Is Copyright Property?
Comments on Richard Epstein's *Liberty Versus Property*

*By Adam Mossoff**

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

Alas, his insight may fall on deaf ears. For the peer-to-peer (P2P) file swappers and their advocates in think tanks and academia, the problem with Epstein's thesis is reflected in the terms of his title: liberty vs. property. For these individuals, the Internet's unique or "exceptional" characteristics—whether in its end-to-end (E2E) infrastructure or in its transaction-cost-lowering effects—changes fundamentally the policy equation. Accordingly, these "Internet exceptionalists" have come to view the debate in terms of only one side of this juxtaposition: liberty.[1] In their minds, "digital copyright," and "intellectual property" generally, is an oxymoron. The digital realm is about freedom—in every respect, from its architecture to its ethos to its implications for politics (as Californians have discovered with a recall election spawned by petition forms that were easily disseminated and downloaded via the web). The enforcement of so-called "traditional" property entitlements on the Internet is, at best, misplaced, and, at worst, dangerous to the freedom and creative potential of this new realm. Their growing despair in response to the Copyright Term Extension Act, the Digital Millennium Copyright Act, and the Supreme Court's recent decision in *Eldred v. Ashcroft* is palpable.[2] Siva Vaidhyanathan decries extending copyright terms and applying copyright to novel forms of expression in digital media because this is "unjustifiably locking up content that deserves to be free."[3] Or, as Larry Lessig bluntly puts it: "[o]urs is less and less a free society."[4]

With growing alacrity, the Internet exceptionalists are thus attempting to frame the public debate solely in terms of freedom, liberty, creativity, our "common culture," and the public domain. No one seems to epitomize this better than the prominent tech commentator and blogger, Doc Searls, who lamented the *Eldred* decision, but came away from the experience having learned an important lesson: the fundamental issue in the policy debate is neither political nor legal, but "conceptual."[5] Searls realized that they lost *Eldred* because proponents of digital copyright—of copyright generally—have successfully defined their legal entitlements as *property*, which makes Searls and others who believe in the "public domain" and the "commons" sound like they are, well, for lack of a better term, "Communist."[6] Searls later wrote that they "need to figure a way around the Property Problem," because "we lose in the short run as long as copyright (and, for that matter, patents) are perceived as simple property. Our challenge is to change that."[7] Some do not even like the term "commons" because it is "itself is a 'property' metaphor."[8] "[W]e must change the terms of the debate,"[9] Vaidhyanathan has intoned, and thus recognize that "[c]opyright should be about policy, not property."[10]

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

When taken in its strong sense, the Internet exceptionalists' thesis quickly devolves into a truism about property rights as such. If it is true—as it must be—that copyright is policy, then it is equally true that *all* property rights are policy. In proving this point in his essay, Epstein prefers utilitarian analysis, and he has spent much of his professional life attempting to show the ways in which the incremental development of property rights in the West represents the slow (and unending) march to identify utility-maximizing rules for our social and political institutions. Yet, even if one does not wish to jump on the utilitarian train that Epstein is calling us all aboard, it is easy to see that *every* tangible property entitlement has arisen from a crucible of moral, political and economic analyses, and thus implicates the same questions about utility, personal dignity, and freedom that now dominate the debates over digital copyright. The preeminent property cases that every law student studies in the first year of law school are exemplars of this basic truth.[11]

When Internet exceptionalists maintain that "[c]opyright is not about 'property,' . . . . [i]t is a specific state-granted monopoly issued for particular policy reasons,"[12] then they must also maintain that no legal rights in any tangible things are *property*. Everything that everyone owns—tangible

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or otherwise—represent only state-granted monopolies issued to individuals for particular policy reasons. As Epstein rightly points out, at a fundamental level of analysis, property and monopoly are simply flip-sides of the *same coin*. Thus, in this strong sense, the Internet exceptionalists' complaint about extending copyright to digital media is, at the same time, neither informative nor instructive—unless one's goal is to restructure universally the concepts and legal rules for *all* property entitlements in American society.

It is unsurprising then that the Internet exceptionalists' rhetoric has produced the politically charged label of "Communist." When Dan Gillmor publishes a webzine article attacking the *Eldred* decision under the heading, "Supreme Court Endorses Copyright Theft," writing that the Supreme Court decision has sanctioned "a brazen heist," and asking his readers, "Who got robbed? You did. I did," one hears the rallying call: Copyright is theft![13] When one hears Lessig's similar complaint that the Copyright Term Extension Act is a "theft of our common culture,"[14] one hears again the rallying call: Copyright is theft! As Doc Searls aptly points out, it is no surprise that Gillmor's and Lessig's readers hear the echoes of the nineteenth-century socialists' self-described "battle cry": "Property is theft!"[15]

We are not compelled, however, to adopt only the strong sense of the Internet exceptionalists' rhetoric. There is also a weak sense to their claim that copyright is policy, not property; namely, that copyright is different from (tangible) property and, as best illustrated in the context of digital media, does not deserve the same moral or legal status typically afforded to our more traditional property entitlements. This is hardly a radical claim, and there is substantial evidentiary support for this proposition in the American copyright and patent scheme. As the Supreme Court has repeatedly stated: the constitutional grant of power to Congress to protect copyrights and patents "reflects a careful balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the 'Progress of Science and the useful Arts.'"[16]

From such judicial and legislative statements, the Internet exceptionalists make an important change to Epstein's juxtaposition. It is not "liberty vs. property," but rather "liberty vs. *monopoly*." And, they conclude, the stifling effects of extending the copyright monopoly to digital media substantially outweigh the negligible benefit of promoting innovation. Here the Internet exceptionalists adopt the same utilitarian metric employed by Epstein, arguing that "[b]efore the [copyright] monopoly should be permitted, there must be reason to believe it will do some good—for society, and not just for the monopoly holders."[17] Reflecting his desire that we interpret the Internet exceptionalists' claims in this weak sense, Lessig asks (somewhat rhetorically but obviously in frustration): "Does calling for balance make one a communist?"[18]

In this weak sense, therefore, the claim that "copyright is policy, not property," is simply shorthand for the proposition that we must achieve and maintain balance in the utility calculation of "liberty vs. copyright monopoly." There are two supporting premises for this proposition that Internet exceptionalists sometimes intermingle: the first is historical, and the second is analytical. On the historical side, they maintain that copyrights and other intellectual property rights have *always* been viewed as monopolies issued by the state according to a strict utility calculus. Again, this is not a radical claim. Thomas Jefferson, an avowed defender of natural rights, believed that "[i]nventions . . . cannot, in nature, be a subject of property," and that "an exclusive right" is granted to inventors by "Society" solely "as an encouragement to men to pursue ideas which may produce utility."[19]

The historical record, however, is not as one-sided as the Internet exceptionalists would like us to believe. Since the enactment of the Statute of Anne in 1709, the first modern copyright law, the justification for copyright has comprised *two* general normative theories. The first is utilitarianism, and the second is natural rights theory, particularly the labor theory of property and the social contract doctrine at the core of John Locke's political philosophy.[20] The labor theory of property is usually given short shrift by modern copyright scholars, but it certainly played a justificatory role in the historical copyright debates. As Representative Gulian Verplanck stated in defense of a bill that became the copyright act of 1831: "the work of an author was the result of his own labor. It was a right of property existing before the law of copyrights had been made."[21] State laws protecting intellectual property rights prior to the 1787 federal convention also reflected a Lockean influence; the New Hampshire legislature, to take but one example, enacted legislation to protect copyrights and other forms of intellectual property because "there being no property more peculiarly a man's own than that which is produced by the labour of his mind."[22] Moreover, the evolution and creation of new types of intellectual property rights in the nineteenth century, such as trademarks and trade secrets, followed the contours of a labor theory of property.[23] The initial definition and protection of trade secrets as property entitlements, for instance, derived its justification from the courts' belief that such rights were similar to other property rights born of valuable labor and already protected by the law.[24]

It is a profound oversimplification to declare that intellectual property rights, including copyright, have *always* been conceived *solely* as "monopolies" doled out by the state according to a utilitarian calculus that weighs social and scientific progress against the stifling effects and deadweight losses attributable to typical government-created monopolies. The proposition that "copyright is a property right" is not a novel form of political rhetoric invented by Jack Valenti sometime in the last twenty years in order to advance the interests of Hollywood before Congress.[25] In casting the history of intellectual property rights in this way, an interesting and multi-faceted historical record is flattened out in order to create a picture of what the Internet exceptionalists believe copyright and other intellectual property rights should be. As one critic has noted, this is not history, but rather the construction of a myth.[26]

Why the Internet exceptionalists retell the history of intellectual property rights in this way reflects their underlying conception of what is the nature of these "rights." As noted

earlier, they believe that intellectual property rights generally are merely "monopolies." In other words, copyrights and patents comprise only monopoly privileges handed out to authors and inventors by Congress under the Constitution's grant of authority to Congress that it "promote the Progress of Science and Useful Arts."[27] This is the analytical side of the weak interpretation of "copyright is policy, not property," and, once again, this is hardly a radical claim, as reflected in the Supreme Court's repeated references to copyright and patent rights as "monopolies."

This definition of intellectual property solely in terms of a utility-based monopoly, as opposed to a type of property, is actually the result of an impoverished concept of property that has dominated our political discourse in the twentieth century. At the turn of the century, legal scholars and judges redefined "property" as a set of "social relations"[28]—what later became known as a "bundle" of rights.[29] With this narrow focus on the purely *social role* of property, it was but a short step to focus on the one *social right* in the bundle of rights that constitute our modern understanding of property: the right to exclude. In fact, the Supreme Court would eventually declare that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[30] As one prominent property scholar put it recently, the right to exclude is the *sine qua non* of a property right.[31]

This narrow definition of property as the right to exclude works well for tangible property entitlements, but it fails miserably to capture our intangible property entitlements. In the world of tangible property, there are fences and boundary lines that *physically* exclude non-owners. There is also ontological exclusivity: two people cannot occupy the same piece of land at the same time but in different ways. Two farmers who each attempted to till the same piece of soil—one trying to grow corn and the other wheat—would soon come to blows as to who may do what with the land.[32] Accordingly, the *fact* of physical exclusion serves as an objective baseline for defining the *right* to exclude.

For intellectual property rights, the problem with reducing property to the right to exclude is readily apparent. There is no natural exclusion of intellectual property entitlements: inventions, books, and computer code can be copied willy-nilly without taking the original physical product away from the inventor or author. Unlike that one acre of land over which the two farmers are pummeling each other, the P2P file swapper can trade music files without impinging on the original author's right to listen to his own song or on my right to listen to the copy that I rightfully have purchased. The right to exclude in intellectual property entitlements exists by legal fiat. It is solely a creation of the law with no natural counterpart in the actual facts of how people interact in the world. Thus, the exclusive rights granted to copyright and patent holders appear arbitrary—they are only legal figments of our collective social imagination. And these rights certainly do not fit the definition of *property*, which, as we are constantly reminded, is naturally exclusive.

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

It is at this fundamental level of analysis that Epstein's essay is most insightful. He reveals that the analytical framework that explains how physical property rights have been defined applies equally to intellectual property rights; the difference between the two types of property rights, as my fellow commentator, Solveig Singleton, notes, is not a difference in *kind*, but only one of *degree*. As with chattels or fishing rights, when one is faced with a different *context*, one must define one's property rules accordingly. The legal rules that make sense for dividing up farmland should not be applied deductively to fish or wild game, or vice-versa. This does not mean that these rights are not property rights, it means that they are only a different *type* of property right—but a property right nonetheless. To put it bluntly, if not in an oversimplified way, digital copyright (and intellectual property rights generally) is to the author and computer programmer today what fishing rights were to the whalers and fishermen of yesteryear.[33]

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

thus, their definition of property as the right to use, possess and dispose of one's possessions.

This concept of property dominated the American understanding of property in the eighteenth and nineteenth centuries. It is revealed in the New Hampshire Supreme Court's explanation in 1872 that "[i]n a strict legal sense, land is not 'property,' but the subject of property. The term 'property,' . . . in its legal signification . . . . 'is the right of any person to possess, use, enjoy, and dispose of a thing.'"[34] Or, as James Madison wrote in 1792, "property" means more than just "land, or merchandise, or money," this concept has a "larger and juster meaning, [in which] it embraces everything to which a man may attach a value and have a right."[35] Property is the right to acquire, use and dispose of the things that one has created through one's labor. It is this concept of property that precipitated the virtual truism in American society that every person has a right to enjoy the fruits of one's labors.

It is also this concept of property—which focuses on the substantive relationship between a person and the thing that he has labored upon or created—that explains and justifies the protection of intellectual property rights, regardless of whether these rights exist in tangible books or computer code. A person's right to control the disposition of his creation, and thereby enjoy the fruits—the profit—of his labors, is central to the legal definition and protection of property entitlements.[36] As the New York Court of Appeals stated in 1856: "Property is the right of any person to *possess*, *use*, *enjoy* and *dispose* of a thing. . . . A man may be deprived of his property in a chattel, therefore, without its being seized or physically destroyed, or taken from his possession."[37] The court was speaking here of a state regulation that prevented a businessman from selling his goods, but the regulation did not require confiscation or possession of the businessman's land or place of business by the state authorities. In the context of tangible property rights, the courts have never demanded that a person be deprived *physically* of his property as a necessary prerequisite for finding a violation of one's property rights. Stealing the fruits of one's labors or indirectly interfering with the use of the property is sufficient; in other words, it is sufficient that one lose the ability to use, control or dispose of the values that one has created. It is this concept of property that explains why copyright is in fact *property*, rather than exclusive monopoly privileges meted out to authors at the leisure of the state's utility calculation.

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

The past evolution of copyright law is notable because we are in the midst of another revolution today—the digital revolution. The impact of the digital revolution is as far reaching as was the industrial revolution of the nineteenth century, but it is important to realize that we are still in the midst of this revolution. It is not yet clear how and in what ways intellectual property rights should be best protected in the new digital domain, but the evolution of intellectual property rights is as necessary today as it was during the industrial revolution. It would be wrong to condemn outright our early attempts to define copyright entitlements for digital content, just as it would have been wrong to condemn the early attempts at defining trademarks in the nineteenth century. A doctrine in transition may be criticized for its various fits and starts, but the transition itself is not grounds alone for junking the doctrine as such.[38]

Endnotes

1 This is a protean term that does not have a precise definition. It covers a wide variety of positions, including individuals advocating for (1) the complete abolition of intellectual property rights in all digital content, and (2) the rolling back of intellectual property rights generally given what we have learned about the nature of innovative work in our new digital world. Moreover, the views of the players in the debate continue to morph along with the evolution of the digital world itself. As used in this essay, therefore, this term is limited to the positions described herein.

2 537 U.S. 186, 123 S. Ct. 769 (2003) (upholding the constitutionality of the CTEA).

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

4 Larry Lessig, *Free Culture*, O'Reilly Network, *at* http://www.oreillynet.com/lpt/a/2641 (last visited Aug. 19, 2002).

5 Doc Searls, *Going Deep*, *at* http://www.aotc.info/archives/000160.html#000160 (last visited Aug. 11, 2003).

6 *Id.*

7 Doc Searls, *Who Owns What?*, *at* http://www.linuxjournal.com/article.php?sid=6989 (last visited Aug. 11, 2003).

8 Larry Lessig, *Free the Air*, *at* http://www.lessig.org/blog/archives/001248.shtml (last visited Aug. 11, 2003) (reporting on and expressing agreement with Yochai Benkler's position here).

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

10 *Id.* at 15.

11 *See, e.g.,* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (discussing acquisition of title to land by the European settlers from the American Indians); Pierson v. Post, 3 Cai. R. 175 (N.Y. 1805) (addressing the requirements for claiming property in wild animals).

12 Vaidhyanathan, *supra* note 3.

13 Dan Gillmor, *Supreme Court Endorses Copyright Theft*, SiliconValley.com, *at* http://weblog.siliconvalley.com/column/dangillmor/archives/000730.shtml (Jan. 15, 2003).

14 Lessig, *supra* note 4.

15 Jean-pierre Proudhon, What Is Property? 13 (Donald R. Kelley & Bonnie G. Smith trans. 1994) (1840).

16 Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146 (1989).

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

18 Larry Lessig, *The Limits of Copyright*, Industry Standard (Sept. 8, 2001), *available at* http://www.lessig.org/content/standard/0,1902,16071,00.html.

19 Letter from Thomas Jefferson to Isaac McPherson (August 13, 1813), *reprinted in* The Life And Selected Writings Of Thomas Jefferson 629-30 (Adrienne Kock & William Peden eds., 1972).

20 Eldred, 537 U.S. 186, 123 S. Ct. at 785 n.18 (noting the "complementary" relationship between the utilitarian and labor-desert theories in copyright law).

21 Thomas B. Nachbar, *Constructing Copyright's Mythology*, 6 The Green Bag 2d 37, 40 (2002) (quoting 7 Register of Debates in Congress at 423-24 (Gales & Seaton 1831)).

22 Adam Mossoff, *Locke's Labor Lost*, 9 Univ. Chi. L. Sch. Roundtable 155, 164 (2002) (quoting Act for the Encouragement of Literature (1783)).

23 *See* Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 415-424 (2003) (discussing the genesis in the nineteenth century of trade secret and trademark rights as intellectual property doctrines).

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

25 Valenti is President and CEO of the Motion Picture Association of America. *See* Frank Field, Furdlog, *at* http://msl1.mit.edu/furdlog/index.php?wl_mode=more&wl_eid=310 (June 12, 2003) (criticizing the proposition that copyright is property as merely a modern "political agenda").

26 *See generally* Nachbar, *supra* note 20.

27 U.S. Const. art. I, § 8, cl. 8.

28 Felix S. Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. 357, 361–63 (1954).

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

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

31 Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 730 (1998).

32 As one natural rights theorist succinctly put it: conflict over goods "shows the falsity of the old saying: 'Mine and thine are the causes of all wars.' Rather it is that 'mine and thine' were introduced to avoid wars." Samuel Pufendorf, De Jure Naturae Et Gentium 541 (C.H. Oldfather & W.A. Oldfather trans., 1934) (1688) (the title translates to *On the Law of Nature and Nations*).

33 Ghen v. Rich, 8 F. 159 (D. Mass. 1881) (discussing rules for resolving two fishermen's competing claims to a whale). *See also* James M. Acheson, The Lobster Gangs Of Maine (1988) (discussing, in part, how lobstermen have created a system of property rights without reference to the legal system).

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

35 James Madison, *Property*, Nat'l Gazette, Mar. 5, 1792, *reprinted in* James Madison, The Mind Of The Founder 186 (Marvin Meyer ed., 1981).

36 *See* Hecht v. Superior Court, 16 Cal. App. 4th 836 (1993) (holding, in part, that a man has a property right in his sperm because he has "decision-making authority as to the use of the sperm for reproduction," and this control over its *use* and *disposition* is an "interest [that] is sufficient to constitute property").

37 Wynehamer v. People, 12 N.Y. 378, 432 (1856) (emphasis added).

38 One of Larry Lessig's online petitions calls for Congress to roll back copyright protections to the rights set forth over two hundred years ago in the first copyright act of 1790. *See* Reclaim Copyright Law, *at* http://www.petitiononline.com/progress/petition.html (last visited Aug. 29, 2003).