200 years, suddenly become candid and consistent. This is wrong: at a minimum, we should respect Jefferson as a supple mind who saw both sides of the issue. More critically, we must recognize that Jefferson not only had no influence in shaping the Patent and Copyright Clause, but also that he had a relatively modest impact on early American economic strategy. As Charles Miller noted, “[a]s an economist Jefferson has usually been considered inconsistent, naive, or simply wrong. Against the program of Alexander Hamilton in setting national economic policy he was certainly unsuccessful.”<sup>172</sup> Miller also made the cogent observation that Jefferson’s views of patents were rooted in an intellectual vision at odds with the fast-moving world of both Silicon Valley and Hollywood:

If Jefferson failed to distinguish between a patent as a spur to invention and a patent as a spur to production (and production as the prelude to profit), it was understandable. In the rather static economy he envisioned, production was not an especially important value, while in the intellectual world he inhabited, invention was.<sup>173</sup>

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169. Proclamation of President George W. Bush, The Bicentennial of the United States Patent Office (July 29, 2002), <http://www.uspto.gov/web/offices/ac/ahrpa/opa/bicentennial/whitehouse2002jul29.htm>.

170. Letter from Thomas Jefferson to Oliver Evans (May 2, 1807), in 5 THE WRITINGS OF THOMAS JEFFERSON 74, 76 (H.A. Washington ed., 1857).

171. *Id.* at 75–76. But Jefferson also expresses his opposition to perpetual patent rights in the 1807 letter: “Certainly an inventor ought to be allowed a right to the benefit of his invention for some certain time. It is equally certain it ought not to be perpetual.” *Id.* at 75.

172. MILLER, *supra* note 161, at 200. Although we might note, ironically, that that is similar to the position of our policymakers who have advocated a “knowledge-based” economy in which Americans design and invent, while others produce and manufacture. One (predictable) outcome of this strategy has been unprecedented and unsustainable U.S. trade deficits in manufactured goods.

173. *Id.* at 204.

More generally, it does not make much sense for intellectual property commentators to appeal to the economic thinking of a political intellectual who advocated for the United States, in turn, agrarian-based self-sufficiency, then laissez faire trade, then protectionism.<sup>174</sup>

The bottom line is apparently Margaret Chon's observation from over a decade ago that neither Madison nor Jefferson "had a unified narrative of intellectual property."<sup>175</sup> Any casual claim otherwise may be rhetorically effective, but it would apparently not be fully researched. It is not inaccurate to say Jefferson "was" opposed to patents—he seems to have been at one time—but that is not a full picture. In the same amount of space, one can more completely say, as Yochai Benkler has, that "Jefferson was initially skeptical about the advisability of empowering Congress to provide for patents at all, but he later accepted their utility within bounds."<sup>176</sup>

For opponents of intellectual property who continue to see Thomas Jefferson as a saint, they should note that when the United States Patent and Trademark Office moved into its new headquarters in 2004, they named one of the five principal buildings after Jefferson (the main building, of course, is named after Madison). The Supreme Court has also used Jefferson's thinking to justify extremely broad patentable subject matter in the United States—in regrettably loose language that will probably trigger additional bad historiography.<sup>177</sup> But popularity among

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174. See William D. Grampp, *A Re-examination of Jeffersonian Economics*, 12 S. ECON. J. 263 (1946). Grampp lays out these three periods and concludes that after 1805, Jefferson largely conceded to Hamilton's economic program, finding that Jefferson "proposed measures that were consistent with the objectives established by Hamilton, though his methods differed from those of Hamilton in revealing a greater concern with constitutional legitimacy." *Id.* at 281. See also Joseph Dorfman, *The Economic Philosophy of Thomas Jefferson*, 55 POL. SCI. Q. 98 (1940). For fans of Airbus, as Ambassador to France, Jefferson also urged the French to import American foodstuffs and raw materials—and told them: "France would find it profitable to subsidize manufactures in order to increase employment in both countries." *Id.* at 102.

175. Margaret Chon, *PostModern "Progress": Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97, 136–37 (1993).

176. Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L.J. 535, 542 (2000).

177. In *Diamond v. Chakrabarty*, the Court's opinion includes this potentially misleading passage: The subject-matter provisions of the patent law have been cast in broad terms to fulfill the constitutional and statutory goal of promoting "the Progress of Science and the useful Arts" with all that means for the social and economic benefits envisioned by Jefferson.

disparate groups is nothing new for Thomas Jefferson. As one Jefferson historian noted in 1940, “[r]adicals, liberals, and conservatives have constantly based their arguments on what they conceived to be his social philosophy.”<sup>178</sup>

#### D. COURTS VIEWING COPYRIGHT AS PROPERTY

The property concept was used by our courts and legislators throughout the nineteenth and twentieth centuries to describe copyright. The Supreme Court referred to copyrighted works as “literary property” four times in the nineteenth century; two of those occasions well before 1845, the year “intellectual property” is supposed to have first appeared, without antecedents, in *Davoll v. Brown*.<sup>179</sup> In the 1820s, works protected by copyright were described as “literary property” in at least two cases, both from Justice Story, each referring to copyrights peripherally while discussing another kind of right or property. In *Moody v. Fiske*, Justice Story, riding circuit in Massachusetts, commented that a substantial taking from a literary work, one that “materially injures the literary property of the author,” is actionable under copyright law.<sup>180</sup> In *Green v. Bridle*,<sup>181</sup> Justice Story, now writing for the Supreme Court, again squarely placed copyright in the property framework:

The protection of property should extend as well to one subject as to another: to that which results from improvements, made under the faith of titles emanating from the government, as to a proprietary interest in

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*Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980). But this passage comes after the Supreme Court recognizes Jefferson as the author of the Patent Act of 1793, not as author of the Patent and Copyright Clause. *Id.* at 309. The Court cites Jefferson’s 1807 letter to Oliver Evans that “ingenuity should receive a liberal encouragement” through the patent system. *Id.* at 308–09. So read in context (and charitably), the Court’s reference to “social and economic benefits envisioned by Jefferson” invokes his intent as author of the first patent statute. Out of context, however, it looks like the Court is treating Jefferson as one of the constitutional framers in order to justify broader intellectual property protection. Unfortunately, the Court quotes this passage—out of context—in *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 131 (2001).

178. Dorfman, *supra* note 174, at 98.

179. *Davoll v. Brown*, 7 F. Cas. 197, 199 (C.C.D. Mass. 1845) (No. 3662). *See also* Brady v. Daly, 175 U.S. 148, 157 (1899) (quoting English law protecting “dramatic literary property”); *Callaghan v. Myers*, 128 U.S. 617, 623 (1888) (discussing whether “all of the matter contained in the [Illinois law reports] are public and common property” or whether the volumes contained material “susceptible of copyright, or in any manner literary property”); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 612 (1834) (holding that “[l]aw reports, like other books, are objects of literary property”); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 57 (1823) (finding that the protection of property “extends to literary property, the fruit of mental labour”).

180. *Moody v. Fiske*, 17 F. Cas. 655, 657 (C.C.D. Mass. 1820) (No. 9745).

181. *Green*, 21 U.S. at 1.

the soil, derived from the same source. It extends to literary property, the fruit of mental labour.<sup>182</sup>

In *Green v. Biddle*, the Court considered conflicting claims to Kentucky land related to land grants made by Virginia authorities, and Kentucky's commitment, upon statehood, to honor those grants. So the above passage is pure dicta, although it clearly shows how Story conceptualized copyright.<sup>183</sup>

A decade later, the Supreme Court's first proper foray into copyright law was the 1834 *Wheaton v. Peters* decision. While there are ambiguities and cross-currents of the justices' opinions,<sup>184</sup> there is no doubt that the issue was repeatedly framed in property terms. Indeed, prior to the Court's hearing, both parties had so expressed the issue—Wheaton saying that Congress's copyright act was intended to secure his "right of property"<sup>185</sup> and Peters defending himself that his republication of Court opinions that appeared in the first three reporters' volumes was "not . . . obnoxious to the [law] protecting literary property."<sup>186</sup> Writing for the majority, Justice McLean reviewed the leading eighteenth-century English cases and concluded that following the Statute of Anne, in England: (1) "literary property of an author in his works" exists post-publication "under the statute;" and (2) "an author, at common law, has a property right in his [unpublished] manuscript," which included not only chattel property rights in the physical manuscript but also a right of first publication.<sup>187</sup> He also labeled the pre-publication rights of an American author as "property"

182. *Id.* at 57.

183. Copyright is also described as "literary property" in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), but this description occurs only in Webster's argument before the Court, not in Marshall's opinion. The case concerned the constitutionality of exclusive rights to navigation of state waters granted by New York.

184. For a thorough discussion of these ambiguities and cross-currents, see Joyce, *supra* note 22, at 372–85.

185. Wheaton "assume[d] that the Acts of Congress were intended to secure [his] right of property existing independent of the Acts themselves," taking the view that copyright property existed as a matter of common law. Pre-Argument Memorandum From Henry Wheaton to Daniel Webster (Jan. 1834), in *The Papers of Henry Wheaton* (on file with the Pierpoint Morgan Library, N.Y., N.Y.). Craig Joyce discusses this memo more extensively in Joyce, *supra* note 22, at 368.

186. Letter from Richard Peters, Jr. to William Cranch (Aug. 14, 1828), in *Peters Papers* (on file with the Historical Society of Pennsylvania, Phila., Pa.). Cranch served as the second reporter of the Supreme Court, following Alexander J. Dallas and preceding Henry Wheaton. See HAMPTON L. CARSON, *THE SUPREME COURT OF THE UNITED STATES: ITS HISTORY* 562–63 (Philadelphia, J.Y. Huber 1891).

187. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 638, 657 (1834). ("[T]he law appears to be well settled in England that, since the Statute of Anne, the literary property of an author is his works can only be asserted under the statute.").

subject to courts of chancery,<sup>188</sup> and repeatedly described any successor to Wheaton's federal rights as a "proprietor"<sup>189</sup>—an unsurprising word choice since "proprietor" appeared in the 1790 statute.

Nonetheless, it is also true that Justice McLean's majority opinion did not use the word "property" to describe what was held by an American federal copyright holder; instead he used the more general word "rights."<sup>190</sup> Again, this is an unsurprising word choice because "rights" also appeared in the statute, but we can also interpret this as the Court being careful not to call the American statutory right a form of property. In contrast, Justice Thompson's dissent was very blunt in its Lockean vision of an author's property arising from intellectual labors.<sup>191</sup> It could reasonably be argued that this difference shows the Court hesitating to christen statutory copyright in American law as a form of "property."

A case from the New York Court of Appeals four decades later can be read the same way. In the 1872 case of *Palmer v. De Witt*, the issue was whether a foreigner enjoyed common law rights for an unpublished dramatic manuscript that had been printed without authorization in New York.<sup>192</sup> The court was clear in its view that the author's common law rights—"copyright before publication"<sup>193</sup>—constituted property: "[t]he protection [the plaintiff] seeks is of property, and a right of property which is well established and recognized wherever the common-law prevails."<sup>194</sup> The court further stated that "property in a manuscript is not distinguishable from any other personal property,"<sup>195</sup> and that it "would be a waste of time to refer in detail to the very many cases in which this original proprietary right of authors has come under review by the courts."<sup>196</sup> But in the court's few references to statutory copyright (which

188. "As before stated, an author has, by the common law, a property in his manuscript; and there can be no doubt that the rights of an assignee of such manuscript, would be protected by a court of chancery." *Id.* at 661. As would a court of equity, a court of chancery handled all kinds of property disputes, including compelling restitution of title deeds, deciding title disputes to real property, and appointing receivers of property. But McLean's mention of chancery adds only very minor evidence that he meant a plain, familiar conception of property.

189. *Id.* at 667–68.

190. *Id.* at 661 (using words such as: "future right," "existing rights," "exclusive right," and "right"), 662 ("right"), 663 ("rights," "this right," "exclusive right").

191. "The great principle on which the author's right rests, is, that it is the fruit or production of his own labour, and which may, by the labour of the faculties of the mind, establish a right of property, as well as by the faculties of the body." *Id.* at 669–70 (Thompson, J., dissenting).

192. *Palmer v. De Witt*, 47 N.Y. 532 (1872).

193. *Id.* at 537.

194. *Id.* at 535.

195. *Id.* at 538.

196. *Id.*

was not the subject matter of the case), “property” is not used as a description.<sup>197</sup>

If cases like *Wheaton v. Peters* and *Palmer v. De Witt* showed hesitation in calling statutory copyright a form of “property” (let us assume they do), that hesitation is a minor chord compared to the bulk of nineteenth-century treatises, cases, and statutes that expressed copyright law in property terms.

Among court decisions, Justice Story weighed in at least once more while riding circuit in 1845. *Folsom v. Marsh*<sup>198</sup> addressed the legal rights to George Washington’s letters, with one party arguing that the letters were not “proper subjects of copyright” because “they were designed by the author for public use, and not for copyright, or private property.”<sup>199</sup> In dismissing this argument, Story concluded “it is most manifest, that President Washington deemed them his own private property, and bequeathed them to his nephew.”<sup>200</sup> While one could read this as a statement about chattel property, in the posture of the litigation it makes sense that Story is speaking of the letters as literary property.

Subsequent nineteenth-century decisions echoed Justice Story’s concept of literary property. In *Crowe v. Aiken*,<sup>201</sup> the court considered whether a playwright lost all rights over his unpublished play when it is performed. Judge Drummond concluded that “[t]he author of any literary or dramatic work is the sole proprietor of the manuscript and its contents . . . independently of legislation, so long as he does not publish it, or part with the right of property.”<sup>202</sup> Beyond that, Judge Drummond continued, it is “the authority of congress to legislate on the subject of

197. For example, the court wrote, “[t]his common-law right ‘of first publication’ is sometimes spoken of as ‘copyright before publication,’ while the right to multiply copies secured by statute, is called in contradistinction ‘copyright after publication.’” *Id.* at 537. The *Palmer* court did rely upon the Phillips treatise for its strong assertion that common law copyright is property; the treatise endorses the view that the statutory right is also a property right. *Id.* See PHILLIPS, *supra* note 119, at 142. For another example of a court of this period unequivocally stating that common law copyright was property, see *Ockenholdt v. Frohman*, 60 Ill. App. 300, 303 (1895) (“It is conceded that an author, at common law, owns his literary production, but may sell it, or lose his property in it by publication.”).

198. *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

199. *Id.* at 345.

200. *Id.*

201. *Crowe v. Aiken*, 6 F. Cas. 904 (C.C.N.D. Ill. 1870) (No. 3441).

202. *Id.* at 905–06. Judge Drummond further wrote:

[It] cannot be true in this country that the lecturer has no rights of property in his unpublished and unprinted lecture; that the clergyman has no rights of property in his unpublished sermon—the work, it may be, in each case, of weeks of thought and labor—merely because he has repeated it to an audience.

*Id.* at 906–07.

literary property.”<sup>203</sup> Ten years later in *Johnson v. Donaldson*,<sup>204</sup> the court upheld jury instructions that “if the plaintiff was the author, designer, or proprietor of the chromos for which he had obtained a copyright, he was to be protected in his property.”<sup>205</sup> In the 1883 *Mark Twain Cases*,<sup>206</sup> the court said “[l]iterary property is the right which the author or publisher of a literary work has to prevent its multiplication by copies or duplication, and is from its very nature an incorporeal right.”<sup>207</sup> This is not an exhaustive list of nineteenth-century court decisions referring to copyrightable works as “property,” literary or otherwise.<sup>208</sup>

In the realm of nineteenth-century law books, John Bouvier’s law dictionary in 1856 defines copyright as “[t]he property which has been secured to the author of a book, map, chart, or musical composition, print, cut or engraving, for a limited time, by the constitution and laws of the United States.”<sup>209</sup> The 1897 edition of Bouvier’s dictionary changes the definition considerably (from “property” to “exclusive privilege”)—although the Statute of Anne is still described as “the first statute . . . which undertook to regulate this species of incorporeal property”<sup>210</sup>—and says “[p]roperty in the other classes of intellectual objects is usually secured by letters-patent.”<sup>211</sup> Eaton Drone’s 1879 copyright treatise envisions copyright as “literary property,” devoting its first ninety-seven pages to “The Origin and Nature of Literary Property” and the “History of Literary Property.”<sup>212</sup> The Drone treatise recognizes conflicting “theories” of copyright—ranging from “intellectual productions [as] a species of property founded in natural law” to “copyright [as] a monopoly of limited duration, created and wholly regulated by the legislature”<sup>213</sup>—but it seems to fall squarely on the side of copyright-as-property when it declares

203. *Id.* at 907.

204. *Johnson v. Donaldson*, 3 F. 22 (C.C.S.D.N.Y. 1880).

205. *Id.* at 23–24.

206. *The Mark Twain Cases*, 14 F. 728 (C.C.N.D. Ill. 1883). *See also* *Brady v. Daly*, 175 U.S. 148, 157 (1899) (quoting English law protecting “dramatic literary property”); *Callaghan v. Myers*, 128 U.S. 617, 623 (1888) (discussing whether “all of the matter contained in the [Illinois law reports] are public and common property” or whether the volumes contained material “susceptible of copyright, or in any manner literary property”).

207. *The Mark Twain Cases*, 14 F. at 731.

208. *See also* *The Mikado Case*, 25 F. 183, 185 (C.C.S.D.N.Y. 1885) (holding that orchestration and piano-forte arrangement were not dramatic compositions entitled to protection of copyright laws).

209. JOHN BOUVIER, *A LAW DICTIONARY* 313 (6th ed. 1856), available at [http://www.constitution.org/bouv/bouvier\\_c.htm](http://www.constitution.org/bouv/bouvier_c.htm).

210. JOHN BOUVIER, *A LAW DICTIONARY* 436, 437 (new ed. 1897).

211. *Id.* at 436.

212. DRONE, *supra* note 51, at 1, 54.

213. *Id.* at 2.

“[p]roperty in intellectual productions is recognized and protected in England and the United States, both by the common law and by the statute.”<sup>214</sup>

States also continued to provide protection for the kinds of literary “property” not protected by federal copyright—such as the New Hampshire (1895) and New Jersey (1895) acts protecting unpublished works.<sup>215</sup> Indeed, many state laws of this period, even if they did not explicitly say “property,” referred to “proprietors” of works or rights in works. The 1899 peace treaty between Spain and the United States declares unequivocally that “rights of property secured by copyrights and patents acquired by Spaniards . . . shall continue to be respected.”<sup>216</sup>

In the twentieth century, these kinds of references continued (although whether there was a meaningful drop-off warrants systematic study). Consider the following passage from the 1938 opinion in *Werckmeister v. American Lithographic Co.*,<sup>217</sup> discussing both common law and statutory copyright:

The Greeks reasoned that the perfect statue already existed in the block of marble, and that it required only the genius of the sculptor to develop its proportions. Copyright protects the captor of the idea, the genius of the sculptor, by giving him the exclusive property in his acquisition or creation.

To pursue the foregoing analogies, the common-law protection continues only so long as the captives or creations are kept in confinement or controlled. The statute permits them to go free and releases the restraint, provided the owner has stamped them with his brand. In either case the property of the owner is protected against appropriation without his consent. The common law protected copyright before publication. The

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214. *Id.* at 100. Another exemplary excerpt: “The property in an intellectual production is incorporeal, and is wholly distinct from the property in the material to which it may be attached.” *Id.* at 98.

215. SOLBERG, COPYRIGHT ENACTMENTS, *supra* note 125, at 105 (N.H.), 108 (N.J.). Rights to intangibles have been characterized as property even when no state law statutory right is involved. In *Gieseking v. Urania Records*, 155 N.Y.S.2d 171, 172 (Sup. Ct. 1956), the court stated that a “performer has a property right in his performance that it shall not be used for a purpose not intended, and particularly in a manner which does not fairly represent his service.”

216. SOLBERG, COPYRIGHT ENACTMENTS, *supra* note 125, at 99 (emphasis added).

217. *Werckmeister v. Am. Lithographic Co.*, 134 F. 321 (2d Cir. 1904).



statute supersedes the common-law right, and subject to certain conditions extends its protection after publication.<sup>218</sup>

This passage is remarkable for its reduction of creativity to a form of discovery (of preexisting forms), a vision that has a long history but is at odds with our mainstream notion of creativity. But even more importantly, the court clearly marks the statutory right as a form of property, simply “extending” the common law protection.<sup>219</sup>

The appearance of the phrase “intellectual property” was a natural development of these cases and commentaries. Drone’s 1879 copyright treatise is entitled “A Treatise on the Law of Property in Intellectual Productions.”<sup>220</sup> Courts also commonly referred to what we would call “works” as “intellectual productions,”<sup>221</sup> or otherwise used the “intellectual” adjective in connection with the property concept, such as when the *Folsom v. Marsh* opinion describes editing work as “intellectual effort.”<sup>222</sup>

There is a danger with the sort of narrative here and in the rest of this Part: the piling on of evidence can create the appearance that “property” (or “literary property” or “intellectual property”) was a dominant or constant concept in any period being discussed. That is possibly true, but is not the argument here. The arguments here are much less ambitious.

To summarize them, any claim that copyrights have only recently been understood as “property” *within* the legal system appears to be historically wrong. “Intellectual property” is certainly a newer phrase, but not as new as some have claimed or intimated. Unless we can be shown how a special grip on the mind comes from “intellectual property,” then

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218. *Id.* at 324.

219. This passage from *Werckmeister* is quoted in its entirety in *Kurfiss v. Cowherd*, 121 S.W.2d 282, 286 (Mo. Ct. App. 1938), so presumably the Missouri court also embraced copyright as property.

220. DRONE, *supra* note 51.

221. *See, e.g.*, *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1883) (referring to “original intellectual conceptions of the author” and “intellectual productions”); *Falk v. Gast Lithograph & Engraving Co.*, 54 F. 890, 891 (2d Cir. 1893) (finding under *Burrow-Giles Lithographic Co.* that the “intellectual production” of the photograph at issue was “the result of thought and conception”); *The Mikado Case*, 25 F. 183, 184 (C.C.S.D.N.Y. 1885) (holding that “[n]o one questions the justice of the claim of the author of any intellectual production to reap the fruits of his labor in every field where he has contributed to the enlightenment or the rational enjoyment of mankind”); *Frohman v. Ferris*, 87 N.E. 327, 329 (Ill. 1909) (holding that an unpublished play was protected because “[p]roperty in intellectual productions is recognized and protected”).

222. *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901). *See e.g.*, *Ockenholdt v. Frohman*, 60 Ill. App. 300, 301 (1895) (“Copyright before publication is the exclusive privilege of first publishing any original material, the product of intellectual labor. Its possession is property, and the violation of it is an invasion of property, and it depends entirely on common law.”).

this long history has to be acknowledged—that is, we must recognize that people have called copyright “property” for the past two hundred years.

Finally, two other arguments should be mentioned. The first is that the “property” discourse of these centuries was offset by a discourse about copyrights and patents as “monopolies.” The monopoly concept was unquestionably present. For example, in discussing the 1842 reform of English copyright law, Catherine Seville notes that “[m]ass petitioning was one of the main weapons used against the bill, provoked by the [opponents’] characterisation of copyright as a monopoly which acted as an intolerable fetter on the diffusion of knowledge.”<sup>223</sup> Aside from sounding eerily familiar to those engaged in late twentieth-century/early twenty-first century copyright debates, Seville’s observation should remind us that the monopoly construct seems to have failed to dominate the judicial or legislative imagination. Additionally, those who emphasize that subsuming copyrights and patents under one umbrella concept is a relatively recent practice should remember that most of the monopoly discourse was directed against patents, not copyrights.<sup>224</sup>

Second, another argument is that when eighteenth and nineteenth century legislators and jurists said “property,” they did not mean what we mean (or what our ill-informed judges and legislators mean). That is a valid theory, but one that would require years of fine-combed study of the

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223. SEVILLE, *supra* note 59, at 8. Based on the publication date, Seville might have written this in a period when her views of the English debates in the 1830s and 1840s could have been affected by our own debates. Of course, there are plenty of occasions where exclusive printing rights were understood as “monopoly.” For example, in his 1694 memorandum, Locke repeatedly refers to the Stationer’s Company pre-copyright exclusive printing rights as a “monopoly.” But he does so only when referring to the entire Stationer’s Company exercising exclusive rights to “print all, or at least the greatest part, of the classic authors,” not to printing privileges on individual books. KING, *supra* note 70, at 378.

224. A point implicitly acknowledged by most. For example, Fisher writes “[i]n the eighteenth century, lawyers and politicians were more likely to refer to patents and copyrights as ‘monopolies’ than they were to refer to them as forms of property” but the evidence he gives for this is the origins to patents in the English 1623 Statute on Monopolies and Thomas Jefferson’s comments about patents. Fisher, *supra* note 32, at 20.

historical record.<sup>225</sup> Absent that—and given that eighteenth- and nineteenth-century legislators and jurists argued and opined about copyright as property in ways that are completely understandable to us today—we should assume that what they meant by “property” is roughly what we mean by “property” (even if there was a unified modern “us”).

### E. COURTS RAILING AGAINST ALL KINDS OF “PIRACY”

As a coda to all this, we might look to what was happening to usage of “piracy” as copyright became comfortably identified as property. Once the modern copyright system was underway, “piracy” transferred easily in English—and then American—jurisprudence into a general label for infringement of statutory copyright rights. In the 1798 case *Beckford v. Hood*, the court characterized the matter before it—an unauthorized, nontransformative, commercial republication of a book—as “an action upon the case for piracy of copyright.”<sup>226</sup> A few years later, in *Hime v. Dale* and *Clementi v. Golding*, the word is used to denote unauthorized, nontransformative republication.<sup>227</sup> These uses would comport with what we think of as true copyright “piracy,” but courts did not shy from using the word more broadly. For example, in the 1776 *Taylor v. Bayne* case, the defendant had copied several map pages from the plaintiff’s map book, but

225. Shubha Gosh devotes a substantial law review article to making an argument of this sort. Gosh, *supra* note 88. Gosh reasons that “in the copyright context, the government is granting a property right.” *Id.* at 423. Nonetheless, he continues, “the historical evidence I present here illustrates that copyright has never been a purely private right. . . . The record does not support copyright’s status as a purely private right secured by the government.” *Id.* at 428. The evidence Gosh presents is limited and sometimes needs much interpretation to reach his conclusion. He contrasts copyright as a “purely private right” with copyrights “viewed in instrumental terms from the very beginning,” but this is a straw man. *Id.* at 439. These are not conflicting perspectives in our historical treatment of real property. For example, the land grant college system, implemented in the 1860s, and the railroad land grant system, operating from the 1860s through 1990, unquestionably involved grants of private property for “instrumental” purposes. Indeed, elsewhere Gosh recognizes the “realist tradition that has envisioned real property as an instrumental construct.” *Id.* at 389. Recognizing “birth of copyright as the creation of property” does not mean recognizing copyright as presocial. *Id.* at 392. Moreover, it is widely believed that notions of “absolute,” “dominion,” and “purely private” are caricatures of property rights—of any sort. See Michael Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 2 (2004) (arguing that “property is not as absolute as it is often claimed to be”); Carol Rose, *Canons of Property Talk, or Blackstone’s Anxiety*, 108 YALE L.J. 601, 631 (1998) (describing the notion of “property as exclusive dominion” as “at most a cartoon or trope”).

226. *Beckford v. Hood*, (1798) 101 Eng. Rep. 1164 (K.B.).

227. *Hime v. Dale*, (1803) 2 Camp. 27 (“This is an action for pirating the words of a song called ‘Abraham Newland,’ published on a single sheet of paper.”); *Clementi v. Golding*, (1809) 170 Eng. Rep. 1069 (K.B.) (“This is an action for pirating a musical composition called ‘Heigh Ho.’”).

nothing approaching the whole work. While the defendant claimed to have taken only facts, the court's opinion called this "an evident piracy."<sup>228</sup>

In the nineteenth century and the first half of the twentieth century, there is a rich history of American courts and commentators referring to *all kinds of copyright infringement* as "piracy." The broad usage of the word "piracy" shows that it was generally equated with infringement: there seemed to be no requirement either that the infringement be a "nontransformative" use *or* that the infringement entail reproduction and distribution on a massive scale.

In the 1820 case of *Moody v. Fiske*, Justice Story noted that a substantial taking was actionable as copyright infringement on the ground that "[i]t has never been supposed that in order to maintain an action, the whole book should be pirated. It has been adjudged sufficient, if a considerable part of the book be pirated . . ." <sup>229</sup> And in the classic 1841 *Folsom v. Marsh* case—the origin of America's fair use doctrine—Justice Story uses "piracy" with equal breadth. Story concluded that although quotation of a work for purposes of genuine criticism was permitted, extensive quotation so as "to supersede the use of the original work . . . will be deemed in law a piracy."<sup>230</sup> Because this passage describes a work of criticism (or a work masquerading as a criticism), "piracy" is being attached to a nominally derivative work. Similarly, in the 1868 *Daly v. Palmer* case, the court equated "piracy" with substantial similarity<sup>231</sup> and wrote "the piracy is, where the appropriated music, though adapted to a different purpose from that of the original, may still be recognized by the ear."<sup>232</sup>

In *Baker v. Selden*, the Supreme Court reasoned that using only *information* from a copyrighted book could not be infringement because

228. *Taylor v. Bayne*, (1776) 10 Mor. Dict. 8308 (Scot.). See discussion in SEVILLE, *supra* note 59, at 224.

229. *Moody v. Fiske*, 17 F. Cas. 655, 656–57 (C.C.D. Mass. 1820) (No. 9745).

230. *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901). See also *Benn v. Leclercq*, 3 F. Cas. 201, 202 (C.C.D. Mass. 1873) (No. 1308) (An author "cannot prevent others from composing or publishing a similar book on the same subject, provided they do not pirate from his copyrighted book, but rely on their own intellect and mental power.").

231. *Daly v. Palmer*, 6 F. Cas. 1132, 1137 (C.C.S.D.N.Y. 1868) (No. 3552) (observing that piracy "depend[s] on whether the air taken is substantially the same with the original").

232. *Id.* Later the court noted:

The true test of whether there is piracy or not, is to ascertain whether there is a servile or evasive imitation of the plaintiff's work, or whether there is a bona fide original compilation, made up from common materials, and common sources, with resemblances which are merely accidental, or result from the nature of the subject.

*Id.* at 1138.

the goal of disseminating information “would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book.”<sup>233</sup> A close reading of this opinion shows the Court reasoning that a book can have a valid copyright “if not pirated from other works”<sup>234</sup>—which seems to describe a one-off (reproductive) event, that is, copying from someone else into your manuscript, without requiring a large-scale commercial (distributive) activity.<sup>235</sup> In the same decade, the 1879 Drone treatise describes piracy this way:

The true test of piracy, then, is not whether a composition is copied in the same language or the exact words as the original, but whether in substance it is reproduced; not whether the whole, but whether a material part is taken. In this view of the subject, it is no defense of piracy that the work entitled to protection has not been copied literally; that it has been translated into another language; that it has been dramatized; that the whole has not been taken; that it has been abridged; that it is reproduced in a new and more useful form. The controlling question always is, whether the substance of the work is taken without authority.<sup>236</sup>

Here “piracy” is equated with any kind of infringement. Similarly, the 1897 and 1914 editions of Bouvier’s law dictionary provide that:

There may be a piracy: 1st. By *reprinting* the whole or part of a book *verbatim*. The mere quantity of matter taken from a book is not of itself a test of piracy . . . . 2d. By *imitating* or copying, with colourable alterations and disguises, assuming the appearance of a new work. Where the resemblance does not amount to identity of parallel passages, the criterion is whether there is such similitude and conformity between the two books that the person who wrote the one must have used the other as a model, and must have copied or imitated it.<sup>237</sup>

Palmer’s 1863 treatise on English copyright law likewise has discrete chapters on “As to Piracy by Quotation,” “As to Piracy by Abridgement or

233. *Baker v. Selden*, 101 U.S. 99, 103 (1879), *superseded by statute*, Architectural Works Protection Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5133-34.

234. *Id.* at 102.

235. *See also* *Harms, Inc. v. Tops Music Enter.*, 160 F. Supp. 77, 81 (S.D. Cal. 1958) (Holding that “[w]here a song is copyrighted under a name, it cannot be dissociated from it. He who pirates it, pirates it as a whole.”).

236. DRONE, *supra* note 51, at 385.

237. JOHN BOUVIER, A LAW DICTIONARY 436, 437 (new ed. 1897). The text is unchanged between the 1897 and 1914 editions. The 1856 edition of the Bouvier Law Dictionary does not have a similar passage.

Digest,” and “As to Piracy by Translation or Retranslation.”<sup>238</sup> As authors and publishers stepped up the fight for American recognition of English copyrights, Reverend Isaac Funk published a 1888 book that deemed the “national sin of literary piracy” to violate the Seventh Commandment.<sup>239</sup>

Such broad uses of the word piracy continued in the twentieth century and continue into our own. Arguably the greatest copyright jurist of the twentieth century, Learned Hand, unquestionably understood nonliteral copying to be “piracy.” In *Sheldon v. Metro-Goldwyn Pictures Corp.*, Hand wrote that a play “may often be most effectively pirated by leaving out the speech, for which a substitute can be found” while “keep[ing] the whole dramatic meaning,” and that “no plagiarist can excuse the wrong by showing how much of his work he did not pirate.”<sup>240</sup>

Literally one hundred years after *Baker v. Selden*, the Supreme Court’s 1973 decision in *Goldstein v. California* described—in complete, century-old consistency—unauthorized, intentional copying as “piracy” on several occasions. Although the Court introduced the concepts in quotations (“tape piracy” and “record piracy”), that was partly because they were statutory terms from California law. Neither the majority nor the dissent quibbled with the terminology.<sup>241</sup> In 1985, the Court again referred to a “pirated” record as an “unauthorized copy” of a music performance, without any qualifier as to the extent of copying and distribution.<sup>242</sup> Finally, a very recent example of unrestricted use of the word “piracy” can be found in the Sixth Circuit’s 2005 decision in *Bridgeport Music v. Dimension Films*:

238. PHILLIPS, *supra* note 119, at ix-x. The Phillips treatise is clear that a person is free to “make what use he pleases of [a] work, save that of multiplication of copies” and therefore “public performance on the stage of a play representing the incidents of a published novel is therefore, no infringement” and “[n]either is the public recitation of a published copyright work a piracy.” *Id.* at 136-37. In other words, the treatise defines “piracy” as coextensive with infringement.

239. VAN DYKE, *supra* note 41.

240. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936). Hand clearly understood that taking *some* material was “piracy.” Upon hearing the case again, he described “the usual case of copyright infringement” as one where “the pirated material has been mixed with matter in the public demesne.” *Sheldon v. Metro-Goldwyn Mayer*, 106 F.2d 45, 49 (2d Cir. 1939). *See also* *Curwood v. Affiliated Distribs.*, 283 F. 219, 222 (S.D.N.Y. 1922) (holding that “while scenery, action, and characters may be added to the original story, and even supplant subordinate portions thereof, there is an obligation upon the one elaborating to retain and give appropriate expression to the theme, thought, and main action of that which was originally written”).

241. *Goldstein v. California*, 412 U.S. 546 (1973). Justice Marshall even says in dissent that “we should not let our distaste for ‘pirates’ interfere with our interpretation of the copyright laws.” *Id.* at 579 (Marshall, J., dissenting).

242. *Dowling v. United States*, 473 U.S. 207, 209 n.2 (1985) (stating that although “the terms frequently are used interchangeably, a ‘bootleg’ record is not the same as a ‘pirated’ one, the latter being an unauthorized copy of a performance already commercially released”).

That leads us directly to the issue in this case. If you cannot pirate the whole sound recording, can you “lift” or “sample” something less than the whole. Our answer to the question is in the negative.<sup>243</sup>

In *Bridgeport Music*, at least, the verb “to pirate” is used to mean *taking the whole work*, as opposed to taking a portion of the work, but “to pirate” is still understood without reference to *mass* reproduction and distribution.<sup>244</sup>

The list of examples could be expanded, but the point would not change. We may bristle when the Motion Picture Association of America (“MPAA”) broadly states that “[p]iracy is the unauthorized taking, copying, or use of copyrighted materials without permission,”<sup>245</sup> but this may not be historically inaccurate: a significant number of jurists have historically understood “piracy” to be coextensive with infringement. Thus, the deluge of recent headlines about piracy of copyrighted works is not because a new, pejorative word is being foisted upon us, but because copyright infringement is simply much bigger news. Whether or not we can—or should—do anything to contain the use of the term “piracy” is taken up in Part V.

#### IV. BETTER UNDERSTANDING THE PROPERTY CRITIQUE OF COPYRIGHT

The statements about what Thomas Jefferson thought, the rhetoric of “piracy,” and the newness of “intellectual property” are always deployed in the service of a bigger argument. That argument has *tended* to be about—and against—the strengthening of intellectual property rights that has occurred from 1976 to the present. Among scholars, this strengthening has often been called the “propertization of intellectual property.” Looking solely at copyright, the literature is actually a constellation of slightly different points: different *descriptive* claims of how copyright policy has

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243. *Bridgeport Music v. Dimension Films*, 410 F.3d 792, 800 (6th Cir. 2005).

244. A few commentators also define “piracy” this way in contradistinction to “plagiarism,” which is identified as passing off (even though plenty of modern sources define “piracy” as plagiarism). See, e.g., Stephen Rebiokoff, *Restructuring the Test for Copyright Infringement in Relation to Literary and Dramatic Plots*, 25 MELB. U. L. REV. 340, 344 (2001) (stating that “the appropriation and passing off of the prior author’s work . . . might properly be described as ‘plagiarism,’” whereas “reproduction in a derivative form . . . is more appropriately labelled [sic] ‘piracy’”); Aaron Keyt, Comment, *An Improved Framework for Music Plagiarism Litigation*, 76 CAL. L. REV. 421, 422 n.4 (1988) (describing plagiarism as “false designations of authorship . . . usually distinct from the other common subcategory of copyright infringement called ‘piracy,’ which involves the production and sale of unauthorized literal copies of a work”).

245. Motion Picture Association of America, Anti-Piracy, <http://www.mpa.org/piracy.asp> (last visited May 20, 2006).

gone bad, several variations of a *causal argument*, and an array of *prescriptions* for how to improve copyright policy in light of the past thirty years. On all these fronts, the pro-*peritization* critique of copyright has been important, but it has also reached some natural constraints. The critique will usefully advance now only if scholars undertake more analytical and empirical work.

#### A. GETTING THE DESCRIPTIVE CLAIMS RIGHT

The phrase “*peritization* of intellectual property” is often a partial misnomer for what scholars are discussing. First, there is the straightforward extension of *intellectual property norms* to resources that were ungoverned by such norms in the past. Sometimes the extension is to old resources (copyright extended to “prints” in 1802,<sup>246</sup> patents extended to business methods in 1998<sup>247</sup>). Other times the extension is to new resources made or made accessible by technology, such as web pages, “copies” of works wholly divorced from dedicated physical media (such as a CD), and human genome data.<sup>248</sup> Taken as a whole, this trend is not so much a thickening of the private rights of intellectual property as it is intellectual property’s conquest of new realms.<sup>249</sup>

Second, “*peritization*” can also mean the more general extension of *property norms*—as instrumentalities of increased private control—to new information or communication areas that were previously outside the range of the property concept. Sometimes these are intellectual property norms and sometimes hybrid creations that draw from real and chattel property. James Boyle’s 1996 book, *Shaman, Spleens, and Software*, remains perhaps the best systematic observation of this late twentieth-century drive for property or property-like private control of information.<sup>250</sup> The human

246. This bill, titled “An act for the encouragement of learning,” extended copyright protection “to the arts of designing, engraving, and etching historical and other prints.” THORVALD SOLBERG, *COPYRIGHT IN CONGRESS, 1789–1904*, at 128 (1905) [hereinafter SOLBERG, *COPYRIGHT IN CONGRESS*] (detailing the bill’s passage in the House and Senate, as well as its signature into law by the President on April 29, 1802).

247. *State St. Bank & Trust v. Signature Fin. Group*, 149 F.3d 1368, 1375 (Fed. Cir. 1998); *AT&T Corp. v. Excel Commc’n*, 172 F.3d 1352, 1361 (Fed. Cir. 1999).

248. See Arti Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 NW. U. L. REV. 77, 88–115 (1999) (noting concerns with *peritization* of human genome data).

249. See generally Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900–2000*, 88 CAL. L. REV. 2187, 2205–06 (2000).

250. For a creative and wide-ranging critique of the growing “*peritization*” of information, see JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* (1996).



genome issue mentioned above is part and parcel of the broader concerns over “proptertization” of research in the sciences—that is, profit-seeking, contracts, and proprietary claims (often based on patents) replacing the partially mythic norms of openness and sharing in science. Another issue is the “proptertization” of personal information: using property concepts to claim control over dissemination of personal information. Examples further afield include Madhavi Sunder’s observation of an “intellectual proptertization” of First Amendment jurisprudence<sup>251</sup> and Naomi Klein’s observations about forces “privatizing the town square” and the “colonization of public space.”<sup>252</sup>

In all these cases, when scholars have said “proptertization,” they have always meant “increased (private) control.”<sup>253</sup> But we owe ourselves some precision: this is proptertization of “information, expression, or communicative capacity,”<sup>254</sup> or of “an intellectual resource.”<sup>255</sup> But the information or the intellectual resource was not typically considered intellectual property previously.<sup>256</sup>

When we say *increased proptertization of intellectual property* it would be more faithful to the words to focus on *increased private control akin to (real and chattel) property over intellectual productions already protected by an existing regime of exclusionary rights (copyright, patents, and trademarks)*. In the case of trademarks, such a phenomenon of “proptertization” has a fairly high profile. Starting as rights strictly “appurtenant” to distinct commercial activities, trademarks have

251. Madhavi Sunder, Note, *Authorship and Autonomy As Rites of Exclusion: The Intellectual Proptertization of Free Speech in Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 49 STAN. L. REV. 143, 144–48 (1996).

252. NAOMI KLEIN, NO LOGO 182, 442 (2000).

253. R. Polk Wagner, *Information Wants To Be Free: Intellectual Property and the Mythology of Control*, 103 COLUM. L. REV. 995, 1002 (2003) (equating “increasing proptertization” with “increasing control”).

254. Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 39 (2001).

255. Richard Posner, *Honorable Helen Wilson Nies Memorial Lecture in Intellectual Property: Do We Have Too Many Intellectual Property Rights?*, 9 MARQ. INTELL. PROP. L. REV. 173, 174 (2005) [hereinafter Posner, *Nies Memorial Lecture*].

256. *Id.* (“I’m going to talk about the phenomenon of ‘proptertization’ (of intellectual property), that is, taking some valuable resource, in this case an intellectual resource broadly understood, and making it a private property.”). Posner’s use of the phrase “property,” then, cannot just include things subject to communal property or public property regimes, but also includes things subject to no regime at all.

increasingly been treated as their own propertized *res*.<sup>257</sup> But with copyrights, what exactly constitutes the propertization phenomenon? If the issue is the extension of copyright to previously contested areas—like P2P reproduction and delivery or “framing” on the Internet—the issue is *new* private control of *new* activities *through* copyright,<sup>258</sup> not a change in copyright law itself.

The question is, has copyright itself—as a legal instrument—become more property-like? Michael Carrier’s 2004 article provides a good analysis of the problem. Like others, Carrier thinks the changes have been dramatic: “[o]ne of the most revolutionary legal changes in the past generation has been the ‘propertization’ of intellectual property (IP).”<sup>259</sup> But when Carrier begins parsing the facts as to what constitutes this “propertization,” he appears to sense there is less there than it first seemed. Professor Carrier writes, “by ‘propertization,’ I mean the expansion of the duration and scope of initial rights to approach unlimited dimensions” and that “‘the shape of property’ in intellectual works has become unlimited in duration and in the rights granted.”<sup>260</sup> Let us consider each of these.

The extension of copyright’s duration is a leitmotif in the propertization literature—this really is the strongest argument that copyright has come to resemble chattel and real property. As a group of leading economists noted in their amicus brief in *Eldred v. Ashcroft*, “the current copyright term already has nearly the same present value as an

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257. We have a long history of denying that trademarks are pure property rights, yet the rise of dilution as a separate basis for trademark infringement, the weakening of the bar on trademark assignment in gross, and the widened understanding of “use in commercial” for a trade symbol all point to a “propertizing” of trademarks. See, e.g., Fisher, *supra* note 32, at 14, 21 (noting that “in American history” the “transition” to property concepts “can be seen most clearly in the context of trademark law”); Eric Berger, Case Note, *TrafFix Devices, Inc. v. Marketing Displays, Inc.: Intellectual Property in Crisis: Rubbernecking the Aftermath of the United States Supreme Court’s TrafFix Wreck*, 57 ARK. L. REV. 383, 383 n.3 (2004) (noting that “the term ‘propertization’ is used to denote the tendency toward increasing protection afforded trademark law, almost turning this form of intellectual property into a full property right”). For a broad discussion of property-based trademark protection, see Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367, 371 (1999) (arguing that “the expansion [of trademark law since the mid-1950s] has focused on a trademark’s value not merely as a device for conveying otherwise indiscernible information concerning a product (‘deception-based trademark’), but as a valuable product in itself (‘property-based trademark’”). Of course, one can reason that as a trademark becomes a cultural object in its own right, it naturally attracts more property-like protections. See Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 682–83 (2004) (discussing the emergence of the trademark as a “floating signifier”).

258. See C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002) (exploring the constitutionality of granting private property holders power to limit other people’s speech and the press).

259. Carrier, *supra* note 225, at 4.

260. *Id.* at 6–7.

infinite copyright term.”<sup>261</sup> But even here, there are different ways to view the propertization. If you were intent on using “Steamboat Willie” in the near future, then the twenty-year extension of copyright in 1998 certainly seems like “propertization.” The extension also seems ominously like propertization if we assume that it is just the first in a long-term series of efforts to get, in Peter Jaszi’s words, “perpetual copyright on the installment plan.”<sup>262</sup>

But from another perspective, we have been living with a near-perpetual term for some time. Using a simple calculation, the *Eldred* economists concluded that at 7% interest a dollar is worth \$14.27 over 100 years (a rough approximate of the present term) and worth only 2 cents more with perpetual protection—an increase of 0.12% only.<sup>263</sup> Yet even prior to the 1998 extension of copyright (a 20-year increase in the term), the \$1 yielded \$14.22 cents over the copyright term,<sup>264</sup> compared to \$14.29 for perpetual protection. In other words, the difference between the value of the “limited” term of copyright protection (1978–98) and perpetual protection—as offered by real and chattel property—was already less than one half of one percent (0.49%). From this economic perspective, the copyright term has been near-perpetual for two decades.<sup>265</sup> And although the discussion here is limited to copyrights, the durational argument is practically no help with “propertization” of patents and trademarks.<sup>266</sup>

What about “the scope of initial rights” granted to a copyright holder? On the statutes, the three expansions of rights in the period under scrutiny

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261. Brief for George A. Akerlof et al. as Amici Curiae Supporting Petitioners at 8, *Eldred v. Ashcroft*, 534 U.S. 1126 (2002) (No. 01-618), available at <http://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/economists.pdf> (concluding that term extension for new works induces new costs and benefits that are too small in present-value terms to have much economic effect) [hereinafter Economists’ *Eldred* Brief].

262. Peter Jaszi, *Caught in the Net of Copyright*, 75 OR. L. REV. 299, 303 (1998).

263. Economists’ *Eldred* Brief, *supra* note 261, at 8 n.12.

264. *Id.* at 10 n.7.

265. A limited term of any sort distinguishes copyright from real property. As Stewart Sterk points out, the difference in duration between property interests in copyrighted works and property interests in land

is consistent with the differing justifications for the two sets of rights. Threats of breach of the peace are timeless. Putting a scarce, valuable, and durable resource “up for grabs” inevitably invites disputes, and extra-legal resolution of those disputes. Similarly, the potential for overuse—the tragedy of the commons—does not diminish with time.

Sterk, *supra* note 28, at 447.

266. Trademark protection has been indefinite since the first trademark statute, and the patent term has barely budged, forcing scholars into secondary arguments about *de facto* extension. See, e.g., Carrier, *supra* note 225, at 17 (“Not only has the scope of patent rights expanded, but their effective duration has lengthened as patents have increasingly been utilized in industries with product generations shorter than twenty years.”).

would be: (1) the addition of the right of public display in 1976; (2) the constitutionally doubtful “right of fixation” added in 1994; and (3) the digital public performance right given to sound recordings in 1995.<sup>267</sup> The first of these has, since its inception, been subject to an elaborate compulsory licensing system; the second is more of a constitutional puzzle; and the third has not yet created the problems for the Internet that it potentially can. None of the three new rights has been scrutinized heavily in the propertization literature. The case law on the idea/expression dichotomy seems relatively stable, and, if there are any trends in the chaotic fair use jurisprudence, they have not been bad. Few dwell on the provisions of the Fairness in Music Licensing Act (1998); the Technology, Education, and Copyright Harmonization (“TEACH”) Act (2002); or the new compulsory licensing provisions of the Digital Millennium Copyright Act (“DMCA”) (1998)<sup>268</sup>—all of which put new limits on some copyright holders’ rights. As Joe Liu has explored, the recent growth of the copyright statute looks more like a regulatory system and, in that sense, less like the private ordering of property.<sup>269</sup> And with the exception of Tony Reese,<sup>270</sup> few scholars have mentioned the massive expansion of the public domain brought on by the 1976 Copyright Act’s placement of unpublished works under statutory copyright.

A prime subject/target in the propertization literature is section 1201 of the Copyright Act, the technological protection measure provisions enacted in the DMCA.<sup>271</sup> It is unquestionably true that section 1201 can

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267. “Clause (5) of section 106 represents the first explicit statutory recognition in American copyright law of an exclusive right to show a copyrighted work, or an image of it, to the public. The existence or extent of this right under the present statute is uncertain and subject to challenge.” H.R. REP. NO. 94-1476, at 63 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5676. The express inclusion of architectural work rights and computer software under copyright count as expanding the writ of copyright, not as a strengthening of rights within copyright.

268. The DMCA expanded the compulsory license for the performance right to a sound recording to include eligible nonsubscription services, such as webcasters. 17 U.S.C. § 114 (2000).

269. Instead of couching the DMCA in terms of expanded property rights, Joseph Liu writes that “the DMCA represents a dramatic expansion of the regulatory impact of our copyright laws.” Joseph P. Liu, *DMCA and the Regulation of Scientific Research*, 18 BERKELEY TECH. L.J. 501, 531 (2003).

270. R. Anthony Reese, *The New Unpublished Public Domain 2-3* (Aug. 15, 2005) (unpublished manuscript, on file with author).

271. Aaron Burstein, Note, *A Survey of Cybercrime in the United States*, 18 BERKELEY TECH. L.J. 313, 317 (2003) (“The DMCA’s creation of legal protection substantially expands to copyright owners the kind of property right that lurks behind the [Computer Fraud and Abuse Act] and related state laws.”).

adversely impact some fair uses—particularly the *ease* of some fair uses.<sup>272</sup> For example, Randal Picker focuses on the section 1201 prohibitions as a source of “proportionization of copyright,” because effective encryption will mean that each use of a copyrighted work will require prior consent of the copyright owner, something Picker says is characteristic of real and chattel property, but was not previously characteristic of copyright.<sup>273</sup> Shubha Gosh writes, “the DMCA also marks a privatization of copyright law itself by *permitting* owners of copyrighted materials to protect their works through technological, rather than legal, means.”<sup>274</sup> But “technological means” have always been *permitted*—that is what the locks on the cinema doors do during show times and what the plastic wrappers on certain magazines do all the time. The first scramblers of television signals date back to at least the early 1980s; the first copy controls on retail software also date back to the 1980s and had become widespread—if also widely unpopular—before the DMCA.<sup>275</sup> Sections 1201(a)(1), (a)(2), and (b)(1) create liability for picking digital locks that copyright owners were *already* allowed to deploy. As the Federal Circuit has noted, in enacting the DMCA, “Congress did not choose to create new property rights,”<sup>276</sup> and yet there was an unquestionable strengthening of the protection copyright owners enjoy.

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272. As the court noted in *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 304 (S.D.N.Y. 2000): “Technological access control measures have the capacity to prevent fair uses of copyrighted works as well as foul. Hence, there is a potential tension between the use of such access control measures and fair use.”

273. Picker, *supra* note 3, at 283.

274. Gosh, *supra* note 88, at 453 (emphasis added). See also Timothy B. Lee, CATO Inst., *Circumventing Competition: The Perverse Consequences of the Digital Millennium Copyright Act 9* (2006), <http://www.cato.org/pubs/pas/pa564.pdf> (“The anti-circumvention rule requires so many exceptions because it is a dramatic expansion of the rights of copyright holders. In effect, the DMCA creates an anti-circumvention right that is materially different from and much more sweeping than the underlying copyright.”).

275. Brian Livingston, *WINDOW MANAGER; Will the New Standard for the Music Industry Signal Big Changes for PC Software Makers?*, InfoWorld, July 26, 1999, at 36 (describing copy protection technologies used by software manufacturers in the 1980s); Tales from the Encryption, *One to One*, Dec. 1997, at 51 (describing “an ever-increasing number of copy protection systems coming onto the market” in the year before the DMCA was passed); Dongle, Wikipedia, <http://en.wikipedia.org/wiki/Dongle> (last visited July 28, 2006) (defining a common type of pre-1998 software copy control hardware). See generally *The Protection of Computer Software: Its Technology and Applications* 23–149 (Derrick Grover ed., 1989) (describing how many computer software manufacturers used “dongles” and other hardware or software technologies to discourage software piracy in the 1980s).

276. *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1203 (Fed. Cir. 2004). See also *Storage Tech. Corp. v. Custom Hardware Eng’g & Consulting, Inc.*, 421 F.3d 1307, 1318 (Fed. Cir. 2005).

We must understand more about how section 1201 is “proPERTIZATION,” either as a change in the legal regime or as a change in the behavior elicited by the law. There is interesting work to be done here—not only dissecting some of the more doubtful decisions under section 1201, but also exploring how the provisions of section 1201 are an expansion of copyright owner control without being, in Hohfeldian terms, additional “rights” per se. On the empirical side, we do not yet have a good study on how section 1201 has or has not affected the amount of digital locks employed to protect copyrighted works, what those locks do, the regularity of breach of such locks, and the statutorily permitted uses being frustrated by such locks—all of which goes to Picker’s claim about the effect of legally protecting what was already legal encryption.<sup>277</sup>

Finally, one of the striking things about the proPERTIZATION discussion is that it overlooks some of the most obvious ways in which private rights of copyright have truly grown more akin to real and chattel property. The first is the abolition of the domestic manufacturing requirement in American copyright law in the 1980s. Between 1909 and 1986, the United States had a domestic manufacturing requirement for nondramatic literary works by U.S. domiciliary authors.<sup>278</sup> The patent counterpart to copyright’s manufacturing requirement was the “working requirement” in American patent law, abolished in 1909. Clearly, these were both significant encumbrances on the respective legal regimes as a form of freehold property.

American trademark law retains this “working requirement” in the form of abandonment doctrine, but balances this with the prospect of perpetual protection. State right of publicity statutes also tend to have requirements that, at least by the time a right of publicity descends to heirs, the likeness or identity must be commercially exploited for the exclusive

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277. When Picker writes that “[i]t is only in copyright that we can imagine a rights holder asserting exclusive control through encryption,” we must remember that the operative word is *imagine*. Picker, *supra* note 3, at 284. If the Reidenberg/Lessig lesson is that we must recognize that the effective law is a function of law and nonlegal reality, then the regular breach of encryption systems—without punishment of all the breachers or reversal of all the information releases—must be taken into account.

278. The domestic manufacturing clause expired on June 30, 1986, pursuant to the Act of July 13, 1982, Pub. L. No. 97-215, 96 Stat. 178 (1977) (codified at 17 U.S.C. § 601 (2000)). Section 601 explains the details of the domestic manufacturing clause, which first appeared in the 1909 version of the Copyright Act at 17 U.S.C. § 16. The details of when the clause applied were specific and complex, including that it applied only to nondramatic literary works “preponderantly” in English. See 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT 7.22[A], at 7-213 to 7-216 (1991).

rights to be retained.<sup>279</sup> In many countries, working requirements are common in plant variety protection; some compulsory licensing regimes also reflect the unproperty-like idea that exclusive rights are “use or lose.” The general elimination of the working requirement in patent and copyright law—an old story—with its continuing retention in newer forms of intellectual property, suggests the unsurprising idea that *the older the crystallization of the intellectual property right, the more it takes on typical characteristics of property.*

Another example of “proPERTIZATION” of copyright that happened earlier than the recent discourse locates the change in the clarification in the 1976 Act that the rights in a copyright can be separately alienated, expressly appealing to the “bundle of sticks” metaphor with which property rights had been reconceptualized in the late nineteenth and early twentieth centuries. Although he did not invent the pungent “bundle of sticks” trope per se, we owe much of this reconceptualization to Wesley Hohfeld,<sup>280</sup> who also believed, fittingly, that property rights could apply to things that do not have physical or corporeal existence.<sup>281</sup>

All of the above suggests that “proPERTIZATION of intellectual property” is a somewhat infelicitous phrase to describe what has happened to copyright post-1975. “Strengthening of intellectual property” would be more descriptively accurate. Discussing the “proPERTIZATION” of copyrights may make us believe we are probing a deeper intellectual vein, but the insights do not fit very well with the label.<sup>282</sup> Contrast this with observations about the “commodification” of intellectual works—where the label seems to “grok” with the intellectual observation being made about the phenomenon at hand.

## B. THE CAUSAL ARGUMENTS

There is, however, another way that “proPERTIZATION of copyright” might be a good description of developments from 1970 to the present.

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279. See Right of Publicity, Scope of the Law, <http://www.unc.edu/courses/pre2000fall/law357c/cyberprojects/spring01/ROP/scope.html> (last visited May 21, 2006).

280. See Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 721 (1917).

281. Kenneth J. Vandeveld, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 359–62 (1980).

282. Robert Bone has expressed a similar concern about commentary focusing on the “proPERTIZATION” of trademark law. Robert Bone, *Enforcement Costs and Trademark Puzzles*, 90 VA. L. REV. 2099, 2121 (2004) (arguing that the “‘property’ or ‘proPERTIZATION’ label tends to obscure rather than advance” substantive trademark policies).

That would be if the concept “property” played a key role in the strengthening of copyright laws. As described above, the argued connection of “property” to the strengthening of copyright rights seems to run in two directions: (1) the recent occurrence of the phrase “intellectual property” is *evidence* of the strengthening of copyright; and (2) the use of the intellectual property construct is viewed as a *cause* of the strengthening of copyright.<sup>283</sup> The causal claims tend to be implicit. For example, Lemley argues that changes in the law, such as longer terms of protection and the increase in the number of things that are copyrightable, “are directly tied to the reconceptualization of patents, copyrights, and trademarks as a form of property.”<sup>284</sup> Professor Carrier states that “[i]n continually strengthening IP, courts have characterized it as a type of property.”<sup>285</sup> In her 2001 book, *Digital Copyright*, Jessica Litman connects today’s “stronger copyright laws” with the fact that “[w]e talk now of copyright as property that the owner is entitled to control—to sell to the public (or refuse to sell) on whatever terms the owner chooses.”<sup>286</sup> Morton Horowitz interprets William Fisher to make the same type of claim.<sup>287</sup> But if we are exploring a causal relationship between the intellectual property concept (or just property concept) and the strengthening of copyright, what is the causal mechanism?

The most straightforward story about causation is the foundational critique that lest we mind our terminology carefully, the words will control. As Benjamin Cardozo cautioned in 1926, “[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”<sup>288</sup> Jerome Frank elaborated on this problem in 1952:

A new name, a novel label expressive of a new generalization, can have immense consequences. . . . But the solution of a problem through the invention of a new generalization is no final solution: The new generalization breeds new problems. Stressing a newly perceived likeness between many particular happenings which had theretofore seemed unlike, it may blind us to continuing *unlikenesses*. Hypnotized

283. See *supra* text accompanying note 28.

284. Lemley, *Free Riding*, *supra* note 9, at 1042.

285. Carrier, *supra* note 225, at 10.

286. JESSICA LITMAN, *DIGITAL COPYRIGHT* 81 (2001) [hereinafter LITMAN, *DIGITAL COPYRIGHT*].

287. Horowitz says that Fisher “identifies a gradual shift in legal terminology that has recently created the generic field of intellectual property, which has contributed to the ‘proportization’ of the field.” Morton Horowitz, *Technology, Values, and the Justice System: Conceptualizing the Right of Access to Technology*, 79 WASH. L. REV. 105, 114 (2002) (citing Fisher, *supra* note 32). But Fisher’s analysis presents the “proportization” process as one that has occurred over a very long period.

288. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926) (describing the relationship between “parent” and “alias” or “dummy” subsidiary corporations as one “enveloped in the mists of metaphor”).



by a label which emphasizes identities, we may be led to ignore differences. For, with its stress on uniformity, an abstraction or generalization tends to become totalitarian in its attitude toward uniqueness.<sup>289</sup>

This seems to be a core element—if not the core element—of the proprietization of copyright argument: using the term “property” blinds us to “unlikenesses” between intellectual works and tangible, physical objects, that is, we become “hypnotized” by the property construct. Professor Lessig, for example, is concerned about the use of “property” to describe copyright “because the muscle to think critically about the scope of anything called ‘property’ is not well-exercised within this [copyright] tradition anymore.”<sup>290</sup>

By itself, this general critique is perfectly correct, but not very satisfying. It is just a version of the *Through the Looking Glass* lesson we learn early in life: we have to master our words, not vice versa.<sup>291</sup> Commentators have, however, gone a little further, identifying a few distinct ways by which property mucks up our thinking:

- (1) “property” leads us toward natural rights notions that property over expression is or should be inviolable, absolute, etc.;
- (2) “property” leads us toward law-and-economics analysis which envisions strong private ownership rights over expression as the best way to maximize wealth, often based on a false understanding that intellectual materials are subject to rivalrous consumption; and
- (3) “property” leads us toward notions of real property, including toward a view that copyrights have easily defined, sacrosanct boundaries enforced without considerations of social good.

In each of these different ways, “property” is thought to skew the discussion of copyright.

In the first group, Carla Hesse finds the “property” framework culpable because it leads to natural rights thinking. Professor Hesse notes

289. *Granz v. Harris*, 198 F.2d 585, 590–91 (2d Cir. 1952) (Frank, J., concurring).

290. LESSIG, *supra* note 7, at 270. See also Fisher, *supra* note 32, at 22–23 (discussing the importance Legal Realists placed on care in use of terminology).

291. LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 100 (Penguin Books 1994) (1872).

“When I use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean—neither more or less.” “The question is,” said Alice, “whether you *can* make words mean so many different things.” “The question is,” said Humpty Dumpty, “which is to be master—that’s all.”

*Id.*

that a “progressive shift in the legal spectrum toward the enforcement of natural rights has led to a steady strengthening of private intellectual property claims over the doctrine of the public interest.”<sup>292</sup> In the same vein, Sam Oddi has argued that use of natural rights discourse in international fora short-circuits more pragmatic discussions of economic development:

These rights are so important that individual [WTO] member welfare should not stand in the way of their being protected as an entitlement of the creators. This invokes a counter-instrumentalist policy that members, regardless of their state of industrialization, should sacrifice their national interests in favor of the posited higher order of international trade.<sup>293</sup>

Also in this first group is Michael Birnhack’s concern about the “proprietary conception of copyright law,”<sup>294</sup> and its inconsistency with the widely held view that copyright and the First Amendment have the shared goal of promoting speech.<sup>295</sup> Although the connection is rarely made, one could argue that the elimination of formalities in the 1976 Act was the single event that most moved American copyright law toward a natural

292. Hesse, *supra* note 72, at 40.

293. A. Samuel Oddi, *TRIPS—Natural Rights and a ‘Polite Form of Economic Imperialism,’* 29 VAND. J. TRANSNAT’L L. 415, 440 (1996).

294. Michael D. Birnhack, *Copyright and Free Speech After Eldred v. Ashcroft*, 76 S. CAL. L. REV. 1275, 1318 (2003). Birnhack reasons that the “proprietary conception of copyright law is not teleological, by definition, so it has no ‘goal,’” and without a goal, it cannot share the goal of any other policy or principle—like the First Amendment. *Id.* He concludes that the “proprietary conception, which views copyright as a natural right, could not be the premise of the no-conflict narrative because it would not make sense to hold both simultaneously.” *Id.* at 1328.

295. The view that copyright and the First Amendment have the shared goal of promoting speech, of course, has been embraced by the Supreme Court and put forward by many commentators. *See, e.g., Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (reasoning that “[t]he Copyright Clause and First Amendment were adopted close in time,” and so the “proximity indicates that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles. Indeed, copyright’s purpose is to *promote* the creation and publication of free expression”); Harper & Row v. Nation Enters., 471 U.S. 539, 558, 560 (1985) (emphasizing that “the Framers intended copyright itself to be the engine of free expression” and that “[c]ourts and commentators have recognized that copyright, and the right of first publication in particular, serve this countervailing First Amendment value”); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 360 (1988) (arguing that copyright strengthens a system of free expression through an argument that “[a]ny system that emphasizes that the audience should receive the speaker’s *intended* message must protect the speaker’s expression from distortion”); Michael J. Madison, *Complexity and Copyright in Contradiction*, 18 CARDOZO ARTS & ENT. L.J. 125, 160 (2000) (recognizing that “copyright provides economic incentives that generate expression to feed the First Amendment”); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970).

rights view: the copyright now metaphysically comes into existence—and remains on the scene—at just the moment the expression does.

A natural rights slant to copyright-as-property does seem likely to curtail further analysis (except for those who believe in natural rights, in which case, what is curtailed is unnecessary). But the problem for this branch of the current propertization critique is that there has always been, as William Fisher notes, a “durable and widespread popular commitment in the United States to a labor-desert theory of property.”<sup>296</sup> That commitment has produced consistent “overtones of the natural law concept” in American copyright law,<sup>297</sup> just as the question of whether copyright was property in eighteenth-century England was bound up with the question of whether an author had a natural right to control his or her work. While pro-property advocates today can be expected to use rhetoric tinged with natural rights intimations, there is no evidence this is more rhetorically effective in the early twenty-first century than it was during the past one hundred years, a period that viewed copyright as property, but property that may be defined and limited for instrumentalist ends.

A second, distinct concern is that using the property construct increases the leverage law-and-economics thinking will have in copyright cases. In 1997, Lemley noted that “[t]he rise of property rhetoric in intellectual property cases is closely identified not with common-law property rules in general, but with a particular economic view of property rights . . . which emerges from the Chicago School law-and-economics movement.”<sup>298</sup> Lemley returned to this issue in 2005, targeting “a particular view of property rights as the right to capture or internalize the full social value of property.”<sup>299</sup> While a person smitten with a natural rights vision of property might be said to shortcut the analysis, the law-and-economics version of property gives a robust analysis. Professor Lemley’s critique of the law-and-economics analysis is that (1) its premises do not apply in a world of inexhaustible, nonrivalrous goods, and (2) it does not justify allowing a property owner to internalize all positive externalities.<sup>300</sup> His central point “is that we cannot and should not seek to internalize all positive externalities and prevent ‘free riding’ on intellectual

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296. Fisher, *supra* note 32, at 12.

297. BUGBEE, *supra* note 40, at 108 (discussing Connecticut’s copyright statute of 1783). Similarly, the Massachusetts 1783 copyright act stated that “security in the fruits of their study . . . is one of the natural rights of all men.” See also VAN DYKE, *supra* note 41 (supporting copyright protection on religious and moral grounds).

298. Lemley, *Romantic Authorship*, *supra* note 12, at 897.

299. Lemley, *Free Riding*, *supra* note 9, at 1037.

300. *Id. passim*.

property . . . [t]he economics of intellectual property simply do not justify the elimination of free riding.”<sup>301</sup> This is a familiar point, but always worth repeating, even with (or maybe particularly with) familiar examples.<sup>302</sup> (Where we draw the line between externalities that should be internalized and those that should not is the tough nugget.)

A third, related concern is that “property” applied to expressive works draws us too easily to parallels with real or chattel property. Like the buy-in to law-and-economics reasoning, the unstated comparison to physical property masks the nonrivalrous nature of the consumption of intellectual goods. The danger, according to James Boyle, is that we “assume that intellectual property and property over tangible objects are the same in all regards.”<sup>303</sup> Of the two analogies—chattel property and real property—the latter clearly troubles everyone more. Jessica Litman, Shubha Gosh, Mark Lemley, and Stewart Sterk each point to the real property thinking they find inherent in the property construct as the culprit when “property” is applied to intellectual works.<sup>304</sup>

There is good evidence to support this concern over how real and chattel property notions infect people’s views of intellectual property. Consider Margaret Atwood’s 1996 testimony to a Canadian parliamentary committee:

In conclusion, I want to emphasis [sic] that writers are small business people and our copyrights are often our only real assets. Exceptions to

301. *Id.* at 1065.

302. See, e.g., Justin Hughes, “Recoding” *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 926 (1999) (“But non-owner benefits are common with other forms of property. For example, non-owners of real property frequently benefit from owners’ control of their own property—as when visitors promenading on public sidewalks enjoy a cityscape which is an amalgam of privately-maintained buildings.”).

303. Boyle states:

But wait, surely theft is theft. . . . Theft is theft, is it not? The answer in a word is “No.” Saying “theft is theft” is exactly the error that the Jefferson Warning is supposed to guard against. We should not assume that intellectual property and property over tangible objects are the same in all regards.

Boyle, *supra* note 8, at 46.

304. See Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1000–04 (1990) [hereinafter Litman, *The Public Domain*] (noting that “[t]reating intellectual property as if it were real property, of course, can be problematic”). It is fundamental to intellectual property that the tangible qualities associated with real and chattel property are lacking. It follows that this lack of physicality (or “thingness”) means that the law must provide “alternative concepts to take the place of physical boundaries.” *Id.* at 971–72. See also Gosh, *supra* note 88, at 389 (2003) (“To conceive of copyright as essentially private property, akin to rights in land, is to ignore the important historical and realist tradition that has envisioned real property as an instrumental construct designed to pursue certain social and political goals, as opposed to protecting pre-social and pre-political rights.”); Lemley, *Free Riding*, *supra* note 9, at 1033 (“The rhetoric and economic theory of real property are increasingly dominating the discourse and conclusions of the very different world of intellectual property.”).

copyright are an expropriation of our property against our will. If copyrights were cars, this would be car theft.<sup>305</sup>

Expropriation would usually mean being deprived of possession and/or all practical uses of a thing. But that is exactly what does not happen with nonrivalrous intellectual works; Atwood's testimony reflects just the sort of inapposite metaphor about which Justice Cardozo and Judge Frank warned. In his 2003 book *Who Owns Native Culture?*, anthropologist Michael Brown wrote that "[a]lthough copyright resembles real property, it differs from other property in its permanence."<sup>306</sup> The differences, however, are much greater, and mentioning only copyright duration reveals a disturbing "buy-in" to the real property metaphor. Another example is Jacob Jacoby's argument that consumer confusion surveys should ask consumers whether a defendant "needed to get" permission to use a trademark. Professor Jacoby reasons that although this survey question sounds like it is asking the respondent for a legal conclusion, that is acceptable because consumers will answer with their own basic understanding of property rights, particularly real property.<sup>307</sup>

### C. THE EVIDENTIARY PROBLEM

The three examples above—Margaret Atwood, Michael Brown, and Jacob Jacoby—are examples of intellectual elite outside legal academia treating intellectual property like real property. But none of these influential people are judges or policymakers. A difficulty for the propertization of copyright argument is assembling evidence of how *those* people have been thinking. Has there been, in the face of the property concept, a collapse of critical thinking in copyright cases and legislation? The property critique of copyright could be advanced with at least three kinds of evidence: (1) better evidence of the golden age of "balance" that is said to have preceded the propertization of copyright; (2) better evidence of how "intellectual property" is more blinding than "literary property" or just "property" as a description of copyright; and (3) better evidence that the property concept influences the outcomes reached by judges and policymakers.

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305. Study of Bill C-32, an Act to Amend the Copyright Act: Evidence Before the Standing Comm. on Canadian Heritage, 35th Parl. (2d sess.) (Nov. 21, 1996) (statement of Margaret Atwood, Chair, Copyright Committee, Writers' Union of Canada), available at [http://www.parl.gc.ca/35/Archives/committees352/heri/evidence/39\\_96-11-21/heri39\\_b1k101.html](http://www.parl.gc.ca/35/Archives/committees352/heri/evidence/39_96-11-21/heri39_b1k101.html).

306. MICHAEL F. BROWN, *WHO OWNS NATIVE CULTURE?* 55 (2003).

307. See Jacob Jacoby, *Sense and Nonsense in Measuring Sponsorship Confusion*, 24 *CARDOZO ARTS & ENT. L.J.* 63, 80–83 (2006).

The propertization critique assumes a golden age of “balance” that preceded the propertization of copyright that began in the 1970s. Depending on the writer, the golden age can be up front or in the shadows. Michael Carrier argues that “[h]istorically, intellectual property has been about balance,” and that as “intellectual property has lost its balance, it has increasingly come to resemble property.”<sup>308</sup> He further queries whether we can “return to the prepropertization era.”<sup>309</sup> But no one has laid out a substantial body of case law for us to consider as this “balanced” period. In contrast, we know that patents fared well in the Supreme Court and lower courts during the first quarter of the twentieth century, suffered a period of disfavor roughly from 1930 to 1950,<sup>310</sup> and have fared significantly better at all levels of the federal courts since the consolidation of patent appeals in the Federal Circuit in 1982.<sup>311</sup> In other words, we can map out distinct periods in patent jurisprudence. Can we map out anything comparable involving copyright? This would be a worthwhile project to advance the propertization of copyright critique.

Of course, case law may not tell the whole story. Professor Lessig lays out a substantial body of social developments in his book *Free Culture*, in which he describes technology stories: radio arising without paying the performers on sound recordings; cable television arising without paying licensing fees for copyrighted works; and the proliferation of the VCR protected from copyright liability by the *Sony* decision.<sup>312</sup> Lessig’s point is

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308. Carrier, *supra* note 225, at 4.

309. *Id.* at 6.

310. H.R. Mayers, *The United States Patent System in Historical Perspective*, 3 PAT. TRADEMARK & COPYRIGHT J. RES. & EDUC. 33, 33–36 (1959) (discussing patent validity adjudications between 1850 and 1958); Simone A. Rose, *Patent “Monopolyphobia”: A Means of Extinguishing the Fountainhead?*, 49 CASE W. RES. L. REV. 509, 530 (noting that “between 1927–1931, 50.4% of patents adjudicated were held valid; by 1944, the percent adjudicated held valid had fallen to 21.6%”). In his treatise, Donald Chisum noted that during the period of disfavor between roughly 1930 and 1950, the Court’s “anti-patent bias was so pronounced that Justice Jackson complained in dissent that the only valid patents were those that the Court had not been able to get its hands on.” DONALD S. CHISUM ET AL., PRINCIPLES OF PATENT LAW 22 (1998) (citing *Jungersen v. Ostby & Barton Co.*, 335 U.S. 560, 572 (1949) (Jackson, J., dissenting)).

311. See ROBERT L. HARMON, PATENTS AND THE FEDERAL CIRCUIT 684–740 (3d ed. 1994) (reviewing the Federal Circuit’s practice in relation to patents); Ronald B. Coolley, *What the Federal Circuit Has Done and How Often: Statistical Study of the CAFC Patent Decisions - 1982–1988*, 71 J. PAT. & TRADEMARK OFF. SOC’Y. 385, 391 (1989) (analyzing appealed patent claims from 1982–88 and concluding that if the lower court held the patent claims valid, the Federal Circuit affirmed that decision in virtually every case); Donald R. Dunner et al., *A Statistical Look at the Federal Circuit’s Patent Decisions: 1982–1994*, 5 FED. CIR. B.J. 151, 155 (1995) (noting that in the five years leading up to March 15, 1994, the chances of the court affirming a finding of infringement (81%) were about the same as for a finding of noninfringement (80%)).

312. LESSIG, *supra* note 7, at 53–78.

that new technologies have bloomed in the past when they did not pay for copyright, but he is careful not to say this is a *necessary* condition (a leap left to the incautious reader). Professor Lessig knows better than to say complete free riding on copyrighted works is necessary for new technologies to bloom: radio was very quickly paying composers (even if it was not paying performers);<sup>313</sup> although the Supreme Court exempted cable retransmission from copyright liability in *Fortnightly Corp. v. United Artists Television*, cable television really blossomed after it began paying substantial retransmission royalties;<sup>314</sup> broadcast television itself only showed feature films when it paid for them; and webcasting, satellite radio, and telephone ring tones are all technologies that have gotten off to a good start while paying copyright royalties. In all these cases, copyright conferred a measure of control over—and burden on—the nascent industry, but the industries prospered anyway.

As stated above, the widespread references to copyrighted works as “literary property” or just plain “property” makes the rise of the phrase “intellectual property” less interesting as a persuasive force—unless we have a theory as to why “intellectual property” would dominate our thoughts more than literary property. Professor Lemley has presented a chart showing the tremendous growth of the phrase “intellectual property” in our case law.<sup>315</sup> Lemley equates this “shift in terminology” with “the rise of the ‘property rights’ view of intellectual property.”<sup>316</sup> I reworked Lemley’s figures, with some additional figures for the occurrence of “literary property” and patents as “industrial property” (manually eliminating those cases where “industrial property” meant chattel property used in industry).

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313. See, e.g., *Jerome H. Remick & Co. v. Gen. Elec. Co.*, 16 F.2d 829 (S.D.N.Y. 1926) (finding that defendant’s unauthorized broadcast of the plaintiff’s copyrighted musical composition over radio constituted copyright infringement).

314. Following *Fortnightly v. United Artists Television, Inc.*, 393 U.S. 902 (1968), Congress enacted the compulsory licensing provisions of 17 U.S.C. § 111 (1976), amended by Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (2004). Section 111 requires cable companies to pay neither for local retransmission of a local broadcast nor for retransmission of network programming, on the assumption that the copyright holder was already fully compensated for broadcast into the local and national markets, respectively. Under section 111’s compulsory licensing scheme, the cable companies do pay for local or non-network signals they carry into otherwise unserved markets. The royalty fund from cable retransmissions has grown dramatically from \$13 million distributed in the 1978 year to roughly \$113 million for 2000. Section 111 also establishes various kinds of retransmissions that are copyright infringements—with no possibility of compulsory licensing.

315. Lemley’s 2005 chart shows the total number of occurrences of the phrase per decade, but does not tell us the base number of cases, and, as he describes it, the chart is quite “unscientific.” Lemley, *Free Riding*, *supra* note 9, at 1033.

316. *Id.* at 1034.

Table 1. Copyright, patent, and trademark (“CPT”) cases		
Years	<i>Instances of Term “Intellectual Property” (Percentage of CPT Cases Using Term)</i>  [bracket shows my results doing same search] <sup>317</sup>	Instances of “intellectual,” “literary,” “artistic,” or “industrial” property <sup>318</sup>
1944–54	9 (0.3%) [10]	97
1954–64	12 (0.3%) [9]	90
1964–74	20 (0.4%) [19]	104
1974–84	140 (3.2%) [127]	218
1984–94	743 (13.0%) [732]	806
1994–2004	3,211 (37.8%) [3171]	3248

Under this analysis, instead of nine cases during 1944–54, there are actually 97. Instead of twenty cases mentioning “intellectual property” in 1964–74, there are 104 mentioning intellectual, literary, or industrial property in the same period. The numbers still rise dramatically in the 1980s and 1990s, but not as steeply. Interestingly, the use of the phrase “literary property” is no greater in 1994–2004 (84) than in 1954–64 (83), although the number of copyright cases has surely increased dramatically. This suggests a substitution effect, that is, what a judge in a prior period

317. The bracket shows my own result trying to duplicate Lemley’s basic approach. I searched for, for example, “(intellectual w/3 property) and date aft 12/31/1943 and date bef 1/1/1955” on Federal Court Cases Combined on Lexis. I used “w/3” to capture usages like “intellectual and literary property,” but manually eliminated examples like “property in intellectual works,” although I think these are clearly predecessor notions. It should be noted that both Lemley and I are counting cases where a court cites a source that discusses “intellectual property” or counsel argues about their “intellectual property,” but the court does not use the phrase in its own reasoning. Variations in the numbers I found are for minor reasons; for example, in the 1964–74 period, I have one lower number because one case uses “intellectual property” only in the case summary, presumably not written by the court.

318. Originally, I searched for ((intellectual or artistic or literary or industrial) w/3 property) as the core of the search construct, but this turned up too many false positives in the form of real or chattel property being discussed as “industrial property.” So a more complex Boolean search was used and most of the results were manually checked to remove false hits.



would have called “literary property” is now called “intellectual property.”<sup>319</sup> More importantly, the dramatic rise in the appearance of “intellectual property” is partly—perhaps mainly—because of the sheer increase in copyright, patent, and trademark (“CPT”) cases. “[T]he most obvious contributing circumstance” for the CPT cases becoming an increasingly large percentage of the total number of cases is the “gradual transformation of the basis of the American economy.”<sup>320</sup>

Such Lexis searches, though helpful, cannot substitute for more meaningful empirical work. For example, can we show that a judge’s use of the word “property” in his or her opinions has a strong positive correlation with the copyright plaintiff prevailing? (This would still be correlation not causation.) Better still, can we establish that when a plaintiff’s counsel used the property trope systematically, the client received a more favorable result? What we are looking for is better evidence vis-à-vis our judges that the property word(s) “hypnotize,” such that there is a lack of the “muscle to think critically” about property as soon as the concept shoves its way into a case.

It is easy to nominate one or two concrete instances of courts and legislators going astray because of the property construct. The classic example of the property-intoxicated court is (and should be) the 1991 case *Grand Upright Music Ltd. v. Warner Bros. Records*,<sup>321</sup> in which the court skipped all balancing of the interests and found copyright liability for a small sampling of music—fueled principally by the admonition “thou shalt not steal.”<sup>322</sup> It is harder to blame the property construct for the same result in the Sixth Circuit’s 2005 decision in *Bridgeport Music v. Dimension Films*.<sup>323</sup> The *Bridgeport Music* court, in a thoughtful, if controversial, reading of the statutory language, determined fair use analysis should not

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319. The number in brackets in the first column “[ ]” shows the results of my recent Lexis search, conducted to parallel Lemley’s analysis, for example, <(property w/1 intellectual) and date aft 12/31/1943 and date bef 1/1/1955> for the first decade. One can see that Lexis turned up almost the same numbers for me; this verified that I was replicating Lemley’s work. In the case of the 1994–2004 period, the period was split into searches for 1994–99 and 2000–04.

320. Fisher, *supra* note 32, at 10. Fisher used these words to describe the expansion of intellectual property rights, but they serve well to explain part of the expansion of the phrase’s deployment.

321. *Grand Upright Music Ltd. v. Warner Bros. Records*, 780 F. Supp. 182 (S.D.N.Y. 1991) (finding that the defendants intentionally violated the plaintiff’s rights by using three words from the plaintiff’s song and a portion of the master recording after they unsuccessfully sought a license to use the song prior to the release of the defendants’ album).

322. *Id.* at 183.

323. *Bridgeport Music v. Dimension Films*, 401 F.3d 792, 798–99 (6th Cir. 2005) (distinguishing infringement of a musical composition copyright, where the issue is whether the infringing work is substantially similar to the original work, and infringement of a sound recording, where the only issue is whether the sound recording has been used without authorization).

apply to sound recording provisions and found copyright liability for music sampling. The word “property” is wholly absent from the opinion. In other words, if these two cases had been an experiment, in the control case—no appearance of the property concept—we got the same result.

Congress provides more examples of the “p” word being used with mixed results. Michael Birnhack points to examples of Members of Congress defending copyright as property in order to show the power of the property idea.<sup>324</sup> But there is irony in Birnhack’s examples: they are all adamant assertions of copyrighted works as property by legislators who opposed—and *lost*—the expansion of the “home-style” exception in 1998.<sup>325</sup> Thus, their comments are not particularly good evidence that the property trope has decisive power.

Better evidence may come from the House floor debates over the DMCA. When the DMCA was considered in August 1998, four Members—the core of those explaining the bill to the House—referred to copyright as “property.” Three others also used plain, property-paradigm

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324. Birnhack, *supra* note 294, at 1327 n.227.

325. In that debate, the copyright-as-property point was rampant—but ultimately failed as a rhetorical device. For further comments in addition to those cited by Birnhack, *supra* note 294, at 1327 n.227, see, e.g., 144 CONG. REC. H1456, H1457 (daily ed. Mar. 25, 1998) (statement of Rep. Doggett) (“If one cannot get someone else’s property for free, then pass a law to allow them to steal it from them.”); 144 CONG. REC. H1456, H1464, H1474 (daily ed. Mar. 25, 1998) (statement of Rep. Hoyer) (“[W]e are considering stripping people of their intellectual property rights over what boils down to a mug of beer”; “the amendment is nothing short of a taking.”); 144 CONG. REC. H1456, H1464, H1475 (daily ed. Mar. 25, 1998) (statement of Rep. Hyde) (“Copyright is a property right”; “Let us not forget that this is about taking someone’s property.”); 144 CONG. REC. H1456, H1458 (daily ed. Mar. 25, 1998) (statement of Rep. Scarborough) (stating that “struggling people who have been working 15, 20, 30 years . . . to build property, intellectual property that is every bit as dear to them as real property in our districts”; “if we are for property rights, real property rights, we should be for intellectual property rights too”).

statements.<sup>326</sup> Perhaps the most successful explanation of the DMCA's anticircumvention measures was an appeal to the prohibition on picking locks that protect real and chattel property.<sup>327</sup> One could reasonably argue that this is the property concept at work without "property" ever being said.

On the other hand, "property" is often mentioned in Congress in the context of trade-offs against other interests, explaining limitations or claiming "balance." In these cases, it is harder to say what persuasive power the property concept has. For example, Congressman Frank explained that under the DMCA, online service providers "will not be held automatically responsible if someone misuses the electronic airway [they] provide to steal other people's property."<sup>328</sup> Congressman Dingell, discussing "digital wrappers" that would make "copyrighted works" "impenetrable" to unauthorized users, commented that, "[w]hile that may sound like the American way, it is not. United States copyright law historically has carved out important exceptions to the rights of copyright

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326. 144 CONG. REC. H7074, H7102 (daily ed. Aug. 4, 1998) (statement of Rep. Coble) ("I am proud that this Congress and our subcommittee on the Committee on the Judiciary specifically have stood up for property rights, both real property and intellectual property."); 144 CONG. REC. H7074, H7102 (daily ed. Aug. 4, 1998) (statement of Rep. Dreier) ("When we have ideas that emanate from individuals, the right to make sure that that is their property must be ensured."); 144 CONG. REC. H7074, H7092 (daily ed. Aug. 4, 1998) (statement of Rep. Frank) ("[O]ne way to sustain [a vibrant society] is to recognize the property right that people have in the product of their intellectual labors, their creative intellectual labors."). There was a parallel floor discussion in the Senate, and further discussions in both chambers when the bill returned from conference committee. For references to copyright as property in these three other sessions, see 144 CONG. REC. S4884, S4892 (daily ed. May 14, 1998) (statement of Sen. Thompson) ("New technologies create exciting opportunities for intellectual property, but the digital environment also poses threats to this form of property."); 144 CONG. REC. S11887, S11889 (daily ed. Oct. 8, 1998) (statement of Sen. Hatch) ("DMCA will protect the property rights of Americans."); 144 CONG. REC. S11887, S11888 (daily ed. Oct. 8, 1998) (statement of Sen. Thurmond) (DMCA will "help protect the property rights of the creative community."); 144 CONG. REC. H10615, H10616 (daily ed. Oct. 8, 1998) (statement of Rep. Dreier) (DMCA will "go a long way towards ensuring the property of individuals is not in any way jeopardized."); 144 CONG. REC. H10615, H10620 (daily ed. Oct. 8, 1998) (statement of Rep. Jackson-Lee) ("The bill demonstrates our commitment to protecting the personal rights and property of American citizens."); 144 CONG. REC. H10615, H10619 (daily ed. Oct. 8, 1998) (statement of Rep. Lazio) ("We must protect American copyright workers from the theft of their property.").

327. See, e.g., H.R. REP. NO. 105-796, at 67 (1998). The report describes the DMCA's exception for legitimate security testing as follows:

[A person] may purchase the lock and test it at home . . . by installing the lock on the front door and seeing if it can be picked. What that person may not do, however, is test the lock once it has been installed on someone else's door, without the consent of the person whose property is protected by the lock.

328. 144 CONG. REC. H7074, H7092 (daily ed. Aug. 4, 1998) (statement of Rep. Frank).

owners to have exclusive control over the use of their property.”<sup>329</sup> In the same spirit, when the TEACH Act was being debated, Senator Feinstein stated in support of the bill that the “drafters of the Constitution . . . recognized the property rights of the creators of [creative] works.”<sup>330</sup>

There are many more examples of recent Congressional use of “property” to describe copyrighted works,<sup>331</sup> but these few show that use of the word does not cleanly correlate with expansion of rights.<sup>332</sup> The evidence shows that certain legislators think of copyright *as* property, but the evidence is not substantially different from the evidence indicating Madison and Justice Story also thought of copyright as property. In 1839, Senator Henry Clay likened copyright to personal property in his own advocacy for protection of British writers:

A British merchant brings, or transmits to the United States, a bale of merchandize [sic], and the moment it comes within the jurisdiction of our laws, they throw around it an effectual security. But if the work of a British author is brought to the United States, it may be appropriated by any resident here, and republished without any compensation whatsoever being made to the author. This distinction in the two descriptions of property, the committee think *unjust*.<sup>333</sup>

One valuable avenue of research in this area would be a careful examination of the legislative records for copyright legislation during different periods—the 1909 Act, the 1976 Act, the legislation in the late 1990s—to establish whether Congressional thought is actually under the influence of property thinking more than it was in the past.

329. 144 CONG. REC. H7074, H7099 (daily ed. Aug. 4, 1998) (statement of Rep. Dingell). See also 144 CONG. REC. H7074, H7099 (daily ed. Aug. 4, 1998) (statement of Rep. Berman) (“In the context of protecting this property, we needed to come to reasonable balances with providers of these services, with people who have legitimate interests in the fair use.”); 144 CONG. REC. H7074, H7098–H7099 (daily ed. Aug. 4, 1998) (statement of Rep. Foley) (“What we have now is a balanced measure that protects both the interests of the users and the consumers, and the property rights of the creators.”).

330. 147 CONG. REC. S5988, S5994 (daily ed. June 7, 2001) (statement of Sen. Feinstein).

331. See, e.g., Senator Orrin G. Hatch, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. PITT. L. REV. 719, 721 (1998) (stating that “[t]he first principle of a contemporary copyright philosophy should be that copyright is a property right that ought to be respected as any other property right. . . . As with real property, copyright today is a bundle of rights . . .”).

332. During the hearings on the 1976 Act, copyright was occasionally referred to as property, but not uniquely. See, e.g., Statement of John Schulman, in *COPYRIGHT LAW REVISION, PART 4, FURTHER DISCUSSION AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW 158–59* (U.S. Government Printing Office 1964) (analogizing copyright to property, then to tort in the same passage).

333. *Plea for Authors, and the Rights of Literary Property*, 4 N.Y. REV. 273, 293 (1839).

## D. SUMMARY

A large chunk of the scholarly discourse has really been about the propertization of more intellectual *stuff*, a worrisome process but a different one than the metamorphosis of copyright. It is important not to conflate the extension of intellectual (or general) property norms to new areas with changes in the copyright norms themselves. As to changes in the norms of copyright law in the past twenty-five or thirty years, unquestionably there has been a strengthening of the exclusive control granted by copyright law—a strengthening of law on the books that strangely parallels an exponential growth in *prima facie* violations of even the old legal norms (as in peer-to-peer reproduction and distribution).

Each dimension of this strengthening must be examined to determine whether it merits being called “propertization,” insofar as it makes copyright law more like the law of chattel and/or real property. The extension of copyright terms counts as “propertization” in this sense. The DMCA’s creation of liability for the picking of digital locks *might* count as propertization if, after careful study, we find that these new rules increase exclusive control over copyright works to the detriment of exceptions and limitations that still exist in the statute. Other ways in which copyright norms genuinely became more like real/chattel property norms are generally ignored by copyright scholars, such as the formal unbundling of section 106 rights and the abolition of domestic manufacturing requirements in the 1970s and 1980s.

“Propertization” could also mean copyright is increasingly being thought about like real/chattel property, causing more exclusive controls to be granted. In other words, the property concept has a causal role in the strengthening of the exclusive control(s) granted by copyright. Scholars have put forward a number of mechanisms by which the property construct—or the intellectual property construct—may compromise the proper analysis of a copyright claim. One of these mechanisms is not property *per se*, but natural rights reasoning. The problem with this mechanism is that natural rights reasoning has been present in copyright discourse all along, even in the language of the Universal Declaration of Human Rights.<sup>334</sup> Other mechanisms by which the property construct may compromise analysis of copyright claims are improper application of law-

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334. Universal Declaration of Human Rights, G.A. Res. 217A, art. 27(2), U.N. Doc. A/810 (Dec. 10, 1948), available at <http://www.un.org/Overview/rights.html> (“Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”).

and-economics reasoning and improper application of real property assumptions.

These are legitimate concerns. The problem is that propertization scholars have not done the hard work required to show a recent effect that did not exist before. Westlaw/Lexis searches are not enough. For example, as discussed above, many of the occasions when Members of Congress refer to copyright as property are *in apologia*, that is, when the members are justifying restrictions on the exclusive rights, or when the property construct is used by legislators who fail to stop such restrictions. On the other hand, the property construct may be powerfully at work in situations that will not appear in a word search—such as when a policymaker appeals to door locks and home burglary to justify laws against circumventing technological protection measures. The discussion above suggested some ways we can dig deeper into the truth or falsity of the propertization argument, specifically engaging in more contextual analysis, comparing results of cases where the property construct does and does not appear, examining how prevailing counsel use the property device, if they use it at all. Readers will probably think of more clever ways to do this kind of analysis; social scientists can help us with other ways to slice and dice the court and legislative records available to us.

## V. DEALING WITH OUR DISCOMFORT ABOUT “PIRACY” AND “PROPERTY”

While there are many interesting avenues for further development and research on the “propertization” of copyright, it is fair to ask what the “payoff” might be, if there is any beyond the crucial but unexceptional warning that we must be on guard so familiar words and concepts do not hypnotize us. I propose here that despite the long pedigree of use, we are now in a period when the issue of “piracy” might be thoughtfully reexamined with possible impact. On the other hand, copyright is and will continue to be understood as a form of property. There is already wide agreement about this in the scholarly community, which tends to make the propertization literature read a bit like *Sturm und Drang*. On that theme, some commentators have suggested we should use the tools of property to limit copyright’s expansion—a topic explored below.

### A. CABINING “PIRACY”

We all know that the use of “piracy” in the context of unauthorized copying “obscures the difference between theft of tangibles, including that

involved in old-fashioned maritime piracy, and the copying of intellectual property,"<sup>335</sup> but it seems awfully late in the day to stop completely this usage. The use of "piracy" to describe unauthorized reproduction and distribution of copyrighted material is rampant in law review articles, court decisions, and newspaper headlines. Indeed, the primary meaning of "piracy" may be quickly becoming related to copyright. For example, a 1999 scholarly article on maritime piracy felt obliged to distinguish "maritime piracy" from what happens to copyrighted works.<sup>336</sup> On two days in February 2006, daily reviews of "Today's News" on Lexis turned up twenty-four uses of the word "piracy" without any adjectives: four were for maritime piracy (two concerning the same incident off the Somali coast) and twenty were for piracy of intellectual works.<sup>337</sup> One is reminded of what happened to the word "guitar." Initially "electric guitar" was a derivative, now the older instrument increasingly must be designated an "acoustic guitar." In similar fashion, we may be moving toward a world of "piracy" and "maritime piracy." Jessica Litman thoughtfully objects to the emerging meaning of the word:

Then there's the remarkable expansion of what we call piracy. Piracy used to be about folks who made and sold large numbers of counterfeit copies. Today, the term "piracy" seems to describe *any* unlicensed activity—especially if the person engaging in it is a teenager. . . .

People on the content owners' side of this divide explain that it is technology that has changed penny-ante unauthorized users into pirates, but that's not really it at all. These "pirates" are doing the same sort of things unlicensed users have always done—making copies of things for their own personal use, sharing their copies with their friends, or reverse-engineering the works embodied on the copies to figure out how they work. What's changed is the epithet we apply to them.<sup>338</sup>

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335. Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 622 (2003) [hereinafter Posner, *Misappropriation*].

336. Phillip A. Buhler, *New Struggle with an Old Menace: Towards a Revised Definition of Maritime Piracy*, 8 CURRENTS: INT'L TRADE L.J. 61, 61, 70 n.4 (1999).

337. If the article used "piracy" with a modifier—maritime, copyright, software, online, etc.—it was not counted. Only uses without an adjective modifier were included. For example, an article that said "piracy of films" was counted, but one that said "film piracy" was not. If an article used "piracy" with a modifier—for example, "software piracy"—but later switched to plain "piracy," I counted it on the ground that such an article contributes to the shift in meaning. As director Steven Soderbergh recently said of his decision to release small-budget films in theaters and on DVD simultaneously, "Name any big-title movie that's come out in the last four years. It has been available in all formats on the day of release. It's called piracy." Xení Jardin, *Thinking Outside the Box Office*, WIRED, Dec. 2005, at 257, available at <http://www.wired.com/wired/archive/13.12/soderbergh.html> (interview with Steven Soderbergh).

338. LITMAN, DIGITAL COPYRIGHT, *supra* note 286, at 85.

Professor Litman is correct that in the past we did not call unauthorized uses by individuals “piracy”—but that is because we did not call it anything at all. We simply did not talk about it. Moreover, there was a strong tendency to label any infringements that we did talk about as “piracy.” To understand what has and has not happened to the word “piracy,” we need to consider the context of the larger, still unstable shift in our intellectual property terminology: what counts as “commercial.” In the history of copyright law, “commercial” was traditionally equated with “large-scale” because no one engaged in large-scale reproduction and distribution *without* a profit motive (whether their operations were authorized or unauthorized). In other words, our pre-Internet experience with unauthorized reproduction and distribution looked like this:

Table 2. Amount of reproduction and distribution		
	SMALL SCALE	LARGE SCALE
FOR PROFIT	<i>nil</i>	traditional infringement cases
NOT FOR PROFIT	traditional private copying (never litigated, so never tested under fair use)	<i>nil</i>

That equation was ripped asunder by digitization and the Internet: we now have large-scale, not-for-profit, unauthorized reproduction and distribution. The law is struggling to respond to this undermining of our prior assumptions, that is, our assumption that the southeast quadrant was empty. Hence the No Electronic Theft (“NET”) Act, which criminalized unauthorized distribution without a profit motive for the first time, and the decision in *A&M Records, Inc. v. Napster, Inc.*, where “commercial” was redefined to include individuals’ not-for-profit activities.<sup>339</sup>

Our problem with “piracy” has the same roots as our problem with “commercial.” In the past, courts did not discuss the quantum of

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339. *A&M Records, Inc. v. Napster, Inc.*, No. C 99-05183 MHP, 2000 U.S. Dist. LEXIS 6243, *aff’d*, 284 F.3d 1091 (9th Cir. 2001).



unauthorized activity when labeling something as piracy because it was assumed a defendant acting for profit would engage in quite a bit of activity—enough to damage the plaintiff. Courts saw that the defendant's activity was “commercial” and treated it as “piracy.”<sup>340</sup> They did not discuss small-scale, not-for-profit private copying, because it was simply not litigated. When Litman writes that “[t]hese ‘pirates’ are doing the same sort of things unlicensed users have always done,” everyone (including Litman) knows that is not quite right—in the past, unlicensed users stayed out of the “large-scale, not-for-profit” quadrant. That quadrant is now positively overflowing with unauthorized activities.

Professor Litman is right that most of us do not want to label the teenage downloader a “pirate.” At the same time, many people—apparently including the entire U.S. Supreme Court<sup>341</sup>—think that the intentional enablers of such reproduction and distribution are bandits of some sort. In other words, just as we call a billion sand particles a “pile,” but not a single grain, many of us may intuitively feel that the individual acts cannot be called “piracy,” but the larger phenomenon can be. A reasonable challenge is to limit the epithetic label to the infringement-based business models that the Court has condemned; emphasize that we did not discuss the individual, unlicensed user in the past; and resist the word being applied to individual users. Such limitations on word use to distinct levels of activity are common for our other problems. A transportation system, for example, suffers from “congestion,” but an individual motorist is not a congestor. A region can suffer from urban sprawl, but people are not individually guilty of sprawl (well, rarely).

An alternative approach—almost an alternative universe approach—would be to turn “piracy” into a neutral or even positive word. This is the approach taken by the low protectionist creator of the “Piracy Calculator,” a website that invites the user to calculate the retail value of all that the person has downloaded without authorization.<sup>342</sup> After the calculator, the website offers the following commentary:

Many of you who actually used this thing will have come up with totals in four digits or higher. But do you actually HAVE that much money? Have you ever? And if you did have the money, would you have bought

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340. See, e.g., *United States v. Moghadam*, 175 F.3d 1269, 1271 n.3 (11th Cir. 1999) (defining piracy as “an unauthorized duplication of a performance already reduced to a sound recording and commercially released,” distinct from bootlegging, “which has been defined as the making of an unauthorized copy of a commercially released performance”).

341. *MGM Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2764 (2005).

342. The Piracy Calculator, <http://qntm.org.nyud.net:8090/owe> (last visited May 21, 2006).

all that stuff legitimately? Even if it was a simple download? I doubt it. The point I'm making is that only a small percentage of illegal downloads are in fact lost sales. **Piracy isn't theft.** It's piracy. There's a big difference.<sup>343</sup>

The point that downloads do not cleanly correspond with lost sales is unimpeachable,<sup>344</sup> but beyond that, this is as fine a spin job as one will find in the pop intellectual property discourse: "Piracy isn't theft. It's piracy." Go figure (literally, using the online calculator). But this website creator is not alone in trying to recast "piracy" in positive terms. In early 2006, a Swedish information technology engineer, Richard Falkvinge, started the "Pirate Party," a single-issue political party bent on abolishing copyright and patent laws in Sweden.<sup>345</sup>

## B. LEARNING TO USE "PROPERTY" WITH TRANSPARENCY

Many—if not most—of the scholars mentioned here are willing to live with copyright *as* property. Laurence Tribe, Richard Posner, and Larry Lessig think that it *is* property,<sup>346</sup> as does a coalition of documentary filmmakers working with Peter Jaszi<sup>347</sup>—just as everyone seems to agree or

343. *Id.* (emphasis in original).

344. See generally Justin Hughes, *On the Logic of Suing One's Customers and the Dilemma of Infringement-based Business Models*, 22 CARDOZO ARTS & ENT. L.J. 725, 744–46 (2005) (discussing how many downloaders would not pay for the tracks they download).

345. Gwladys Fouche, *Pirates Pursue a Political Point*, THE GUARDIAN (London), Feb. 9, 2006, at 3.

346. See Laurence H. Tribe, Memorandum of Constitutional Law on Copyright Compensation: Issues Raised by the Proposed Congressional Reversal of the Ninth Circuit's Betamax Ruling 8 (Dec. 5, 1981), reprinted in *Copyright Infringements (Audio and Video Recorders): Hearings on S. 1758 Before the Senate Comm. on the Judiciary*, 97th Cong. 78 (1982) ("The fact that copyrights are incorporeal does not deprive them of their nature as species of property."); *Id.* at 26 ("Those who claim that Congress may eliminate copyright protection because Congress has created it have forgotten that all property is a creation of the state."); Posner, *Nies Memorial Lecture*, *supra* note 255, at 174–76 (discussing the differences between real and intellectual property); LESSIG, *supra* note 7, at 64 (stating that "although copyright is a property right of a very special sort, it *is* a property right").

347. ASSOCIATION OF INDEPENDENT VIDEO AND FILMMAKERS, ET AL., DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE 1 (2005) (describing the "social bargain at the heart of copyright law, in which as a society we concede certain limited individual property rights to ensure the benefits of creativity to a living culture").

concede that patents are property.<sup>348</sup> Jacqueline Lipton views the property concept as inevitable in relation to information works.<sup>349</sup> Stewart Sterk thinks it is “far too late to expunge the rhetoric of property” from the copyright discourse.<sup>350</sup> Michael Carrier also thinks “it is too late in the game to reverse course,” as does Peter Yu.<sup>351</sup>

To be sure, this is a grudging conclusion for many. For example, Professor Lemley comments critically that “notwithstanding Supreme Court statements distinguishing the two, they [the Court] regularly refer to copyrights as property.”<sup>352</sup> The case he cites is *Dowling v. United States*,<sup>353</sup> in which the Court parses the issues with rigor—while squarely maintaining that copyright is a form of property: “[w]hile one may colloquially liken infringement with some general notion of wrongful appropriation, infringement plainly implicates a more complex set of *property* interests than does run-of-the-mill theft, conversion, or fraud.”<sup>354</sup> To me (and, I think, to Lemley) the Court’s comment in *Dowling* is actually both the minimum of what we should demand and the most we can expect.

348. Kenneth W. Dam, *The Economic Underpinnings of Patent Law*, 23 J. LEGAL STUD. 247, 253, 255 (1994) (“[T]he patent system today is undeniably a property rights system”; “Legal differences between patents and other forms of property can therefore easily be exaggerated.”). See also Cont’l Paper Bag v. E. Paper, 210 U.S. 405, 424 (1908) (discussing patent rights and noting, “[t]he inventor is one who has discovered something of value. It is his absolute property.”); Consol. Fruit-Jar Co. v. Wright, 94 U.S. 92, 96 (1876) (“A patent for an invention is as much property as a patent for land. The right rests on the same foundation, and is surrounded and protected by the same sanctions.”); *In re Etter*, 756 F.2d 852, 859 (Fed. Cir. 1985) (“The essence of all property is the right to exclude, and the patent property right is certainly not inconsequential.”). Of course, the Patent Act itself provides that patents shall have the attributes of personal property, which could be construed as clearly stating that patents are property or waffling a bit on the issue. 35 U.S.C. § 261 (2000).

349. Jacqueline Lipton, *Mixed Metaphors in Cyberspace: Property in Information and Information Systems*, 35 LOY. U. CHI. L.J. 235, 237, 240 (2003) (observing that “it is impossible to avoid the use of property metaphors in cyberspace,” and “regardless of what anyone has said about the undesirability of incorporating notions of property into information and information systems, there is no practical way to avoid this outcome”).

350. Stewart Sterk, *What’s in a Name?: The Troublesome Analogies Between Real and Intellectual Property* 43 (Cardozo Law Legal Studies Research Paper, Paper No. 88, 2004), available at <http://ssrn.com/abstract=575121>.

351. Carrier, *supra* note 225, at 145; Peter K. Yu, *Intellectual Property and the Information EcoSystem*, 2005 MICH. ST. L. REV. 1, 5 (“I believe ‘intellectual property’ will remain in common usage despite the uneasy analogy [with real property]. Although the term tends to encourage overgeneralization of disparate rights, there is a practical need for the existence of an umbrella term.”).

352. Lemley, *Free Riding*, *supra* note 9, at 1043.

353. *Dowling v. United States*, 473 U.S. 207 (1985). See Lemley, *Free Riding*, *supra* note 9, at 1043.

354. *Dowling*, 473 U.S. at 217–18 (emphasis added).

Why is this the most we can expect? There is a body of Anglo-American case law going back two hundred years that treats statutory copyright as a form of property. “Property” is how Black’s Law Dictionary characterizes copyright in the 2004 edition,<sup>355</sup> as well as in the 1990, 1979, 1968, 1957, 1933, 1910, and 1891 editions.<sup>356</sup> One of Black’s competitors, John Bouvier, defined copyright as property as far back as 1856.<sup>357</sup> In the above-quoted passage from *Dowling*, the Court essentially said, “there are property interests here, but they are different from real or chattel property.” This is the kind of thoughtful posture we want courts to take, even if we disagree with the particular results. While the siren’s call of the property metaphor may be strong, the property construct has often popped up just when someone is talking about the limits of those property rights—whether it is the 1853 circuit court case of *Stowe v. Thomas*<sup>358</sup> or the 2001

355. BLACK’S LAW DICTIONARY (8th ed. 2004) defines “copyright” as “The right to copy; specif., a property right in an original work of authorship.” *Id.* at 361. Interestingly, the book defines a patent as “[t]he right to exclude others from making, using, marketing, selling, offering for sale, or importing an invention for a specified period” without any reference to property. *Id.* at 1156.

356. In each of these editions, the first line of the definition of copyright is “[t]he right of literary property as recognized and sanctioned by positive law.” See BLACK’S LAW DICTIONARY 276 (1st ed. 1891); BLACK’S LAW DICTIONARY 270 (2d ed. 1910); BLACK’S LAW DICTIONARY 435 (3d ed. 1933); BLACK’S LAW DICTIONARY 406 (4th ed. rev. 1957); BLACK’S LAW DICTIONARY 406 (4th ed. rev. 1968); BLACK’S LAW DICTIONARY 304 (5th ed. 1979); BLACK’S LAW DICTIONARY 336 (6th ed. 1990). The only volume missing in this sequence is the original fourth edition, from 1951.

357. JOHN BOUVIER, A LAW DICTIONARY 313 (6th ed. 1856), available at [http://www.constitution.org/bouv/bouvier\\_c.htm](http://www.constitution.org/bouv/bouvier_c.htm) (Defining “Copyright” as “The property which has been secured to the author of a book, map, chart, or musical composition, print, cut or engraving, for a limited time, by the constitution and laws of the United States.”). In the 1897 edition of Bouvier’s dictionary, the definition of copyright is changed considerably, but within the definition, the Statute of Anne is described as “the first statute . . . which undertook to regulate this species of incorporeal property.” JOHN BOUVIER, A LAW DICTIONARY 436, 437 (new ed. 1897).

358. *Stowe v. Thomas*, 23 F. Cas. 201, 206 (C.C.E.D. Penn. 1853) (No. 13,514). The court states: The claims of literary property . . . cannot be in the ideas, sentiments, or the creations of the imagination of the poet or novelist as disserved from the language, idiom, style . . . His exclusive property in the creation of his mind, cannot be vested in the author as abstractions, but only in the concrete form which he had given them, and the language in which he has clothed them.

comments of Senator Feinstein during the congressional discussions about distance learning. If anything, jurists should be a little better equipped to avoid the real property metaphor now than they were 75–100 years ago. Judges now live in a world robust with intangible, legally protected interests that courts have come to call “property”<sup>359</sup> without mistaking any of them as having all the aspects of real property. Anytime a judge or policymaker seems to be drifting toward a “real propertization” of copyright, or a law-and-economics perspective that would justify the copyright owner internalizing all value from a work, the sermon needs to start with something like the Court’s observation in *Dowling*.

### C. DRAWING BOUNDARIES TO PUT THINGS OUTSIDE COPYRIGHT

If Part IV is roughly correct in its criticisms of the propertization literature, and Part V.A immediately above is correct that we cannot undo two centuries of thinking about copyright as property, why has “propertization of intellectual property” or “propertization of copyright” so captured the imagination of scholars? Perhaps it is not just that copyright is becoming more property-like (in its conception, statutory characteristics, or enforcement), but that scholars are becoming uncomfortable with the property characteristics copyright already had. In particular, scholars are

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*Id.* Nineteenth-century courts discussing expressive works as “literary property” drew parallels to personal property generally, not real property. *See, e.g.*, *Parton v. Prang*, 18 F. Cas. 1273, 1278 (C.C.D. Mass. 1872) (No. 10,784) (“Personal property is transferable by sale and delivery, and there is no distinction in that respect, independent of statute, between literary property and property of the other description.”); *Jones v. Vanzandt*, 13 F. Cas. 1054, 1055 (C.C.D. Ohio 1849) (No. 7503) (“Literary property is the exclusive right of printing, publishing and making profit by one’s own writings. The property in a slave consists, under the laws of Kentucky, in the right of the master to his services.”). Nineteenth-century courts had no problem distinguishing intangible property from both chattels and real estate. *See Henry Bill Publ’g v. Smythe*, 27 F. 914, 916 (C.C.S.D. Ohio 1886) (describing why “literary property,” because of its intangible nature, requires “further protection” beyond the “[o]rdinary remedies [that] protect one’s exclusive right to sell his horses”); *Lawrence v. Dana*, 15 F. Cas. 26, 53 (C.C.D. Mass. 1869) (No. 8136) (“Literary property, even when secured by copyright, differs in many respects from property in personal chattels, and the tenure of the property is governed by somewhat different rules.”).

359. The Supreme Court has, to varying degrees of explicitness, recognized “property” interests in: *welfare entitlements* (*see Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (“It may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity.’ Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property.”)); *Social Security* (*see Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (citations omitted) (“The Secretary does not contend that procedural due process is inapplicable to terminations of Social Security disability benefits. He recognizes . . . that the interest of an individual in continued receipt of these benefits is a statutorily created ‘property’ interest protected by the Fifth Amendment.”)); and *licenses* (*see Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (“The requirement for some kind of hearing applies to . . . the revocation of licenses”) (citing *In re Ruffalo*, 390 U.S. 544 (1968))).

becoming uncomfortable with those property characteristics when coupled with the “boundaries problem.”

For creatures living in a Newtonian world, pieces of real and chattel property have distinct, clear boundaries. The lack of such clear edges for intellectual property bothers us. For example, Litman finds that the fit between real property and copyright is poor because the latter does not have the clear boundaries that make managing physical property so easy.<sup>360</sup> She notes that clearer lines may be drawn by patent law,<sup>361</sup> where the granted patent seems to look like a land deed, setting out the metes and limitations of the patent owner’s claim. Richard Posner sees things conversely, observing in 2003 that “[c]opyright law draws generally sharp boundaries; patent law less so but there is the Patent and Trademark Office to filter applications.”<sup>362</sup> The point is not that either conceptualization is right or wrong, but that both are uncomfortable.

The lack of clear boundaries is not a new characteristic of intellectual property. Even in his own time, Justice Story observed that the boundary of a copyright is “almost evanescent.”<sup>363</sup> Along with patents, Story understood copyrights to take us into the “metaphysics of the law, where the distinctions are . . . very subtle and refined.”<sup>364</sup> The boundaries of copyright took a quantum leap in fuzziness over a century ago—when our sense of justice led us to protect against more activities than exact, complete reproduction. In the 1870 extension of copyright to protect

360. Litman, *The Public Domain*, *supra* note 304, at 1000–04. Litman reasons that with copyrighted works, “what we rely on in place of physical borders, to divide the privately-owned parcels from the commons and to draw lines among the various parcels in private ownership, is copyright law’s concept of originality.” *Id.* at 1000. However, Litman continues, “the concept of originality is a poor substitute for tangible boundaries among parcels of intellectual property because it is inherently unascertainable.” *Id.* at 1004.

361. Litman states:

Systems are important—so important that the public is reluctant to grant a fuzzy property right in systems to anyone claiming an interest. Instead, we have the patent statute under which a claimant can obtain a firmer property right, but only after making a significantly more specific showing of the basis of her claim.

*Id.* at 1013. See also Thomas P. Burke, Note, *Software Patent Protection: Debugging the Current System*, 69 NOTRE DAME L. REV. 1115, 1159 (1994) (“A patent is most similar to a real property deed specifying the metes and bounds for a parcel of land. Both documents are not easily understood but succeed if they secure the owner’s interests in the specified claims.”).

362. Posner, *Misappropriation*, *supra* note 335, at 638. It is not clear what Posner means by this, because there are no patent boundaries until the application has been “filtered” at the USPTO into a granted patent. Moreover, the comparison to real property can lead to discussions about *real property rights* being more limited than generally understood. See, e.g., George Pieler, *Send Me No Files: Senate INDUCES a Threat to the Future of Information Technology* (Competitive Enterprise Institute, CEI On Point No. 91, July 21, 2004), available at <http://www.cei.org/utills/printer.cfm?AID=4126>.

363. *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901).

364. *Id.*

against unauthorized translations and adaptations,<sup>365</sup> we redefined “expression” to include levels of abstraction significantly above what is really expression.<sup>366</sup> This exacerbated the fuzzy boundaries problem. Learned Hand’s opinions seemed to solidify the fuzziness, although he thought the boundaries of copyright as the doctrine came to him were already plenty ambiguous.<sup>367</sup>

If copyright has always suffered from fuzzy boundaries, then what explains the current wave of scholarly discontent over copyright as property? There is a larger reason that boundary fuzziness has become more disturbing. When society was poorer, a greater percentage of wealth was concentrated in the physical world; the realms of expression and ideas were relatively uninhabited. Borders of intellectual works could be more ambiguous—just as were the borders of nineteenth-century ranches—with only infrequent disputes. But as more and more people emigrate to the realm of expression—as more of us become members of the “creative class”—that realm has literally gotten more crowded.

The world is producing explosively more expression than it did fifty years ago, when you consider feature-length films, plastic arts, magazines, webpages, and corporate newsletters. It is producing explosively more expression because a much larger number of people—absolutely and as a percentage—earn their livings and pass their free time in expressive activities. Defining the “creative class” as scientists, engineers, artists, musicians, designers, and knowledge-based professionals (which includes all lawyers, physicians, and teachers), Richard Florida finds that 30% of the

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365. Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198 (1870) (providing that “authors may reserve the right to dramatize or to translate their own works”). Prior to that, authors in America were unable to assert rights against translators. *See, e.g.,* Stowe v. Thomas, 23 F. Cas. 201 (C.C.E.D. Penn. 1853) (No. 13,514) (holding that copyright of *Uncle Tom’s Cabin* was not infringed by German translation for domestic German speakers).

366. As the Nimmer treatise points out, that a Russian translation can infringe an English original shows that copyright protection had extended beyond the precise expression of a literary work, since “not a single word—or even a single letter” is the same in the Russian and English works. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT 2.04[C], at 2-52.3 n.30.1 (2004). *See also* Diane Leenleer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 683 (1992) (noting the extension of copyright to more than protection of pure expression and that “[a]s the property right began to protect against works derivative of, rather than identical to, the original . . . the problem of defining the ‘expression’ that was properly owned became more complex”).

367. On the boundary problem in his own time, Hand said, “[n]obody has ever been able to fix that boundary, and nobody ever can.” *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930). *See also* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT 13.03[A][1], at 13-36 to 13-52 (2005) (applying various tests to the “situation where there is a comprehensive similarity between two works”).

American workforce are now in this group—38 million people—compared to 10% of the workforce in 1900, 15% in 1945, and still only 20% in 1980.<sup>368</sup> This number is only exemplary—it definitely overcounts and undercounts the people in whom we are interested. But however we count them, with millions more people as “symbol manipulators,” the conflicting claims and counterclaims over symbolic territory have grown and are only likely to grow, exacerbated by the fuzzy boundaries.

Whereas many commentators have framed the conflict as one between traditional copyright and digital technologies and others have rightly observed that abolition of copyright formalities has allowed copyright claims to pop up everywhere,<sup>369</sup> the deeper conflict may be between traditional copyright and the slow, steady rise of a creative class that earns its keep (and gets its jollies) by manipulating and handling expression. This class is empowered by new technologies, that is sure, but it is *the waves of immigrants to the realm of expression* that have triggered the critical rethinking of copyright as property.

When there are large numbers of new people coveting propertized assets, possible responses include: (1) abolition of the property in favor of some type of communal arrangement; or (2) a substantial cutting back of the property rights. Sure enough, these responses appeared in early strands of cyber-thinking about copyright, and continue to have substantial adherents. But practically speaking, these are not very meaningful options. Reinstating some form of formalities at some point in a copyright’s duration may be the most sensible and it has faced strong, almost reflexive opposition from copyright industries.

So, what else can be done? One obvious step is to see how we can use the property construct against itself. Carrier and Lipton have both explored this possibility, but neither has yet pursued one available form of intellectual ju-jitsu: use property to evoke the familiar idea of the rigid and formal boundary. It is widely observed that clear rules—clear boundaries—

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368. RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS: AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY AND EVERYDAY LIFE* 8–9 (2002).

369. This is the heart of a proposal advocated by Lessig to reinstate a Berne-compatible formalities requirement for continued protection of works. Paul Festa, *Lessig Mobilizes Copyright Reform*, CNET NEWS, June 6, 2003, [http://news.zdnet.com/2100-3513\\_22-1013939.html](http://news.zdnet.com/2100-3513_22-1013939.html). Chris Sprigman elaborates on this idea in Christopher Sprigman, *Reform(alizing) Copyright*, 57 STAN. L. REV. 485 (2005).



preserve peace in the physical world.<sup>370</sup> As the realm of expression gets more populated and congested, if the project of deconstructing expressive property qua property is going nowhere (which seems to be its scheduled destination), we might undertake to clarify boundaries as a means of reducing strife and increasing freedom of expressive movement. Professor Sterk's description of the physical world—"[w]hen preserving peace is at stake, clear rules present significant advantages"<sup>371</sup>—increasingly applies to the realm of expression as well as the physical world.

This line of thinking recommends us to develop clearer "permitted uses" in American copyright law, either codified separately from fair use (as in European countries) or judicially developed nuggets within the fair use doctrine itself. More generally, instead of assuming that fair use is a unique limiting doctrine that distinguishes copyright from other property, as Richard Posner does,<sup>372</sup> we should treat fair use and other limitations as the boundary of the property right—and expect at least the lawyerly class to respect the property boundaries.

In this spirit, David Nimmer continues to emphasize that "fair use" is a limitation on the section 106 rights, and *definitional* to the copyright owners right:

To evaluate "a right of a copyright owner," one cannot stop with [17 U.S.C.] section 106, whose own preamble instructs that the six-fold enumeration contained therein is "[s]ubject to sections 107 through 121 . . . ." It is erroneous to view section 106 as cataloging all the rights of copyright owners and subsequent sections (through 121) as enumerating the concomitant "rights" of users. Instead, Congress delineated the rights of copyright owners in all of sections 106 through 121.<sup>373</sup>

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370. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 578 (1988) ("We establish a system of clear entitlements so that we can barter and trade for what we want instead of fighting."). See also Terry L. Anderson & Peter J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163, 165, 168–79 (1975) (noting increasingly sharp definitions of property in land, livestock, and water); John Umbeck, *A Theory of Contract Choice and the California Gold Rush*, 20 J.L. & ECON. 421, 432–37 (1977) (noting the same trend in gold mining).

371. See, e.g., Sterk, *supra* note 28, at 450.

372. Posner, *Nies Memorial Lecture*, *supra* note 255, at 175 ("The only real exception I can think of to the absence of a fair use doctrine in the law of physical property is what is called a 'trespass by necessity.'").

373. David Nimmer, *InacSSibility*, in BENJAMIN KAPLAN et al., AN UNHURRIED VIEW OF COPYRIGHT REPUBLISHED (AND WITH CONTRIBUTIONS FROM FRIENDS) Nimmer 8 (Iris C. Geik et al. eds., 2005).

To put this in property parlance, section 107 fair use draws a border on the property rights granted under section 106. Everything on the fair use side is not just fair use, it is *outside* the *property right*.

A laudable example of a clear property boundary via the fair use doctrine is the 2004 decision in *Online Policy Group v. Diebold Inc.*<sup>374</sup> When students at Swarthmore College posted Diebold's internal documents detailing problems with the company's electronic voting machines, Diebold sent take-down notices to Swarthmore (as the students' ISP) under 17 U.S.C. § 512. The students filed for declaratory relief and Judge Fogel found that Diebold was liable under 17 U.S.C. § 512(f), which provides that "[a]ny person who knowingly materially misrepresents . . . that material or activity is infringing . . . shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer."<sup>375</sup>

Judge Fogel found there was no commercial market for the internal documents, no cognizable market damage to Diebold, a clear "public interest" purpose to the students' postings,<sup>376</sup> and that "Diebold appears to have acknowledged that at least some of the emails are subject to the fair use doctrine."<sup>377</sup> On this basis, the opinion concluded that "[n]o reasonable copyright holder could have believed that the portions of the email archive discussing possible technical problems with Diebold's voting machines were protected by copyright" and "[a]ccordingly, there is no genuine issue of material fact that Diebold, through its use of the DMCA, sought to and did in fact suppress publication of *content that is not subject to copyright protection*."<sup>378</sup> It would have been better if the court had more closely followed section 512(f) and said that "Diebold, through its use of the DMCA, sought to and did in fact suppress *activity* that was not *infringing*." The finding that Diebold's counsel should have seen the fair use led to the section 512(f) conclusion that Diebold's take-down notices "knowingly materially misrepresent[ed]" that an infringement was occurring. In short, the students' use of some copyrighted works was so clearly outside the

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374. *Online Policy Group v. Diebold Inc.*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004).

375. *Id.* at 1202.

376. *Id.* at 1203.

377. *Id.*

378. *Id.* at 1204 (emphasis added). Judge Fogel declined to adopt both the plaintiff's low threshold view of "knowingly materially misrepresent[ed]" (knowing there was "no likelihood of success" in a copyright action) and Diebold's higher threshold for the same standard (knowing that a copyright infringement lawsuit would be "frivolous"). Instead, the court interpreted "knowingly materially misrepresent[ed]" as a constructive knowledge standard. *Id.* My thanks to one of my students, Nathan Kaufman, for emphasizing this point to me.

copyright as defined by sections 106–21 that claiming infringement was knowing and material misrepresentation.

Real property boundaries are usually easy to see;<sup>379</sup> chattel property boundaries even more so. We may not know who the owner is, but we can readily see where the property starts, know that it does not belong to us, and assume that it belongs to someone else. In contrast, the boundaries of copyright properties seem intolerably fuzzy. We need more courts to adopt the reasoning of *Online Policy Group v. Diebold*: sometimes a copyright claim (or patent or trademark claim) is so obviously outside the borders of the copyright owner's rights, the action constitutes an abuse of process. And it *may* be that the property concept *helps* here. If our analysis about X as a fair use is always an ad hoc balancing of social interests, it will be harder to say that counsel should have known activity X was a fair use. But if there is an edge, albeit a difficult one for laymen to see, it will be easier for the court to say, "Counsel, it was your duty to see where the property stopped and the public domain began."

## VI. CONCLUSION

Scholarly displays of the malleability of history are ever-present. As evidence that knowledge in ancient Greece was considered a gift, not a commodified *res*, historian Carla Hesse writes that "Socrates held the Sophists in contempt for charging fees for their learning."<sup>380</sup> Of course, *charge the Sophists did*—which speaks of information already being commodified. Given Socrates' fate, it is reasonable to think that the Sophists' business model was at least as compatible with the Athenian zeitgeist.

History may be even more dangerous in the hands of amateurs—lawyers and law professors. Despite what one might read, Jefferson had equivocal views of what we call intellectual property—and said hardly a preserved word about copyrights. "Biopiracy" may be a new idea,<sup>381</sup> copyright piracy is not. The two hundred years of its popular use to

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379. But not always. Southern Californians are familiar with the "Malibu summer beach wars," in which Malibu beachfront property owners try to dissuade the public from using the beach area between high tide and low tide that is, throughout California, public property. *See, e.g.,* Jenny Price, *A Line in the Sand*, N.Y. TIMES, Sept. 14, 2005, at A29. The fuzziness of the high tide line definitely contributes to the ability of beachfront owners to confuse and intimidate nonowners who would use the "public domain." Southern Californians have faced other surprises about what is private land and public land in their residential lots. *See* Michelle Hofmann, *Crossing the Line*, L.A. TIMES, Feb. 12, 2006, at K1 (describing unknown "unauthorized encroachments" in residential property).

380. Hesse, *supra* note 72, at 26.

381. BROWN, *supra* note 306, at 113.

describe all types of unauthorized copying actually antedates our modern notion of copyright. “Intellectual property” is far, far older as a concept than 1970. More importantly, modern copyright has been understood as property since its inception with “two hundred years of progressive expansion of property rights that followed the resolution of the eighteenth century copyright debates.”<sup>382</sup> Readily available materials establish that copyright has a very long, unimpeachable pedigree of being described as “property,” “literary property,” “artistic property,” and, now, “intellectual property.”

These incomplete historical claims are usually made in the service of a larger argument about the “propertization of intellectual property.” Just as there is no question that we have seen unprecedented amounts of copyright infringement brought on by digitization and the Internet, there is no question that copyright laws have been strengthened greatly in the past two decades. But with the exception of copyright term extension, it is not clear that this strengthening of statutory rights is, as a matter of doctrine, fittingly called “propertization.”

“Propertization” might be a good characterization if “intellectual property” or any other property construct (real property, law-and-economics property, natural rights property) was/is a causal force in the strengthening of copyright rights, but no one has assembled serious evidence of this. As scholars—purveyors of words and ideas—we would like to believe that constructs, concepts, and principles have this force, but we should not overstate the case. As Jessica Litman has thoughtfully written:

One can greatly overstate the influence that underlying principles can exercise over the enactment and interpretation of the nitty-gritty provisions of substantive law. In the ongoing negotiations among industry representatives, normative arguments about the nature of copyright show up as rhetorical flourishes, but, typically, change nobody’s mind. Still, . . . [t]he ways we have of thinking about copyright law can at least make some changes more difficult to achieve than others.<sup>383</sup>

No one who identifies the recent “propertization” of copyright with the phrase “intellectual property” has put forward a serious theory as to why “intellectual property” causes changes in our conception of copyright (or makes those changes easier to achieve) that had not already been

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382. Rose, *Nine-tenths of the Law*, *supra* note 70, at 86.

383. LITMAN, *DIGITAL COPYRIGHT*, *supra* note 286, at 77.

achieved with “literary property” and just plain old “property.” Meanwhile, Members of Congress often prove Litman’s point, pronouncing copyrights to be “property” precisely when copyright rights are being limited or cut back. If “property” or the phrase “intellectual property” is a force in judges deciding cases in favor of copyright owners, or policymakers passing new laws, we should at least have some statistical correlation of word/concept usage and pro-copyright results. Sophisticated projects of this sort are needed to advance the propertization critique.

The strengthening of copyright on the statute books *is* a cause for concern. But, so far, the propertization critique of copyright mainly seems to be the claim—quite possibly right, but not systematically proven—that judges and legislators are sometimes hypnotized by the normative idea of “property” into believing that intellectual works need to be protected more than they actually do. Either the research agenda in this area needs to become more complex, or we must content ourselves with a familiar remedy: caution with our words—in this case making sure the seductive word “property” does not hypnotize us into the wrong results, and that it means just what we choose it to mean—neither more or less. With apologies to Humpty Dumpty, that remains a message powerful in its simplicity, a message worth whispering into Caesar’s ear every chance we get.