

2006

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Recommended Citation

Shubha Ghosh, *Exclusivity—The Roadblock to Democracy?*, 50 St. Louis U. L.J. (2006).

Available at: <https://scholarship.law.slu.edu/lj/vol50/iss3/9>

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EXCLUSIVITY—THE ROADBLOCK TO DEMOCRACY?

SHUBHA GHOSH*

I. THE IDENTITY CRISIS IN INTELLECTUAL PROPERTY

Does the institution of property lead to democracy? This is the question that Professor Rose addresses in the 2005 Childress Lecture,¹ to which this Article is a response. Unless one adopts a very mechanistic relationship between property rights and government, the immediate response to the question should be a firm “no.” The problem is that the question does not specify the social, economic, and legal institutions through which property rights function and seemingly ignores the “social embeddedness” of law.² As a result, it may not be possible to separate the institution of property from democracy. If one measure of the efficacy of property is the ability of democratic institutions to protect property rights,³ then it is just as sensible to ask whether democracy promotes the institution of property, or whether democracy and property can be promoted harmoniously.

Despite its limitations, this question is valuable because of its ability to provoke. Professor Rose uses the question to evaluate the Washington Consensus,⁴ promoted by key international organizations like the World Bank and the World Trade Organization, that the rule of law protecting property and

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1. Carol M. Rose, *Privatization—The Road to Democracy?*, 50 ST. LOUIS U. L.J. 691 (2006).

2. For a discussion of social embeddedness with specific applications to technology and intellectual property, see MARK WARSCHAUER, *TECHNOLOGY AND SOCIAL INCLUSION* 202–05 (2003).

3. For a discussion of the role of democratic institutions and governance in protecting property, see BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 352 (1992), which presents Madisonian positions on the role of the government in protecting rights, including the right to property, and GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 268–69 (1991), which presents arguments about property and democracy particularly stemming from John Calhoun. For a discussion of the problems of defining democracy, let alone implementing democratic institutions, see GERRY MACKIE, *DEMOCRACY DEFENDED* 424–25 (2003), which summarizes arguments about democracy and the public good.

4. Rose, *supra* note 1, at 691–92.

contract is a prerequisite to economic and political development.⁵ Professor Rose also provokes us to reconsider the meaning and function of intellectual property law, a central item in the agenda of the Washington Consensus.⁶ Addressing the connection between property and democracy permits a more coherent understanding of intellectual property. In turn, the refined understanding of intellectual property illustrates why democracy may not inevitably follow from a strong institution of property.

Attempting to understand intellectual property's connection to democracy reveals a crisis of identity for the field of intellectual property. Many people, both within and outside the field, question whether it is meaningful to characterize intellectual property as property.⁷ The term "intellectual property" is of relatively recent vintage,⁸ and the equating of patent, copyright, trademark, and other doctrines with real and personal property does not fully capture their complex historical and doctrinal roots. At the same time, turning patent, copyright, trademark, and the rest into orphans from the property family creates the vexing problem of identifying the appropriate adoptive parents. Tort law does not completely fill the bill because compensation for injury describes only one dimension of the goals of patent and copyright, for instance.⁹ While patents and copyrights do regulate the marketplace, leaving the orphans at the doorstep of competition law would ignore the long-running squabble with antitrust.¹⁰ Perhaps, as one author has suggested, we should

5. See generally CHRISTOPHER ARUP, THE NEW WORLD TRADE ORGANIZATION AGREEMENTS: GLOBALIZING LAW THROUGH SERVICES AND INTELLECTUAL PROPERTY 27–29 (2000) (describing role of law in globalization); SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 7–17 (2003) (analyzing structure of the World Trade Organization and intellectual property agreements).

6. Rose, *supra* note 1, at 692–94. See generally MICHAEL P. RYAN, KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY 125–39 (1998) (describing the political background to the promotion of the World Trade Organization and Agreement on Trade Related Aspects of Intellectual Property Rights).

7. For an analysis of the current state of the debate, see Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1033–39 (2005), which discusses property rhetoric in intellectual property law.

8. *Id.* at 1033–34.

9. *Id.* at 1072 (discussing an alternative in which intellectual property is treated as a species of tort law).

10. For a summary of this squabble, and a proposed resolution, see Michael A. Carrier, *Resolving the Patent–Antitrust Paradox Through Tripartite Innovation*, 56 VAND. L. REV. 1047, 1049–53 (2003). On this point, it is interesting to note that one of the first leading casebooks on the subject of patents, copyright, trademarks, and related doctrines was EDMUND W. KITCH & HARVEY S. PERLMAN, LEGAL REGULATION OF THE COMPETITIVE PROCESS: CASES, MATERIALS, AND NOTES ON UNFAIR BUSINESS PRACTICES, TRADEMARKS, COPYRIGHTS, AND PATENTS (1972). In 1998, several years later, the fifth edition of the book was entitled *Intellectual Property and Unfair Competition*. EDMUND W. KITCH & HARVEY S. PERLMAN, INTELLECTUAL PROPERTY AND UNFAIR COMPETITION (5th ed. 1998).

simply treat patent, copyright, trademark, and other doctrines as statutory fields, a solution that avoids the question of what these separate statutory areas have in common.¹¹ The problem is so vexing, and the identity crisis so profound, that one proposal is to replace the term “intellectual property” with the noncommittal initials “IP.”¹² In light of this consternation, the answer to the question posed by Professor Rose may be very simple with respect to intellectual property: even if the institution of property does lead to democracy, intellectual property does not fit into the equation because intellectual property simply is not property.

This answer, however, ignores an important insight for understanding intellectual property to be gained from addressing Professor Rose’s question. Analyzing intellectual property in terms of the relationship between property and democracy allows us to appreciate the relationship between the legal structure of patents, copyrights, trademarks, and related doctrine and property more broadly. Professor Rose identifies four roles for property in promoting democracy: recognition, deregulation, divestment, and enablement.¹³ Intellectual property fits into each of these four roles, as I demonstrate in Section II of this Paper. The observation that intellectual property fulfills each of these roles suggests that there may be a family resemblance between what is called intellectual property and other types of property. This family resemblance cannot be ignored by either orphaning intellectual property or by reducing it to its bare initials. In other words, Professor Rose’s analysis of how property can shape democracy provides an understanding of intellectual property that connects the field to real and personal property. At the same time, a careful analysis of how intellectual property can fail to promote democracy reveals why the broader category of property may fail to lead to democracy. The failure, I conclude, arises from property rights, whether of the real, personal, or intellectual species, being defined too exclusively. In short, the argument in this Paper has two parts. First, Professor Rose’s analysis of the relationship between property and democracy helps to understand how intellectual property can be understood as property. Second, identifying the ways in which intellectual property can promote democracy helps to isolate an important reason for the failure of property to lead to democracy: property rights, too broadly defined, lead to exclusivity.

This two-part argument is developed as follows. In Section II, I show how intellectual property fits into each of Professor Rose’s categories of privatization: recognition, deregulation, divestment, and enablement. In Section III, I show how intellectual property rights too broadly defined can lead to exclusivity, a roadblock to democracy. In Section IV, I derive three

11. See Lemley, *supra* note 7, at 1075.

12. *Id.*

13. Rose, *supra* note 1, at 694–98.

lessons to temper the claim that the institution of property is a prerequisite for democracy. The three lessons pertain to the design of political, market, and social institutions that would promote the harmonious development of property rights and democracy.

II. THE ROLE OF INTELLECTUAL PROPERTY IN PRIVATIZATION

The first quarter of Professor Rose's paper identifies the mechanism through which property can lead to democracy.¹⁴ The more interesting question of why property is crucial to the promotion of democracy is the central question for the last three-quarters of the paper. I will follow the order of Professor Rose's argument by addressing in this next section how intellectual property can lead to democracy; the "why," or perhaps more accurately, the "why not" question will be the focus of Section III.

From the academic and policy debate over property and democracy, Professor Rose distills four ways in which property is deemed to secure democracy: recognition, deregulation, divestment, and enablement.¹⁵ Each is a distinct mechanism to implement privatization, or the shifting of "assets and economic decision-making away from the political arena and into the hands of individuals or private corporations."¹⁶ Even though Professor Rose identifies enablement as the key mechanism to explain how intellectual property functions,¹⁷ I make the case in this section that each of the four categories has application to intellectual property. Professor Rose's four mechanisms can be understood as part of a theory of property grounded in the values of democratic governance. Situating intellectual property within these four mechanisms locates it within a democratic theory of property. This move is helpful to establish the proposition that intellectual property perhaps can correctly be described as property, once property is appropriately understood. For the rest of this section, I will demonstrate how intellectual property fits into Professor Rose's four categories, starting with enablement, the category within which Rose places intellectual property,¹⁸ and then addressing the remaining three: recognition, deregulation, and divestment, in that order.

A. *Intellectual Property As Enablement*

Enablement is a mechanism implemented by the state to define property rights when rights cannot be created or enforced through extra-legal means. Intellectual property is an example of enablement.¹⁹ By providing a legal right

14. *Id.* at 694–701.

15. *Id.* at 694–98.

16. *Id.* at 691.

17. *Id.* at 697–98.

18. Rose, *supra* note 1, at 697.

19. *See id.*

to exclude to the creator of inventions or expressive works, the state allows the creator to prevent the copying of the work, limit its distribution, and realize rents from the artificial scarcity of the work in the marketplace. Absent the state-created right to exclude, the creator's work could be easily duplicated and every consumer could be allocated as many copies of the work as desired. The market scarcity made possible by legal protection allows for allocation based on the consumer's willingness to pay as measured by price.

The mechanism of enablement serves not only to create markets, but also to permit private management of resources.²⁰ As Professor Rose states, tradeable emission permits are an example of enablement.²¹ Tradeable emission permits not only create markets for pollution, but also allow the owner of the permits to decide how to allocate resources between production and pollution abatement.²² Intellectual property also functions as a tool for private resource management. Patents, for example, are sometimes argued to be a tool for prospecting, the grant of exclusivity allowing the patent owner to develop and improve her invention.²³ The private management of resources has implications not only for the institution of markets, but also for democracy. Private management of resources permits decentralized decision-making and governance structures. Once the state institutes property rights, rights holders are free to exercise the rights within the scope defined by the state. To make enablement a meaningful mechanism, however, the rights holders also must have a say in how the rights are enforced and defined.²⁴ If the power to enforce and define rights rests solely with the state, then enablement would be a meaningless way to privatize economic decision-making.

While certain dimensions of intellectual property can be understood as enablement, other dimensions are less comprehensible under this theory. Digital rights management is a technological means of protecting the subject matter of intellectual property.²⁵ Through digital rights management, the creator can prevent copying of her work by encryption. However, legal

20. See generally YORAM BARZEL, *ECONOMIC ANALYSIS OF PROPERTY RIGHTS* 6–7 (2d ed. 1997) (describing ways in which property rights aid in managing and exchanging resources).

21. Rose, *supra* note 1, 698.

22. See James L. Hufman, *Markets, Regulation, and Environmental Protection*, 55 MONT. L. REV. 425, 432 (1994).

23. See Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265, 270–71 (1977).

24. See BARZEL, *supra* note 20, at 88–89 (describing need for balance of power in delineation and definition of rights); see also ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 37–43 (1970) (discussing the role of voice as an alternative to exit); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 243 (1993) (discussing the benefits of deliberative democracy).

25. See JESSICA LITMAN, *DIGITAL COPYRIGHT* 166–70 (2001) (explaining digital rights management).

protection, such as the Digital Millennium Copyright Act (DMCA),²⁶ is also needed to ensure that the encryption is not circumvented.²⁷ The DMCA, often described as para-copyright, does not fit into the enablement mechanism. By implementing legislation like the DMCA, the state is not creating property rights, but protecting privately defined rights over intellectual property. The state is not so much enabling rights, but implementing technologically defined rights. The result is two layers of rights defined through both technology and law. The example of the DMCA illustrates that with intellectual property, the state acts as more than just an enabler of rights. As I show in the remainder of this section, intellectual property can be understood also through recognition, deregulation, and divestment.

B. *Intellectual Property As Recognition*

While the enablement mechanism entails the state's creation of property rights, the recognition mechanism entails the state's creation of institutions that permit the giving of public notice of property ownership. The creation of public notice, such as through a titling system, facilitates the exchange of property, the development of markets, and the accumulation of assets that allow property owners to engage more broadly in civil society.²⁸ In some ways, the recognition mechanism shares many features of the enablement mechanism. Both can lead to the development of markets. Both allow for the more effective management of property. A key difference is that the recognition mechanism assists the enforcement of pre-existing property rights and is agnostic as to the definition and source of these rights.

Intellectual property fits within the recognition mechanism. While patent and copyright are generally accepted as statutory rights, and therefore the creation of the state, other types of intellectual property, such as trade secrets and trademarks, have roots in the common law. Furthermore, all types of intellectual property originate in a Lockean theory of property under which rights are created by the imposition of the owner's labor on things in the world.²⁹ The Lockean, or labor, theory of intellectual property informs not only its common law foundations, but also the interpretation of statutory rights of patent and copyright. From the Lockean perspective, intellectual property

26. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended at 17 U.S.C. §§ 1201–1205, 1301–1322, and 28 U.S.C. § 4001 (2000)).

27. LITMAN, *supra* note 25, at 27, 167.

28. See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 17–20 (2000); see also Bernadette Atuahene, *Land Titling: A Mode of Privatization with the Potential to Deepen Democracy*, 50 ST. LOUIS U. L.J. 761, 762 (2006).

29. See Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 297–300 (1988).

rights exist before the state.³⁰ Consequently, the state, through intellectual property law, acts to recognize, rather than create property.³¹

I should point out that not everyone accepts the Lockean theory of property.³² For example, in several publications, I have advocated for a regulatory theory of property, one that perhaps fits more closely with the enablement, deregulatory, and divestment mechanisms.³³ Nonetheless, the Lockean theory has broad acceptance and needs to be addressed within the four mechanisms. Furthermore, the recognition mechanism is consistent with a regulatory theory of intellectual property. Under the regulatory theory, the titling function of intellectual property serves as a means of regulating property rights among various owners and users. The possible inconsistency between the regulatory theory and the recognition mechanism arises from the source of intellectual property. While the recognition mechanism is agnostic as to source, the regulatory theory identifies the state as the primary source of intellectual property rights.

The history of intellectual property illustrates the recognition mechanism of property. Patent law's roots, for instance, are traced to the patent statute enacted by the Venetian Republic in 1474.³⁴ The Venetian statute permitted any inventor within Venice to obtain a limited property right in a new and ingenious invention upon its registration with a central registry.³⁵ The purpose of this registry was to give notice of the invention and the inventor's claims.³⁶ Similarly, the early English history of copyright illustrates a private registration system among members of the printer's guild, known as the Stationer's Company, to allocate the right to make copies of an author's manuscript among its members.³⁷ While this registry was privately administered, the notice function of copyright served to determine which publisher had the right to copy a particular manuscript.³⁸ The notice function of intellectual property continues today with the publication requirement for patents, the registration requirement for the initiation of a copyright suit, the federal registration of trademarks, and the registration of domain names. The domain name system is particularly noteworthy because of its echoes of

30. *See id.* at 300.

31. *See id.*

32. *See id.* at 330.

33. *See generally* Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387, 413–21 (2003) (arguing for the theory of democratic governance).

34. Craig Allen Nard & Andrew P. Morriss, *Constitutionalizing Patents: From Venice to Philadelphia* 9 (Case Research Paper Series in Legal Studies, Working Paper No. 04-12, Aug. 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=585661.

35. *Id.*

36. *Id.*

37. *See* L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS* 21 (1991).

38. *Id.*

copyright's early history. In the United States, domain name registry is privatized with regulation by the Internet Corporation for Applied Names and Numbers (I.C.A.N.N.), a private corporation to whom the authority was derogated by Congress in the late Nineties.³⁹

The recognition mechanism can also be seen in the doctrinal structure of intellectual property. The subject of intellectual property can be protected through private means, such as technological protections and secrecy. For example, Leonardo da Vinci famously wrote his inventions in code and maintained secrecy in the disclosure of his ideas.⁴⁰ Secrecy is quite common in contemporary industrial settings, and with the rise of digitalization, encryption is an effective means for protecting information.⁴¹ Patents and copyrights, appropriately defined, can serve as an efficient alternative to secrecy and technological protection measures.⁴²

Patents, for example, grant a strong right to exclude in exchange for complete disclosure of the invention to the public.⁴³ While copyright protection does not have the broad disclosure requirement of patent law, a work must be registered as a condition of bringing a suit for copyright infringement.⁴⁴ Furthermore, both the patent and copyright systems contain formalized rules for registering licenses and other contractual interests based in intellectual property.⁴⁵ These formalized rules provide notice of ownership to subsequent users of the protected know-how.

Intellectual property illustrates not only the enablement mechanism, but also the recognition mechanism. Whether recognition is a means of providing notice of pre-political rights (as implied by the Lockean theory of property) or a means for property regulation (as implied by the regulatory theory), intellectual property serves many of the titling functions Professor Rose

39. See A. Michael Froomkin & Mark A. Lemley, *ICANN and Antitrust*, 2003 UNIV. ILL. L. REV. 1, 2–8 (presenting I.C.A.N.N. in a nutshell); see also MILTON L. MUELLER, *RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE* 80 (2002).

40. See MICHAEL WHITE, *LEONARDO: THE FIRST SCIENTIST* 131–32 (2000) (describing dark side of da Vinci, who wrote his scientific notes in secret code to prevent plagiarism and theft).

41. Aaron Perkins, Comment, *Encryption Use: Law and Anarchy on the Digital Frontier*, 41 HOUS. L. REV. 1625, 1626–27 (2005).

42. See KIM LANE SCHEPPELE, *LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW* 24–31 (1988) (describing the rationale based in the economics of information for creating property rights in information to avoid the problem of secrecy).

43. See 35 U.S.C. § 101 (2000) (inventions patentable); § 102 (conditions for patentability; novelty and loss of right to patent); § 103 (conditions for patentability; non-obvious subject matter), § 111 (application for a patent); § 112 (describing the specification required in a patent application); § 113 (when drawings shall be included in application); § 122(a) (confidentiality of patent applications); § 122(b) (publication of patent applications).

44. See 17 U.S.C. §§ 411–412 (2000).

45. See § 111 (on the patent application); § 409 (on the copyright application).

identifies in other forms of privatization.⁴⁶ Based on the recognition mechanism, the case can be made that intellectual property fits within a broader theory of property and privatization. The case becomes stronger when considering the deregulation and the divestment mechanisms.

C. *Intellectual Property As Deregulation*

Deregulation, following Professor Rose's definition, is a mechanism for relaxing governmental controls over business activities.⁴⁷ The assumption is that relaxing governmental controls will unleash private economic activity and more efficient use of resources. Like the enablement and recognition mechanisms, the deregulation mechanism facilitates private decision-making and the creation of market institutions.

One way through which intellectual property has been taken from governmental control is the Bayh–Dole Act of 1980, which removed restrictions on the patenting of inventions that were the product of federal government funding.⁴⁸ The impetus for the Bayh–Dole Act came from a need by universities and private industry for the fostering of university–industry collaborations.⁴⁹ While the federal government provided a very important source of financing for early research and development in inventive and innovative activities, the marketing and development of these activities were argued to be hindered by the inability to patent, or otherwise protect through intellectual property law, the fruits of university research.⁵⁰ By removing the restriction on patenting that came with the government funding, the Bayh–Dole Act removed the disincentives for university–industry collaboration and stimulated spin-off activities that are evident among many major university centers, whether in Silicon Valley, Route 128, or areas near major land grant institutions.⁵¹

Like many types of deregulation, the Bayh–Dole Act has been controversial. A salient criticism is that the Act, by fostering university–industry collaboration, has caused many universities to move away from their core mission of basic research and education.⁵²

Furthermore, the Act has had unexpected effects on patent law itself, narrowing the scope of the doctrine of experimental use, which is an important limitation on patent rights for the purpose of research and experimentation. In

46. See Rose, *supra* note 1, at 694–98.

47. See *id.* at 695–96.

48. See 35 U.S.C. §§ 200–212 (2000); Arti Kaur Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 NW. U. L. REV. 77, 94–98 (1999).

49. See Rai, *supra* note 48, at 96–98.

50. *Id.* at 97.

51. See generally *id.* at 97–98.

52. See Brett Frischmann, *Innovation and Institutions: Rethinking the Economics of U.S. Science and Technology Policy*, 24 VT. L. REV. 347, 415–16 (2000).

Madey v. Duke University, for example, the Federal Circuit seemed to imply that universities, because of their engagement in commercial activities, may lose the benefit of the experimental use doctrine except in very narrow circumstances.⁵³ More importantly for the argument of this Paper, the treatment of intellectual property under the Bayh–Dole Act raises an important question: Did the Act actually deregulate intellectual property or enable it within the context of federally funded research?

The answer to that question rests on one’s conception of intellectual property. If intellectual property is solely the creation of the state, then the Bayh–Dole Act arguably enabled property rights in a previously excluded area. If intellectual property is derived from the imposition of human labor on the world, and therefore existed before the creation of the state, then the Bayh–Dole Act deregulated the patent system by permitting property rights where they no longer existed. The history of intellectual property supports the conclusion of deregulation.

What we call patents and copyrights were originally grants from the sovereign.⁵⁴ The crown would issue a “letters-patent,” or an open grant, to individuals who had secured an innovative product for distribution within the country.⁵⁵ Copyright, which originally started as a form of private regulation among members of the Stationer’s Company, became a grant from the sovereign for the exclusive right to publish a manuscript.⁵⁶ The system of sovereign grants came under attack during the Elizabethan Age, and the Parliament in 1624 under the reign of King James I enacted the Statute of Monopolies, which limited the sovereign’s power to make open grants.⁵⁷ The Statute of Monopolies became the basis for contemporary patent and copyright law under which individuals are given exclusive rights in inventions and writings upon satisfying the statutory requirements.⁵⁸ There is an instructive parallel between the origins of patent and copyright and the development of corporate charters.⁵⁹ Corporate formation was originally a matter of a

53. 307 F.3d 1351, 1362–63 (Fed. Cir. 2002).

54. See DOUGLASS C. NORTH & ROBERT PAUL THOMAS, *THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY* 147–48 (1973); KENNETH W. DOBYNS, *A HISTORY OF THE EARLY PATENT OFFICE: THE PATENT OFFICE PONY* 7–10 (1994).

55. *Figueuroa v. U.S.*, 66 Fed. Cl. 139, 148 (Fed. Cl. 2005) (stating that the word “patent” derives from the English phrase “letters patent,” which were grants by the sovereign to an individual); DOBYNS, *supra* note 54 at 7–8.

56. Copyright History, <http://www.patent.gov.uk/copy/history/> (last visited Mar. 30, 2006).

57. See Chris R. Kyle, ‘*But A New Button to an Old Coat: The Enactment of the Statute of Monopolies*, 21 *James I cap.*3, *J. LEGAL HIST.* Dec. 1998, at 203, 205–17.

58. See *id.* at 203.

59. See HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW 1836–1937*, at 11–16 (1991) (describing development of incorporation in the United States). For a fuller discussion of the parallel noted in text, see Shubha Ghosh, *Patents and the Regulatory State: Rethinking the Patent Bargain Metaphor After Eldred*, 19 *BERKELEY TECH. L.J.* 1315, 1317–18 (2004).

sovereign grant.⁶⁰ With the shift from a monarchical to democratic forms of government, corporate chartering became a legislative function. For example, in the nineteenth century, corporations in the United States were formed by special legislation.⁶¹ The incorporation movement sought successfully to make the act of incorporation the product of private decision-making prescribed by statutory requirements. Modern patents and copyrights, like corporate charters, result no longer from a grant by a legislature, but from a private act permitted by statute.⁶² In this way, patents and copyrights can be understood as the product of deregulation, or a relaxation of governmental controls over private decision-making.

Intellectual property's role as a deregulatory mechanism can be seen in its transformation from a sovereign grant to an instrument of private economic decision-making. Just as a citizen can choose to form a corporation, a citizen can decide whether to pursue the protections afforded by patent and copyright law. Therefore, the Bayh–Dole Act's status as deregulation should not be surprising. Instead of recognizing or enabling property rights, the Act liberated the exercise of choice to those who had received federal funding and sought to patent its fruits. Although the consequences of the Act are controversial, its deregulatory function, as well as that of intellectual property itself, should not be.

D. *Intellectual Property As Divestment*

The divestment mechanism entails the transfer of ownership over key industries and infrastructure from governmental agencies to private citizens.⁶³ While the privatization of key utilities, such as water and electricity, are fairly well recognized examples of divestment, the example of intellectual property as divestment may not be.⁶⁴ To understand intellectual property as a form of divestment requires an appreciation of the government's role in the creation of cultural products and innovation.⁶⁵

Divestment involves shifting the locus of certain activities from the state to private industry.⁶⁶ Similarly, the creation of intellectual property moves the locus of creative activity from the state to private individuals. Citizen–creators can make use of intellectual property to keep others from making unauthorized

60. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1433 (1987).

61. See HOVENKAMP, *supra* note 59, at 11–13.

62. See *id.* at 13 (describing modern view of corporation as a means of private ordering).

63. See Rose, *supra* note 1, at 696.

64. See generally MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD (2002) (describing traditional forms of privatization as devolution); Shubha Ghosh, *Copyright As Privatization: The Case of Model Codes*, 78 TUL. L. REV. 653, 655–57 (2004) (proposing that copyright can be understood as a type of privatization).

65. See Ghosh, *supra* note 64, at 663–68.

66. Rose, *supra* note 1, at 696.

copies of the products of their creativity. Put more strongly, intellectual property gives the citizen–creator the right to police the marketplace to prevent the making of illegitimate imitations of works and act as private attorneys general to enjoin acts of infringement. In this way, intellectual property is a form of divestment.

An illustrative example of copyright as divestment is provided by the case of J.S.G. Boggs, an American artist who was the subject of criminal prosecution because of his artistic depiction of U.S. currency.⁶⁷ Boggs's work depicts various denominations of currency.⁶⁸ While these depictions clearly are not currency, they have value as artwork and are accepted in exchange for goods and services.⁶⁹ The problem is that while Boggs's artwork is quite different from counterfeit money, he has been arrested for counterfeiting in England and in Australia.⁷⁰ The Boggs saga illustrates that at the heart of intellectual property lies a question of authority. The U.S. treasury creates a particular representation of money. Under federal law, no private citizen can make a representation of money.⁷¹ Even though Boggs's exchange of his currency portraits for goods and services is a barter exchange, the exchange is seen as too close a substitute for an exchange of goods and services for authorized currency.⁷²

By giving itself the exclusive right to represent money in a particular form, the state retains the authority to determine what representations of money are legitimate and how transactions can occur. In theory, the state could assign the right to make currency to private parties (as, for example, happens with the artwork on postage stamps),⁷³ but has not done so for the practical reason of retaining control over the stock of money in the economy.⁷⁴ Boggs's artwork challenges the state's exclusive authority to represent money and demonstrates intellectual property's potential role as a form of divestment.

While the state retains the authority to represent money and control its copying, the state has vested the right to create and control copying to private citizens in other instances. For example, the King James Bible was a large government project from the seventeenth century.⁷⁵ As an alternative to the government project, the state could have allowed a private organization to

67. LAWRENCE WESCHLER, *BOGGS: A COMEDY OF VALUES* 4–5 (1999).

68. *Id.*

69. *Id.*

70. *Id.* at 4–5, 120–21.

71. 18 U.S.C. §§ 474–475 (2000).

72. See WESCHLER, *supra* note 67, at 4–5.

73. See H.R. Rep. No. 94-1476, at 60 (1976).

74. Nathan K. Cummings, *The Counterfeit Buck Stops Here: National Security Issues in the Redesign of U.S. Currency*, 8 S. CAL. INTERDISC. L.J. 539, 542–43, 547–49 (1999).

75. See ADAM NICOLSON, *GOD'S SECRETARIES: THE MAKING OF THE KING JAMES BIBLE* 63–70 (2003).

make the translation and allowed the private entity to control copying through intellectual property law. In fact, most creative and expressive works are created through private means under the auspices of copyright law.

A particularly striking example of the state's divestment of activities through copyright is provided by the copyright treatment of laws and statutes. In the United Kingdom, the copying and distribution of parliamentary legislation is controlled through a crown copyright.⁷⁶ In the United States, federal legislation and other federal governmental materials are not protected by copyright and therefore can be copied and distributed freely.⁷⁷ Federal and state judicial opinions are also exempt from copyright protection.⁷⁸ Controversy has arisen over the treatment of state legislative materials. In one case, a federal appeals court recognized copyright in privately drafted legal code, but concluded that once the privately drafted code is enacted into public law, the copyright is extinguished.⁷⁹ This last example shows how even the drafting of legislation can be derogated to private individuals who can make use of copyright law to protect the draft before enactment by the state.

By shifting the locus of creative and innovative activities from the authority of the government to the authority of private citizens, intellectual property is a form of divestment. This conclusion does not imply that creativity and innovation occurs only within governmental agencies or solely under the sponsorship of the state. Rather, intellectual property has been used to derogate certain governmental functions to private entities. The artist Boggs's run-in with the law demonstrates the limits of divestment.⁸⁰ Boggs's painted currency also makes evident that at the heart of intellectual property is the tension between state authority and private authority in the creative process.

E. Intellectual Property and the Democratic Theory of Property

Professor Rose's distillation of privatization into four types serves not only to summarize arguments about the relation between property and democracy, but also to help formulate a theory of property grounded in democratic theory. The mechanisms of recognition, deregulation, divestment, and enablement show how property functions within a democratic society.⁸¹ Professor Rose's implicit functional theory of property also has room for intellectual property, whose many uses include the recognition of property rights, the deregulation of

76. WILLIAM CORNISH & DAVID LLEWELYN, *INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS, AND ALLIED RIGHTS* 530–33 (5th ed. 2003).

77. 17 U.S.C. § 105 (2000).

78. *See Banks v. Manchester*, 128 U.S. 244, 252–54 (1888); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 666 (1834).

79. *Veeck v. S. Building Code Cong. Int'l, Inc.*, 293 F.3d 791, 796 (5th Cir. 2002).

80. *See supra* notes 67–72 and accompanying text.

81. *See Rose, supra* note 1 at 694–98.

government control over rights, the divestment of creative activities, and the enablement of property rights. In response to the identity crisis bedeviling intellectual property theory, the functional theory of property offers a basis for concluding that intellectual property perhaps can accurately be understood as property, once property is appropriately understood.

But the case for intellectual property within the functional theory of property has an important implication for the question of whether property leads to democracy. The establishment of property rights may fail in the goal of achieving democracy. Professor Rose provides several reasons for this failure.⁸² By focusing on the connection between intellectual property and democracy, I propose a major explanation for the failure: exclusivity. I analyze this proposition in the next section.

III. EXCLUSIVITY AS A ROADBLOCK TO DEMOCRACY

The four mechanisms discussed in Section II explain how property can lead to democracy through privatization. The more important question is why. Professor Rose presents five theories for why the institution of property rights can lead to democracy: the priority theory, the power-spreading theory, the distraction theory, the symbolic theory, and the civilizing theory.⁸³ Each theory, in isolation or in conjunction with some of the other theories, offers a causal narrative for how property rights lead to democracy. The case of intellectual property allows us to isolate a common weakness in each of these five narratives. My thesis is that property rights can fail to lead to democracy if the rights create too strong a power to exclude. Examples from intellectual property support the conclusion that exclusivity is the source of the problem.

Historian Sean Wilentz describes property as a “dazzling abstraction.”⁸⁴ Property’s dazzle is reflected in its complicated role in the development of American democracy. Property can be an impediment to democracy when property ownership is made a condition of civic participation.⁸⁵ Property can be antithetical to democracy when property rights are established over people, making status as property an insurmountable stigma against civic recognition.⁸⁶ At the same time, an expansion of property ownership, through more equal distribution of resources, has often been touted as the key to civic engagement and democratic participation.⁸⁷ Inappropriately designed property systems, as gauged by distribution and the scope of what counts as property,

82. *Id.* at 709–10.

83. *See id.* at 701–20.

84. SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 343 (2005).

85. *Id.* at 27–28.

86. *See id.* at 226–27.

87. *See id.* at 485 (discussing how people could be “turned into great defenders of property” when property is diffused broadly).

are undoubtedly hostile to democracy. The problem for the argument that property leads to democracy is defining property rights appropriately. The case of intellectual property demonstrates the various dimensions of the problem.

Intellectual property's identity crisis stems in part from a recognition that the subject of intellectual property is different from land and chattels, the subject of real and personal property respectively.⁸⁸

The recognized difference is one of the abilities of desirability for creating exclusionary rights for intellectual property as strong as those that exist for real and personal property. For some commentators, intellectual property is no different from real and personal property.⁸⁹ All three, according to this perspective, require a strong right to exclude in order to facilitate private investment and market exchange.⁹⁰ Other commentators recognize that the logic of intellectual property requires some degree of exclusion, but given the nature of information and the processes of creativity and innovation, too strong a right to exclude can inhibit the goals of progress.⁹¹ Yet another perspective questions the desirability of any right to exclude, urging that attempting to exclude ideas would be tantamount to excluding the atmosphere or sunlight.⁹² The key lesson is that the debate about intellectual property is over exclusivity. Similarly, the connection between property and democracy can also be understood as a question of the value of exclusivity as a means of obtaining democracy.

In oral commentary on the ideas leading up to this Paper, Professor Rose questioned whether I was correct in narrowing intellectual property to the right to exclude. As she correctly pointed out, the goal of the intellectual property system is the spread and progress of knowledge.⁹³ Therefore, rights to alienate and transfer are also an important part of intellectual property. The problem is that the debate over intellectual property, as summarized in the previous paragraph, is about the scope of the right to exclude under intellectual property law. Furthermore, rights to alienate and transfer are subsidiary to the right to

88. See, e.g., Lemley, *supra* note 7, at 1034–35.

89. See Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108, 112 (1990).

90. *Id.* (advocating a strong right to exclude in intellectual property).

91. See LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 19–21 (2001).

92. Thomas Jefferson, Letter to Isaac McPherson, in *BASIC WRITINGS OF THOMAS JEFFERSON* 708, 712–13 (Philip S. Foner ed., 1950) (1944).

93. As I understood it, Professor Rose's point was an articulation of her argument that property rights do not necessarily imply "despotic dominion" by the property rights holder. See Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 631 (1998). My point in this Paper is to demonstrate how the right to exclude within intellectual property, as well as other systems of property, requires limitations in order to be consistent with the democratic theory of property. Put a bit more strongly, those who espouse a strong right to exclude are working against the creation of democratic institutions.

exclude. Patents, copyright, trademarks, trade secrets, and related doctrines give the rights-holder only the right to exclude others from making, using, or selling the object of the right.⁹⁴ The rights-holder's ability to make, use, or sell the object of the right can be limited as well. For example, the patent owner's right to practice an invention can be regulated or even prevented under the state's police power.⁹⁵ The logic of the intellectual property system is that the right to exclude facilitates the rights-holder's ability to make, use, or sell the object of the right without the fear of imitation once the object is marketed. Whether this freedom from imitation also entails freedom from market competition, or other interferences with the value of the right, rests largely on how broadly the scope to exclude is construed. Therefore, it is perfectly appropriate to focus solely on the right to exclude in the context of intellectual property. Furthermore, by focusing on the right to exclude, the centrality of exclusivity to the connection between property and democracy can be more carefully explored and understood.

The rest of this section identifies the weaknesses to the five theories of the property–democracy connection with examples from intellectual property. The examples show that an important problem for the design of property rights is the proper scope of exclusivity.

A. *The Priority of Intellectual Property and the Effects of Exclusivity*

The importance of property as a touchstone for democracy rests in its primacy. Property existed before politics and before the vagaries of the state, and therefore it reflects a natural order based on the abilities of the individual property owner. Once property is established, then so are the rights, capacities, and identity of the citizen who becomes free to be involved in civic society.⁹⁶ So goes the priority theory of property and democracy. With its roots in the ideas of John Locke, the priority theory offers an explanation for property and an explanation for democratic governance: property is prior to, and necessary for, government, and government serves to protect property.⁹⁷

Given the Lockean foundations for the priority theory, it should not be difficult to imagine the argument for the primacy of intellectual property for democracy. Even though land and inventions are clearly different, the argument for intellectual property as prior to, and necessary for, democratic governance is not difficult to make. Democratic governance rests on the

94. See, e.g., *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) (identifying right to exclude as “the hallmark of a protected property interest”).

95. See *Webber v. Virginia*, 103 U.S. 344, 347–48 (1881) (holding that patent law did not displace police power).

96. Rose, *supra* note 1, at 701–02 (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT 315–17 (Peter Laslett ed., Cambridge Univ. Press 1963) (1690)).

97. *Id.*

exchange of ideas.⁹⁸ Ideas need to be expressed in order for this exchange to have substance, since freely floating ideas are not negotiable. Copyright provides rights in the expression of ideas that can serve as the currency for the marketplace of ideas.⁹⁹

The democratic case for patents may be more difficult to see until one recognizes the role of technological development in the growth of the state and the economy. To avoid the dangers of the state regulating and monitoring economic development, rights in inventions need to be allocated before the state is formed, and then the state's subsequent role in protecting property rights in inventions will mirror the Lockean vision of protection for real property.¹⁰⁰ Even though Locke did not talk about intellectual property, the extension of his ideas from the priority of real property to the coequal priority of intellectual property follows from the primacy of labor as a means of defining the rights and identities of the citizen in a democratic government.

The problem is that if the right being defined is a right to exclude, then it becomes very difficult to imagine how property rights are prior to the state. More importantly, it becomes harder to understand why the state should sanction pre-existing property rights rather than engage in the distribution or the redefinition of rights to serve potentially to correct the adverse effects of exclusivity on democracy. I address these two points separately as potentially overlapping criticisms of the priority theory.

The definition problem for property is well illustrated by the conundrums within intellectual property as to what subject matter the right to exclude attaches. In patent law, the trend in the United States since the Patent Act of 1952 is to extend the right to exclude to "anything under the sun that is made by man."¹⁰¹ But even within this broad reach, there are hesitations. European critics question the extension of patent rights to software, raising the specter of anti-competitive effects on the software industry and the many industries that are software-based.¹⁰² The United States, however, maintains its broad approach, arguing, in perhaps true Lockean fashion, that any harms that arise

98. Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 297–98 (1998) (stating that an "exchange of ideas and free flow of information [are] necessary to spur, consolidate and enhance democratic governance").

99. See L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article 1, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909, 942–45 (2003) (discussing the relationship between copyright law and the First Amendment).

100. See Hughes, *supra* note 29, at 296–330, for a discussion of the Lockean theory of property; see also ADAM D. MOORE, *INTELLECTUAL PROPERTY AND INFORMATION CONTROL* 103–19 (2001).

101. *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980).

102. See Michael Guntersdorfer, *Software Patent Law: United States and Europe Compared*, 2003 DUKE L. & TECH. REV. 0006, ¶ 21, <http://www.law.duke.edu/journals/dltr/articles/2003dltr0006.html>.

from the exercise of property rights can be remedied through common law or other statutes.¹⁰³ But even the United States on occasion backtracks from the position that patent rights can attach to anything that is man-made. In 2000 the United States Patent and Trademark Office denied a patent to a “chimera,” a mixed animal–human cellular life form because, the agency concluded, property rights cannot attach to humans or human-like organisms.¹⁰⁴ The limitation suggests that property rights may not be pre-political after all, and that the state can define rights in order to obtain other regulatory and social goals.

The examples of software and chimeras illustrate one obvious chink in the armor of the priority theory. If intellectual property rights exist prior to the state, how can they attach to inventions created after the formation of the state? The answer to this conundrum is that intellectual property rights are attaching to the exercise of human labor that exists before the state is created. But not all human labor is treated equally under intellectual property law. Copyright law, for example, grants a right to exclude only to original works of authorship.¹⁰⁵ The U.S. Supreme Court has clearly stated that originality cannot be based on the sweat of the brow.¹⁰⁶ A property right in an expression attaches to creative elements of the expression, and it is only creators who can be copyright owners. Copyright law makes distinction between artists, who bring their labor flowing from their creative genius to bear upon the world, and artisans, who engage in slavish labor with no creativity.¹⁰⁷ While this distinction can be explained in the functional terms of copyright, it is far from clear how this determination of originality exists prior to the state. Once again the debate over software illustrates the point. Viewed at one time as purely a functional or utilitarian item, software rests squarely within the domain of copyright law with the recognition that software is a type of literary work.¹⁰⁸ It is hard to imagine that the line between utilitarian and expressive works can be drawn independently of the state’s goal of promoting certain works, and industry, through copyright.

The priority theory also ignores the state’s goal in redefining property rights to meet either distributional goals separate from copyright or the goals of intellectual property itself. The copyright battles in particular industries

103. *Id.* at ¶¶ 5–6.

104. *Patent Application Is Disallowed As ‘Embracing’ Human Being*, PAT. TRADEMARK & COPYRIGHT J., June 17, 1999, at 203, 203–04.

105. 17 U.S.C. § 102(a) (2000).

106. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 359–60 (1991).

107. *Id.* at 359–61 (discussing earlier “sweat of the brow” cases).

108. Matthew Brett Freedman, *Machinima and Copyright Law*, 13 J. INTELL. PROP. L. 235, 238 n.17 (2005) (citing *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 285 F.3d 857 (9th Cir. 2002); *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 702 (2d Cir. 1992); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983)).

illustrate the state's role in redefining property rights. When the film industry was confronted with the question of defining copyright when there were multiple contributors to a work, the state created the "work-for-hire" doctrine¹⁰⁹ to vest ownership of the copyright in the employer.¹¹⁰ As new technologies arose for the transmittal of sound and video images, copyright law was adopted to deal with new methods of reproducing and distributing works and new citizens, such as performers, who had a stake in the enterprise.¹¹¹ By defining new rights, the state was not simply enforcing pre-existing rights, but adapting the system of rights to new institutions and environments. It was also actively engaging in redrawing and redistributing the rents to be gained from new technologies. The most striking example of this role of the state comes from the Internet. In the *Tasini*¹¹² case, the Supreme Court had to decide whether freelance writers had retained their rights to reproduce and distribute their works in a digital database when they transferred their works to publishers.¹¹³ The case involved a technical analysis of a provision of the Copyright Act, but at issue was how to allocate the economic benefits from Internet transmission between authors and publishers.¹¹⁴ The Court ruled in favor of the authors, and even though subsequent publishers were able to reacquire the rights via contract, it is hard to deny that the state was not engaged in the definition of rights, rather than the protection of rights that existed prior to the state.¹¹⁵

The problem in each of these examples arises from the problem of exclusivity. For new technologies and new inventions, the recurring question is who gets the right to exclude. The allocation of this right is not determined

109. See Catherine L. Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 YALE J.L. & HUMAN. 1, 2–5 (2003) (discussing the development of this doctrine, which governs works created while employed by another).

110. See SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS 81–116 (2001) (describing the motion picture industry's role in shaping copyright law).

111. *Id.*

112. *New York Times Co., Inc. v. Tasini*, 533 U.S. 483 (2001).

113. *Id.* at 487.

114. *Id.* at 506. At issue was the interpretation of 17 U.S.C. § 201(c), which allows the creator of a collective work, like a newspaper or magazine, to use copyrighted materials that the creator has been allowed to use in the collective work in any revision of the collective work. See 17 U.S.C. § 201(c) (2000). For example, the publisher of *The New Yorker* is allowed to republish materials that it was authorized to publish in the first publication of *The New Yorker* in *The Best of The New Yorker*. Under the Copyright Act, the "best of" work would be viewed as revision. See *id.* The question the Court decided in *Tasini* was whether republishing materials in a digital database constituted a permitted revision or required the publisher to license separate rights for the inclusion of the work in the database. 533 U.S. at 498–500. The Supreme Court held that the digital database was not a revision. *Id.* at 500.

115. 533 U.S. at 506. On the ability of the publishers to simply revise contracts and recapture the right to publish works in digital databases, see *id.* at 506–07 (Stevens, J., dissenting) (pointing out the possibility of recapture).

solely by an appeal to abstract labor or to an actual exercise of exclusion, but some determination of who should have the right to exclude. The state, therefore, has to exercise some judgment in allocating rights beyond simply enforcing pre-existing rights. Furthermore, the right to exclude may shift from one citizen to another as needed to promote certain industries and activities. Here, the state is acting to redistribute the right to exclude rather than simply enforce existing systems and assumptions about exclusion. Given the importance of the state's actions in defining and redefining intellectual property rights in the promotion of key industries in developed economies, it is hard to accept the argument that property is prior to the state and not a key instrument for how economies and industries are shaped by the state. The salient question is how the right to exclude and the institutions that support it are to be drawn.

B. Power Spreading and the Problem of Monopoly

Under the power spreading theory, recognizing property rights broadly among citizens allows economic power to be spread more evenly across society and subsequently prevents political power from being concentrated.¹¹⁶ Through broad property ownership, individuals can have opportunities to enter into profitable commercial activities, which permits the accumulation of wealth and of influence in the political process. Put another way, property owners have a stake in society and a motivation to participate and counter oligarchy.

The right to exclude may belie the power spreading theory. If the right to exclude is spread broadly, then each citizen is given the equal and reciprocal right to exclude his neighbor. But if the right to exclude is used collectively at the expense of a targeted group, then pernicious results will inevitably follow. The example from real property of racially restrictive covenants demonstrates the dangers.¹¹⁷ While there was some attempt to justify racially restrictive covenants on separate but equal grounds since the ability to restrict on race applied to all races, the reality of the covenants was their effect on the development of an African-American middle class in large segments of the United States during the first half of the twentieth century.¹¹⁸ The wide-spread allocation of property by itself did not lead to democracy because the right to exclude was used collectively to prevent the exercise of property rights by others. Property was a weapon that permitted the monopolization of economic and political power rather than a tool that whittled it away.

116. See Rose, *supra* note 1, at 705.

117. See Carol M. Rose, *Property Stories: Shelley v. Kraemer*, in *PROPERTY STORIES* 169, 169–200 (Gerald Korngold & Andrew P. Morriss eds., 2004).

118. *Id.* at 170.

In intellectual property, the power spreading theory is undermined in two ways. First, since intellectual property rights are based on the products of one's creative endeavors, the value of one's intellectual property will largely depend upon one's endowment of talent. The recognition of talent will often rest on the tastes of the citizens of society and the rights of citizens not to patronize certain creators or vendors of creative output.¹¹⁹

The lack of appreciation, in their time, for the talents of Herman Melville and of Vincent van Gogh as well as the suicide of the fledgling novelist John Kennedy Toole, whose novel *A Confederacy of Dunces* won a Pulitzer Prize and became a top seller posthumously,¹²⁰ illustrates the whims of tastes. Therefore, the right to exclude under intellectual property will often come into conflict with the right to exclude by consumers. The ownership of intellectual property may not lead to more active participation if market exclusion, which reflects the exclusivity of tastes, prevents the realization of value from one's intellectual property.

Furthermore, the right to exclude under intellectual property will inevitably be exercised in a collective fashion. The collective use of the right to exclude under intellectual property reflects in part the law's roots in the guild system. Copyright was originally a system of private regulation among the Stationer's Company in England.¹²¹ Many features of patent law, including the original rules of duration and inventorship rules, reflect practices of apprenticeship in guilds.¹²² In the contemporary marketplace, intellectual property invariably is exercised in a collective fashion either through corporate entities to whom patents and copyrights are assigned as part of the employment relationship or to collective-rights organizations that serve to look out for the rights of performers and artists. The right to exclude under intellectual property leads more often to the concentration of economic and political power than to its diffusion. As with real property, the path to democracy requires as much restriction on the right to exclude as its broad recognition.

C. *Distraction and the Idols of the Intellectual Property Marketplace*

The distraction theory views the establishment of property rights and the consequent pursuit of wealth as taking citizens' minds away from the bloody world of politics to the sanguine, peaceful world of beneficial exchange and

119. See TYLER COWEN, IN PRAISE OF COMMERCIAL CULTURE 130–31 (1998) (discussing the market for music); DAVID THROSBY, ECONOMICS AND CULTURE 23–26 (2001) (describing demand for artistic works in terms of economic theory of utility).

120. Edwin McDowell, *Publishing Manuscripts Posthumously*, N.Y. TIMES, Sept. 10, 1984, at C13.

121. See *supra* note 37 and accompanying text.

122. See generally Nard & Morriss, *supra* note 34, at 10, 15–16 (discussing roots of patents in guild system).

the marketplace.¹²³ Property, it is argued, turns savages into gentle shopkeepers, pursuers of political power into purveyors of goods and services for individual economic profit and the greater good.

The saliency of this theory rests on its pedigree. As Albert Hirschman has documented, the distraction theory was perhaps the primary defense of “capitalism before its triumph” and is echoed in Adam Smith’s *The Wealth of Nations*.¹²⁴ The problem with the theory is that it rests on a simplistic separation between the quest for power and the quest for wealth. The argument assumes that if citizens focus on the second, they will lose interest in the first. But the distraction from politics can also be a curse because it allows someone questing for political power to rise to the helm, unnoticed by those busy tending shop. In this example, the right to exclude can be transformed into the right not to be bothered by others, including those bearing news on the specter of tyranny.¹²⁵ Perhaps the problem can be resolved by disbanding government altogether, but then the exercise of connecting property to democracy becomes irrelevant and meaningless. Under the distraction theory, property would lead to anarchy governed by the discipline of the marketplace, rather than democratic governance.

If the distraction theory is a meaningful theory of how property leads to democracy, then the distraction cannot lead to a complete blindness to politics. The distraction theory needs to be refined to allow for the integration of economics and politics. Under this refinement of the distraction theory, property distracts citizens from the pursuit of power but not from the requirements of governance. But psychologically and institutionally, it may be difficult to separate the pursuit of power from the pursuit of wealth. Intellectual property illustrates this point. Many markets based on intellectual property are structured as winner-take-all markets, in which there are one or two individuals who obtain all the rents in the marketplace, while other

123. Rose, *supra* note 1, at 710.

124. See ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* 69–70 (20th anniversary ed. 1997). Amartya Sen captures the distraction theory vividly as follows:

[C]onsider a situation in which you are being chased by murderous bigots who passionately dislike something about you. . . . As they zero in on you, you throw some money around as you flee, and each of them gets down to the serious business of individually collecting the notes [T]he universalizing theorist would . . . note that this is only an example . . . of the general phenomenon of violent passion being subdued by innocuous interest in acquiring wealth.

Amartya Sen, *Foreword* to HIRSCHMAN, *supra* at x. Needless to say, this strategy is most effective when the target is particularly well-endowed with money to throw about.

125. See generally CASS SUNSTEIN, *REPUBLIC.COM* 105–23 (2001) (warning against the possible withdrawal of Internet users from the public sphere).

participants earn very little.¹²⁶ The markets for blockbuster movies and books and pharmaceuticals illustrate this phenomenon. Under this structure, the pursuit of wealth leads to wealth and power as resources become more concentrated. Economics and politics may not be so easy to separate.

The world of ideas and the subject of intellectual property provide countless examples of how the pursuit of wealth and the pursuit of power are in tandem. Academic politics perhaps once was petty because the stakes were so low, but the profits to be earned as a star academic novelist, spokesperson, or celebrity have made the pursuit of position within academia arguably more savage and bitter. If such anecdotes fall too close to home, recall Isaac Newton, who was not shy in using his power to sabotage colleagues and rivals.¹²⁷ The point is not that all academics or even many academics are somehow rotten. Rather, the assumption that the pursuit of power and the pursuit of wealth can be neatly separated can be readily contradicted in many instances, especially in ones where intellectual property plays a role. Wealth is just power in another form and economics is politics by other means.

A less nasty example than that of academic politics is provided by Governor Arnold Schwarzenegger, who was the plaintiff in a law suit against the manufacturer of a bobblehead doll in the his likeness.¹²⁸ The manufacturer had made bobbleheads of other political figures without problem.¹²⁹ The difference with the governor of California is that he was an actor, still is an actor, and most likely will be an actor when the flirtation with politics ends.¹³⁰ As a result, Schwarzenegger alleged that the bobblehead, a wry political commentary that portrayed the governor holding an assault rifle, infringed his rights of publicity in his image as an actor.¹³¹ The case was settled before it even went to trial with the manufacturer promising not to manufacture or distribute any more Schwarzenegger dolls holding a gun and to donate “a substantial portion of the sales” to the governor’s designated charity, Arnold’s All Stars.¹³² If the case had gone to trial, the court would have had to sort out the various aspects of the governor’s identity and publicity. But the dispute illustrates the difficulties of separating politics from economics in a way that

126. See generally ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER-TAKE-ALL SOCIETY* 23–30 (1995) (explaining how winner-take-all markets arise); JAMES HEILBRUN & CHARLES M. GRAY, *THE ECONOMICS OF ART AND CULTURE* 330–31 (2d ed. 2001) (describing superstar phenomenon in the arts).

127. See SIMON SINGH, *BIG BANG: THE ORIGIN OF THE UNIVERSE* 117–18 (2004) (describing Isaac Newton’s nastiness to fellow physicists); JAMES GLEICK, *ISAAC NEWTON* 62–63, 86–89 (2003) (describing rivalry between Newton and Robert Hooke).

128. See Tyler T. Ochoa, *The Schwarzenegger Bobblehead Case: Introduction and Statement of Facts*, 45 SANTA CLARA L. REV. 547, 547 (2005).

129. *Id.* at 551–52.

130. *Id.* at 549.

131. *Id.* at 552–54.

132. *Id.* at 555.

would satisfy the assumptions of the distraction theory.¹³³ The right to exclude is a key element both in the pursuit of wealth and of politics, and one cannot presume how the right will be exercised.

D. The Symbolism of Intellectual Property

Property can serve as a symbol of stability, of commitment to individual initiative and civic engagement. The symbolism of property, with its validation of the individual, is a precondition to democratic governance. The symbolic theory of property has a peculiar application to intellectual property. The visibility of intellectual property institutions may indicate a commitment to creativity, innovation, and dynamism in the marketplace. This commitment may in turn support a system of governance that is responsive to individual participation. But the symbolism is perhaps belied by the realities of exclusivity. This failure may arise in real property systems, under which the haves may be able to camouflage the have-nots, especially if property becomes the primary qualification of a citizen. For intellectual property, the symbolism may be particularly confounding, sending the mixed message that individual expression and inventions are valued, while, at the same time, valuing some expression and invention more than others.

Professor Rose points to the debate over traditional knowledge as a weakness to the symbolism theory.¹³⁴ This example is appropriate. Intellectual property protection for traditional knowledge has been heralded as a means to empower indigenous groups both politically and economically. Both the World Intellectual Property Organization (WIPO) and the World Bank have released studies over the past five years documenting the actualities and the possibilities of traditional knowledge protection.¹³⁵ The examples include the marketing of traditional folklore and handicrafts under the protection of intellectual property laws as part of the promotion of tourism or as export goods to developed countries.¹³⁶ Intellectual property serves to

133. See Shubha Ghosh, *On Bobbling Heads, Paparazzi, and Justice Hugo Black*, 45 SANTA CLARA L. REV. 617, 637–41 (2005).

134. See Rose, *supra* note 1, at 715–16. See generally MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 229–34 (2003) (discussing conflicting values in the property protection of the artifacts of traditional knowledge).

135. See WORLD INTELLECTUAL PROPERTY ORGANIZATION, IDENTIFYING THE INTELLECTUAL PROPERTY NEEDS AND EXPECTATIONS OF TRADITIONAL KNOWLEDGE HOLDERS: RESULTS OF THE 9 FACT-FINDING MISSIONS (July 3, 2000), <http://www.wipo.int/tk/en/tk/ffm/report/interim/pdf/7.pdf>. See generally POOR PEOPLE'S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES (J. Michael Finger & Philip Schuler eds., 2004), available at http://www.worldbank.org/research/Poor_Peoples_Knowledge.pdf (discussing promoting innovation, knowledge, and creative skills of poor people in developing countries).

136. See Frank J. Penna, Monique Thormann & J. Michael Finger, *The Africa Music Project*, in POOR PEOPLE'S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING

transform traditional knowledge into commodities, and this transformation also serves to assimilate the groups that produce these forms of knowledge into market and civic participants.

But the symbolism needs to be confronted with the realities of both the legal system of intellectual property and the social system of ownership. There appears to be a “let them sell cake” quality to the WIPO and World Bank reports. While the reports express concern with integrating indigenous and other minority groups into civil society, the emphasis on selling knick-knacks, trinkets, and traditional music seems to fall short of a full-scale plan for assimilation.¹³⁷ The protection of cultural artifacts may serve to validate groups that might meet certain conceptions of indigeneity or authenticity.¹³⁸ But such protection should include the full rights of citizenship, such as access to government services, education, and health care. While there may not be evidence of these resources being denied, it would be hard to argue that protection for cultural heritage is somehow more important or even a precursor to protection of the broader rights of citizenship.¹³⁹ Furthermore, there is a certain danger of majoritarianism that lurks behind the protection of cultural heritage.¹⁴⁰ If we protect indigenous heritage, then why not also the heritage of the Irish, the British, the Italians, the French? And if the goal of protecting indigenous heritage is to provide a voice in the political and market arenas, why would not this voice be muffled by the cacophony of every group’s heritage chasing after the scant attention, votes, and dollars in the political and economic marketplace?

The confounding symbolism is illustrated most strikingly in the dispute over the Sonny Bono Copyright Term Extension Act, legislation enacted by

COUNTRIES, *supra* note 135, at 95, 108 (describing use of African music to encourage tourism); Maureen Liebl & Tirthankar Roy, *Handmade in India: Traditional Craft Skills in a Changing World*, in POOR PEOPLE’S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES, *supra* note 135, at 53, 69–70 (discussing tourism in India and the role of handicrafts).

137. See BROWN, *supra* note 134, at 245–46 (situating indigenous and traditional knowledge debate in broader context of human rights).

138. SHELLY ERRINGTON, THE DEATH OF AUTHENTIC PRIMITIVE ART AND OTHER TALES OF PROGRESS 70–75 (1998) (describing social construction of authenticity and indigeneity); see Jonathan Benthall, *Indigenism and Intellectual Property Rights*, ANTHROPOLOGY NEWS, Apr. 2001, at 5.

139. For a discussion of the broad set of social and economic rights at stake in economic development, see AMARTYA SEN, DEVELOPMENT AS FREEDOM 112–16 (1999) (discussing how markets can create social opportunity and participation among citizens).

140. See, e.g., SUSAN SCAFIDI, WHO OWNS CULTURE? APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW 70–74 (2005) (discussing Italian-American cultural heritage in terms of legal protection of cultural property); see also AMARTYA SEN, REASON BEFORE IDENTITY 5–7 (1999) (describing development of social identity in defining community); CHARLES TAYLOR, THE ETHICS OF AUTHENTICITY 93–108 (1991) (commenting on the iron cage of authenticity and a need for an understanding of authenticity that moderates between boosterism and skepticism).

Congress in 1998 that extended the term of copyright by twenty years for all works.¹⁴¹ The name of and the motivation for the legislation demonstrates the trouble with the symbolic theory of property. Named after a former singer turned politician who died tragically, the Act suggests an inclination to help artists and creative forces in society. In fact, the Act affected the copyrights of several prominent poets and songwriters whose works were about to enter into the public domain absent the extension.¹⁴² By singling out these interests, however, the Act also elevates the creative person, not as the instrument of democracy, but as an elite who needs the special protection of intellectual property law. In *Eldred v. Ashcroft*, the Supreme Court upheld the Sonny Bono Copyright Term Extension Act against a constitutional challenge.¹⁴³ Justice Ginsburg, in her majority opinion, reasoned that Congress has broad latitude in extending the term of copyright since there is little or no quid pro quo from the copyright owner to society from the granting of the copyright.¹⁴⁴ Justices Stevens and Breyer, in dissent, reasoned otherwise, viewing copyright and other intellectual property as tools for social and economic progress, which reign in the legislative power of Congress.¹⁴⁵ The tension between the majority and the dissent highlights the difficulty with the symbolic theory of property. Precisely what is it that is being symbolized? The value of the creator, or the value of the creative process and its fruits for society?

The symbolism of intellectual property is confounding because of the ambiguity of protecting creative and innovative individuals in society. In the case of traditional knowledge, the symbolism seems to relegate certain groups to a specific position in the marketplace. In the case of intellectual property legislation in the United States, it is not clear whether intellectual property protection is recognized in creative individuals because of their special status or because of their special contribution. In both examples, the exclusivity of intellectual property has the potential to be destructive to democracy.

141. Pub. L. No. 105-298, § 101-02, 112 Stat. 2827 (1998).

142. See Amy Harmon, *A Corporate Victory, but One That Raises Public Consciousness*, N.Y. TIMES, Jan. 15, 2003, at A24 (stating that the Walt Disney Company lobbied for the Act because early Mickey Mouse movies were about to enter the public domain).

143. 537 U.S. 186, 194 (2003).

144. *See id.* at 217.

145. *See id.* at 223–25 (Stevens, J., dissenting); *see id.* at 244 (Breyer, J., dissenting).

E. Civilizing Influences and the Barbarism of the Anticommons

Property can lead to propriety. By recognizing property rights in all citizens, each citizen is given an instrument of self-governance that refines the personal and social skills of the property owner.¹⁴⁶ The honing of these skills leads to greater civic engagement and participation in civil discourse. Such is the tenor of the civilizing theory of property and democracy.

As applied to intellectual property, there is a certain degree of logic to the civilizing theory. Science and the invention process are regulated through the recognition of property rights. Patents recognize the individual creator's interest in his invention, and other inventors and users can license the invention as they see fit and as the patent owner allows. Cross-licensing and blocking patents serve to negotiate the potential quagmire that occurs when patents in inventions conflict.¹⁴⁷ The logic of the civilizing theory seems to be reflected in the relationship between copyright law and the First Amendment in the United States. The historical and doctrinal argument is that copyright and the First Amendment complement each other.¹⁴⁸ Copyright gives a speaker a right in her expression, which then allows the speaker to engage in the marketplace of ideas. As with any market, property rights facilitate transaction. Furthermore, copyright allows anyone to participate in the marketplace of ideas by bringing to market original expression that can be exchanged with other speakers.

The dangers of exclusivity are demonstrated quite starkly within the civilizing theory. If the intellectual property owner is granted too broad a right to exclude, potential exchange can be stifled. Patent owners attempt to extend the scope of their grant and sometimes even collude to control the marketplace.¹⁴⁹ When these activities become too egregious, antitrust law can provide a remedy. Nonetheless, despite the potential cure of antitrust law, the point remains that intellectual property may work against the demands of civil society. In the marketplace of ideas, copyright can act to inhibit speech as copyright owners seek to enjoin speakers who allegedly copy or create adaptations of protected work.¹⁵⁰ Once again, there are potential limits on the

146. See GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY* 26–43 (1997) (describing a civic conception of property as articulated by Thomas Jefferson).

147. See, e.g., Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting*, 1 *INNOVATION POL'Y & ECON.* 119, 119–22, 134, 144 (2001).

148. See Patterson & Joyce, *supra* note 99, at 943–45.

149. See generally Richard J. Gilbert & Carl Shapiro, *Unilateral Refusals to License Intellectual Property and International Competition Policy*, in *COMPETITION AND TRADE POLICIES* 65 (Einar Hope & Per Maeleng eds., 1998); Carl Shapiro, *Exclusionary Conduct: Testimony Before the Antitrust Modernization Commission*, Sept. 29, 2005, <http://faculty.haas.berkeley.edu/shapiro/exclusion.pdf>.

150. See Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 *STAN. L. REV.* 1, 2–3, 52, 71, 81–82 (2001).

ability of the copyright owner to control the marketplace of ideas. But the point remains that property may potentially inhibit the civilizing influence as much as it may promote it. Propriety may require limits on property.

F. Summary

In this section, I have used intellectual property as a lens through which to scrutinize the five political theories for property presented by Professor Rose. Each theoretical justification for property has to confront the problem of exclusivity, a contentious issue for intellectual property. The key lesson is that there needs to be limits on property rights in order to reach the goals of democracy. In the next section, I distill this key lesson into several discrete ones for understanding the relationship between property and democracy.

IV. DISTILLING THREE LESSONS

“No one is in charge of a market—or, rather, everyone is in charge.”¹⁵¹ This statement by economist John McMillan captures the attractiveness of markets as a tool for facilitating democracy. By permitting the decision-making autonomy that is the hallmark of markets, the institution of property, it is argued, is also the linchpin of democracy. The relationship between intellectual property and democracy is riddled by the academic and popular skepticism as to intellectual property’s status as property. I have suggested that perhaps intellectual property theorists can get off the analyst’s couch with the new-found sense that the object of their study is property after all. But this certainty of identity comes at the expense of altering the meaning of property itself.

Professor Rose offers a very helpful political theory of property within which intellectual property can be contained. But once the relationship between intellectual property and democracy is seen, the source of the problem of why democracy may not inevitably flow from the establishment of property rights can also be better understood. If property rights are drawn too broadly, permitting too much exclusivity, then democracy will be sacrificed. From the perspective of legal reform and institutional design, exclusivity is the problem that needs to be addressed. I would like to end the analysis of this Paper with three lessons that I hope can guide future scholarly and policy discussion about property rights, democracy, and intellectual property.

The three lessons are the following. First, markets should not be pursued at the expense of other institutions. Second, the institution of property is most effective when designed with limits on the right to exclude, implemented either from outside property law or within property law. Third, whether property-rights systems lead to democracy rests largely on the ability to limit

151. JOHN MCMILLAN, *REINVENTING THE BAZAAR* 7 (2002).

concentrations of economic and political power and to permit participation. The principal conclusion from these lessons is that property institutions must be designed appropriately in order to foster democracy.

Professor Rose's provocative question and equally provocative response forces us to rethink property and to reconstruct intellectual property. The "dazzling abstraction" is given some degree of concreteness through the typologies presented in the paper, which demonstrate the many ways in which property is used and conceived. The danger is in designing property as an exclusionary mechanism that emphasizes one of the categories in the typology over the others. The example of intellectual property shows the breadth of the political theory of property and the need to avoid becoming dazzled by an abstraction that can so easily become fatal to our democratic ideals.

