

Be Careful What You Wish For: Copyright's Campaign for Property Rights and an Eminent Consequence of Intellectual Monopoly

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INTRODUCTION

Two competing theories attempt to define the essence of intellectual property. One theory holds that intellectual property rights are no different than the ownership of tangible private property, such as houses and cars.¹ The contrasting theory is that the right to own an idea is quite different from the property rights afforded to ownership of physical property.² Proponents of this latter argument generally disagree with intellectual property laws, claiming that they effectuate "intellectual monopolies" in an economy that should instead encourage competition.³ Part I of this Comment explains the problems with characterizing intellectual property as tangible private property. An understanding of each rationale is necessary to comprehend each side's justification for protecting, or not protecting, intellectual property rights.

Part II of this Comment highlights the historical campaign for property rights conducted by copyright proponents. It outlines the path toward absolute and perpetual copyright protection that is currently being taken both by Congress and the Courts. Furthermore, it stresses the blatant disregard for both the intended meaning of the Constitution and the importance of free and unobstructed dissemination of information.

To show exactly what this campaign means for creative and economic efficiencies, Part III parallels the current copyright legal model with implications that violate the honorable intentions of antitrust law. Here, an analysis of the media industries is undertaken, specifically calling attention to empirical data of market monopolization. Furthermore, government-granted monopolies generate undue market power, causing market fragmentation and consumer frustration when copyrighted products are tied with incompatible patented technology. Finally, Part III emphasizes the internal burdens that intellectual property laws, and more specifically copyright laws, place on the creative process.

Part IV discusses recent changes in the law of eminent domain, in evaluating the Fifth Amendment's application to the

¹ Eugene Volokh, *Sovereign Immunity and Intellectual Property*, 73 S. CAL. L. REV. 1161, 1167 (2000) ("Intellectual property advocates often stress that intellectual property is property, with dignity and worth equal to that of tangible property.").

² Michele Boldrin & David K. Levine, *Property Rights and Intellectual Monopoly*, at para. 2, <http://www.dklevine.com/general/intellectual/coffee.htm> (last visited Apr. 8, 2007).

³ *Id.* at para. 9.

framework of copyrights. Although the idea has never been implemented due to strong opposition, this Part explains that intellectual property, and more specifically copyrights, are at risk of becoming subject to the government's power of eminent domain. State governments have the constitutional authority to undertake this action, and the U.S. Supreme Court has ensured state immunity from suit for infringing certain intellectual property rights. Through a proposed system of compulsory licensing and periodical payments of just compensation, the market inefficiencies caused by perpetual copyright protection will be alleviated, and the incentive to create will remain intact.

Part IV discusses the real possibility of eminent domain's application to copyright, and should be considered as a warning to copyright proponents. Thus, it does not zealously advocate for broad government power over property, whether that property is tangible or intangible. Instead, Part IV should be understood to proffer one possible resolution, albeit unfavorable to copyright owners, to the problems that arise from copyright's campaign for perpetual protection. Copyright proponents should take heed to this suggested path and realize that their staunch position for property rights may lead them to unwanted consequences. Indeed, the very position that they take opens the door for the government to apply its eminent domain power over copyrights.

I. INTELLECTUAL PROPERTY OR GOVERNMENT-GRANTED MONOPOLY: WHY THE INTANGIBLE SHOULD NOT BECOME TANGIBLE

A. Theory One: Intellectual Property

The Copyright Clause of the U.S. Constitution secures for authors "the exclusive Right to their respective Writings," but only "for limited Times."⁴ Literalists, while disregarding the language "for limited Times," equate such exclusivity to that which is afforded by property laws to owners of real and personal private property.⁵ Proponents make a case that an idea is "property," as that word is read and understood in property class as a first year law student.⁶ Thus, "[t]he argument exploits an ambiguity in the common usage of the word 'idea' to incorrectly equate the usual meaning of the word 'property' and its specific

⁴ U.S. CONST. art. I, § 8, cl. 8.

⁵ Volokh, *supra* note 1, at 1167.

⁶ *Id.*

meaning in 'intellectual property.'"⁷ Advocates for the private property argument ("Private Property") tend to be "rent-seekers with a vested interest in the existing law."⁸ It is no surprise that the most recent legislation pushing copyright protection closer to perpetual property rights⁹ was backed by notorious copyright owners such as Disney and Bob Dylan.¹⁰ Understandably, owners of moneymaking assets will want those assets protected. Thus, it is the result of lobbying and rent-seeking motives that the term "intellectual property" has replaced that which only a generation ago was coined "copyright."¹¹ Regardless of the motive for the campaign for Private Property, legislators have taken heed.¹²

Proponents of Private Property continue to rest their case on Locke's Labor Theory,¹³ which creates the assumption that by mixing our labor with something, we make that thing our own. Thus, the application of intellectual property to this theory creates the following equation: mental labor plus other ideas equals private property. Accordingly, "[i]deas and expressions and inventions are all the product of mixing our labor, in this case our mental labor, with the common property of preexisting ideas and information."¹⁴ It is a fundamental assumption that property rights, if recognized through a legal system, provide incentive to expend resources to improve that property.¹⁵ The argument follows that authors and inventors need incentive to create their works, and that without this incentive, innovation and invention would be no more. Pointing to the Copyright

⁷ Boldrin & Levine, *supra* note 2, at para. 2.

⁸ *Id.*

⁹ Copyright Term Extension Act, 17 U.S.C. § 302(a) (2000).

¹⁰ Jesse Walker, *How Intellectual Property Laws Stifle Popular Culture*, REASON, Mar. 2000, at 46, available at <http://www.reason.com/news/show/27635.html> (last visited Apr. 8, 2007).

¹¹ Gary Shapiro, President, Consumer Electronics Assoc., Remarks at the Cato Institute Conference: Copyright Controversies: Freedom, Property, Content Creation, and the DMCA, in *Copyrights and Property Rights*, CATO POLICY REPORT, July-Aug. 2006, at 17 ("[I]ntellectual property' didn't even exist a generation ago; it was just called copyright.").

¹² *Id.* ("Copyright protection has also expanded immeasurably over the last three decades. Terms of protection are much longer. The original term was set in 1790 at 14 years. Congress has acted 13 times to expand the length of the copyright terms; 11 of those expansions were passed during the last 40 years.")

¹³ JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287-88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) ("The Labour of his Body, and the Work of his Hands, we may say, are properly his.")

¹⁴ Jim Harper, Director of Information Policy Studies, Cato Institute, Remarks at the Cato Institute Conference: Copyright Controversies: Freedom, Property, Content Creation, and the DMCA, in *Copyrights and Property Rights*, *supra* note 11, at 15.

¹⁵ David K. Levine, Co-author of *Against Intellectual Monopoly*, Remarks at the Cato Institute Conference: Copyright Controversies: Freedom, Property, Content Creation, and the DMCA, in *Copyrights and Property Rights*, *supra* note 11, at 16.

Clause in the Constitution, advocates latch onto legal positivism, claiming that the Framers promised to “promote the . . . Arts”¹⁶ by affording exclusive control over that which is original. Without such a guarantee, there would be no incentive to expend mental labor.¹⁷ Therefore, this incentive is so necessary that intellectual property should be governed similarly to tangible private property.¹⁸ The creator of an original idea should be able to completely exclude all others from it, and should be able to possess, use, and transfer it as the owner sees fit. As one professor has stated,

Intellectually or artistically gifted people have the right to prevent the unauthorized use or sale of their creations, just the same as owners of physical property, such as cars, buildings, and stores. Yet, compared to makers of chairs, refrigerators, and other tangible goods, people whose work is essentially intangible face *more* difficulties in earning a living if their claim to their creations is not respected. Artists, authors, inventors, and others unable to rely on locks and fences to protect their work turn to IP rights to keep others from harvesting the fruits of their labor.¹⁹

B. Theory Two: Intellectual Monopoly

Opponents of Private Property distinguish intellectual property from private property.²⁰ The Constitution, the importance of the public domain, and the effect that intellectual property laws ostensibly have on economic efficiency all lend support to this argument.²¹ At the outset, this theory is more easily understood by defining the fundamental characteristics of tangible property and contrasting these inherent traits with those of intangible property.

Physical property is a scarce resource, and its use and possession is limited. Inherent in tangible things is the fact that two people cannot possess the same thing at the same time.²²

¹⁶ U.S. CONST. art. I, § 8, cl. 8.

¹⁷ Thomas G. Field Jr., *What is Intellectual Property?*, FOCUS ON INTELLECTUAL PROPERTY RIGHTS 2 (2006), available at <http://usinfo.state.gov/products/pubs/intelprp/iprbook.pdf>.

¹⁸ Volokh, *supra* note 1, at 1167.

¹⁹ Field Jr., *supra* note 17, at 2–3 (emphasis added).

²⁰ Boldrin & Levine, *supra* note 2, at para. 2.

²¹ The constitutional support and the importance of the public domain are analyzed in Part I. The effect of IP laws on economic efficiency is evaluated in Part III.

²² Harper, *supra* note 14, at 15 (“If I have an apple and you want to eat it too, we can’t both eat it without bumping our faces together and making quite a mess. In economic parlance, an apple is a rivalrous physical good. No two people can possess it at the same time.”).

Thus, the sale or transfer of physical property necessarily means that the prior possessor cannot use it anymore. Similarly, the execution of the right to exclude necessarily means that the owner will be the only one who can use it. Copying tangible goods is a limited process, because again, other tangible goods must be used as production materials.²³ “[P]roperty rights in tangible goods,” from an economics perspective, help facilitate efficient transactional interaction “in the context of scarcity.”²⁴ Without such property rights, transaction costs would be extremely high because resources such as time and energy would be spent ensuring exclusive possession and protection. Realistically, the market for transferring tangible goods becomes an arena for animalistic behavior.

In contrast, intellectual property is not similarly scarce. The creator of an idea may still enjoy that idea exclusively, but only if he or she does not reveal it. He or she may, however, communicate that idea to another person, and still retain an identical copy; the original copy.²⁵ However, the transferee’s copy “leads an existence entirely independent of [the transferor’s] copy.”²⁶ The new copy may be limitlessly transferred or duplicated without affecting the original copy. Consider the following scenario:

You teaching me the law is a production process through which at least three private, rivalrous, and excludable inputs (your idea, your time, and my time) generate a private, rivalrous, and excludable output: my knowledge of the law If you were to die, my copy of the idea of the law . . . would continue to exist, and would be at least just as useful as it would have been had you remained alive. My copy of the law . . . possesses, therefore, economic value. Similarly, your copy of the law . . . also possesses economic value.²⁷

An idea is not a public good, and may be excludable. Yet, an idea may multiply without depleting resources, and once it is disclosed, it becomes public.²⁸

The argument against Private Property, then, insists that intellectual property is not ‘property’ at all. Instead, it is simply a government-granted monopoly;²⁹ it is a license to possess, use,

²³ *Id.*

²⁴ *Id.*

²⁵ Boldrin & Levine, *supra* note 2, at para. 3.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Harper, *supra* note 14, at 15.

²⁹ Walker, *supra* note 10, at 46.

