

Chapman University Dale E. Fowler School of Law

From the Selected Works of Tom W. Bell

2007

Copyright as Intellectual Property Privilege

Tom W. Bell



Available at: https://works.bepress.com/tom_bell/5/

Copyright as Intellectual Property Privilege,

58 SYRACUSE L. REV. __ (2007) (forthcoming)

by
Tom W. Bell*

v. 2007.10.22

* I thank Sherwood Tung for research assistance, and Chapman University School of Law for supporting my work on this article with a sabbatical. Copyright 2007, Tom W. Bell.

Copyright as Intellectual Property Privilege,

58 SYRACUSE L. REV. __ (2007) (forthcoming)

Abstract

We often call copyright a species of intellectual property, abbreviating it, "IP." This brief paper suggests that we consider copyright as another sort of IP: an intellectual *privilege*. Though copyright doubtless has some property-like attributes, it more closely resembles a special statutory benefit than it does a right, general in nature and grounded in common law, deserving the title of "property." To call copyright a "privilege" accurately reflects legal and popular usage, past and present. It moreover offers salutary policy results, protecting property's good name and rebalancing the public choice pressures that drive copyright policy. We face a choice between two ways of thinking about, and talking about, copyright: As an intellectual property that authors and their assigns own, or as an intellectual privilege that they merely hold. Perhaps no label can fully capture the unique and protean nature of copyright. Recognizing it as form of intellectual privilege would, however, help to keep copyright within its proper legal limits.

Copyright as Intellectual Property Privilege,

58 SYRACUSE L. REV. __ (2007) (forthcoming)

Outline

Introduction

I. Applying "Privilege" to Copyright

- A. Copyright as a Statutory Exception to Common Law
- B. Copyright as Not a Fundamental Civil Right

II. Questioning Copyright-*qua*-Property

- A. Right to Exclude
- B. Use
- C. Alienation
- D. Acquisition
- E. Preservation
- F. Compensation for Takings
- G. Center of a Web of Relations

III. Policy Impacts of Using "Intellectual Privilege"

- A. Defending Propertysm
- B. Rebalancing Copyright
- C. The Risk of Encouraging Meddling

IV. Merely Semantics?

Conclusion

Introduction

What should we call the legal powers granted by U.S. law to the author of a fixed expressive work? Typically, we call them "copyrights." We classify copyrights as a species of intellectual property, abbreviating it, "IP." We say that people *own* copyrights—first a work's author or authors, then, often, a transferee. Eventually, the copyright expires, and the public owns it. We thus speak of copyright in tones redolent of

property.¹ I here argue for an alternative model, one that casts IP as a form of intellectual privilege.²

Copyright more closely resembles a privilege—a special statutory benefit—than it does a right, general in nature and grounded in common law, deserving the title of "property." To call copyright a "privilege" follows legal and popular usage, past and present. It does not, however, justify calling copyright a fundamental civil liberty. Part I explains.

Though copyright doubtless has some property-like attributes, it can claim none of them without qualification. "Privilege" thus fits better, as Part II reveals. Part III observes that honest talk about copy privileges will encourage salutary policy results, protecting property's good name and rebalancing the public choice pressures that drive copyright policy. Part IV offers *an apologia* for this paper's foray into legal semantics, justifying the exercise as far from meaningless.

It appears that no one has hitherto advocated using "intellectual privilege" to describe copyrights and patents.³ I here offer the phrase as more accurate than "intellectual property" and, thus, as more apt to encourage good public policy. Intellectual privilege moreover devolves into the same acronym—"IP"—so often now used as shorthand for "intellectual property." Far from merely a happy coincidence, that calculated effect helps to ensure that "intellectual privilege" fits smoothly into the rhetorical infrastructure now surrounding copyright. Prior efforts to supplant "intellectual property" have foundered,⁴ in part, no doubt, because they put terminology before communication. Even skeptics of the copyright-as-property model naturally hesitate to deviate from common usage. "Intellectual privilege," because it remains faithful to IP-talk, offers an attractive alternative to "intellectual property."

To clarify that copyrights constitute intellectual privileges, some have called them "copyprivileges."⁵ That felicitous term captures an important truth, one apt to suffer

¹ See, e.g., BLACK'S LAW DICTIONARY 336 (6th ed. 1990) (describing copyright as "[t]he right of literary property as recognized and sanctioned by positive law.").

² See, e.g., *id.* (describing copyright as a "privilege").

³ But see RONAN DEAZLEY, *RETHINKING COPYRIGHT – HISTORY, THEORY, LANGUAGE* 165 (2006) (advocating "the language of *Intellectual Property Freedoms* (IPFs) and *Intellectual Property Privileges* (IPPs), and in that order.") (footnote omitted) (emphasis in the original); PETER DRAHOS, *A PHILOSOPHY OF INTELLECTUAL PROPERTY* 200 (1996) ("[T]alk about rights in intellectual property should be replaced by talk about privilege."). See also *id.* (using "intellectual property privileges").

The phrase "intellectual privilege" has also cropped up a few times in entirely different contexts. See, e.g., Garrett Epps, *What's Loving Got to Do with It?*, 81 IOWA L. REV. 1489, 1500 (1996) (accusing a fellow law professor of "bullying and braggadocio and arrogation of unearned intellectual privilege . . ."); Ilhyung Lee, *Race Consciousness and Minority Scholars*, 33 CONN. L. REV. 535, 537-38 (2001) (placing that accusation in context).

⁴ See DEAZLEY, *supra* note [[cite]] at 163 (discussing how even Peter Drahos, an early proponent of abandoning "intellectual property" for labels, such as "intellectual property privileges" or "monopoly privileges," has lately reverted to conventional usage).

⁵ That coinage has cropped up, apparently independently, in a number of online fora.

obscurity so long as we speak, and think, of copyrights.⁶ "Copyprivilege" has yet to win widespread use, however, because it jars the ear. I chalk that up to novelty; the word does not sound ugly. Nonetheless, this paper uses "copyprivilege" only for occasional emphasis, more generally relying on the traditional "copyright."

Consistent with the copyright-as-privilege model, this paper speaks of "copyright holders" rather than of "copyright owners." Courts and commentators use both terms freely. A person can hold a privilege or a property. It sounds odd to speak of owning a privilege, however. I thus prefer "copyright holder" as consistent with general use and as more accurate than "copyright owner." Table 1 illustrates how that and related terms offer alternatives to property-talk help to express the privilege theory of copyright.⁷

Property Theory	Privilege Theory
Intellectual Property	Intellectual Privilege
Copyright	Copyprivilege
Owner	Holder

Table 1: Terminological Parallels

One last caveat: I here offer more of a legal analysis than a philosophical one. Others have delved the depths of property theory in an effort to discern copyright's fundamental nature.⁸ In contrast, I here aim to understand "property" as do United States

See, e.g., Anonymous, *Comment on "FreeCulture 101 -- back-to-school links for copyfighters,"* BOING BOING, September 9, 2007, at <http://www.boingboing.net/2007/09/08/freeculture-101-back.html#comment-10608> ("I was wondering if we could stop calling it copyright and just start calling it copyprivilege, since it's not really a right. "); Michael Halcrow, *Re: [uug] Mac OS X and iTunes*, June 6, 2003, at <http://www.mail-archive.com/uug-list@uug.byu.edu/msg02170.html> ("[T]he term "copyright" itself is a misnomer. It would be more accurately termed, "copyprivilege."); yerricde, *IP is not "property" and isn't subject to "theft,"* SLASHDOT, December 15, 2001, at <http://slashdot.org/comments.pl?sid=24925&threshold=1&commentsort=0&mode=thread&cid=2707742> ("Copyright' is a misnomer; it really should be 'copyprivilege'."). *But see* Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343 (1989) (using "copy-privilege," but limiting the term to a Hohfeldian meaning).

⁶ "Copyleft," another alternative, seems to have languished. It conveys an unfortunately political flavor, however, rendering it suspect to friends of tangible property.

⁷ As we might call it. And why not? Giving this field of study a label might help it to win something like property theory's sophistication, wealth, and utility.

⁸ *See, e.g.,* DEAZLEY, *supra* note [[cite]]; DRAHOS, *supra* note [[cite]]; Adam Mossoff, *Is Copyright Property?* 42 SAN DIEGO L. REV. 29 (2005) ; Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 HAMLINE L. REV. 65 (1997); Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J. L. & PUB. POL'Y 817 (1990); Alfred C. Yen, *Restoring the Natural*

citizens, attorneys, judges, and lawmakers.⁹ To them, for better or worse, the musings of Hegel, Marx, or even Locke mean far less than concrete experience and practical wisdom. Theory influences the legal definition of property, of course. It far from determines it, however.

I. Applying "Privilege" to Copyright

Courts and commentators have often described copyright as a legal privilege.¹⁰ On that view, copyright represents a statutory exception to our common law rights. More generally, copyrights represent, together with patents, a species of intellectual privilege, one authorized in the U.S. Constitution¹¹ and effectuated through legislation.¹²

In particular, the Copyright Act entitles a copyright holder to enlist agents of the state in *prima facie* violations of non-owners' rights.¹³ Absent copyright, we would remain free to employ our persons and property in echo of others.¹⁴ Copyright sharply limits those, our natural and common law rights.¹⁵ Perhaps it does so for good reason,

Law: Copyright as Labor and Possession, 51 OHIO ST. L.J. 517 (1990); Gordon, *supra* note [[cite]]; Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988).

⁹ Other people, in other legal systems, might of course find many of the observations offered here relevant. I mean them no disrespect, and welcome comparative analyses. Here, though, I want to stick to what I know best.

¹⁰ *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 233 (2003) (referring to "copyright privileges") (J. Steves, dissenting); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 421 (1984) (referring to "copyright privilege"); Watson v. Buck, 313 U.S. 387, 404 (1941) ("copyright privileges").

¹¹ U.S. Const. Art I, cl. 8, § 8.

¹² Patent Act of 1952, 35 U.S.C. § 101 *et seq.*; Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2006 & Supp. V 2007).

¹³ *See* 17 U.S.C. §§ 501-13 (defining copyright infringement and describing remedies afforded for infringement).

¹⁴ *See* Palmer, *supra* note [[cite]] at 855 ("[P]atents and copyright monopolies interfere with the freedom of others to use their own bodies or their own justly acquired property in certain ways."); Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411, 414 (1983) ("Granting individuals exclusive rights to . . . information . . . conflicts with other rights in a way that granting exclusive rights to tangible property does not.").

¹⁵ *See, e.g.*, JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT CH. II, § 4, lines 3-7 (1689, rev. ed. Peter Laslett, ed., 1960) (explaining that in nature all men enjoy "a State of perfect Freedom to order their Actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the Will of any other Man."); THOMAS PAINE, THE RIGHTS OF MAN 39 (1791; Heritage Press ed. 1961) (including among the natural rights "all those rights of acting as an individual for his own comfort and happiness, which are not injurious to the natural rights of others.").

and for the common good.¹⁶ What looks like a theft to us might look like the seizure of infringing copies to a court.¹⁷ An apparent throttling might come at court order.¹⁸

Nonetheless, for right or wrong, copyright represents an exception to the general rule that we can freely speak the truth. It thus won't do to call copyright simply a "property right." We should at least append the qualifying phrase, "and an *anti-property* right," because copyright's power comes at the expense of our rights in our pens, presses, and throats. Should we also call copyright an *anti-person* right? It endures only at cost to our liberties, after all. At any rate, copyright hardly deserves the honorable title, "property." Better we should call it "privilege."

So this Part argues. Sub-part A reviews some definitions of "privilege," applying them to find that "copyright" represents a statutory exception to common law. In particular, copyright represents a species of *intellectual* privilege: A statutory exception to common law rights and obligations that grants special powers and immunities. Sub-part B argues that copyright does not represent a rather different sort of privilege—a fundamental civil right enacted to defend every citizen's natural and common law rights. Rather, copyright represents a policy device justified, if at all, as a net public good.

A. Copyright as a Statutory Exception to Common Law

Copyright fits squarely within Black's first definition of the term: "A particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens. An exceptional or extraordinary power . . ."¹⁹ The Copyright Act gives copyright holders power to bring civil actions against infringing non-owners,²⁰ winning equitable²¹ and legal remedies.²²

Common law rights, facially violated when a copyright plaintiff invokes state power, provide no redress to the infringer. Black's definition of "privilege" speaks to that phenomenon, too: "That which exempts one from a liability which he would otherwise be required to . . . sustain in common with all other persons."²³ An ordinary, average citizen enjoys no just power to break down your door, cut your communications, rifle through your accounts, seize your assets, or, if you show contempt, to throw you in jail. You would ordinarily have every right to defend yourself against anyone who committed,

¹⁶ Theory suggests that we would suffer an underproduction of expressive works absent the copyright privilege. Perhaps we would; perhaps we would not. That remains a question of fact, and a controverted one at that.

¹⁷ See 17 U.S.C. §§ 503 (providing for impounding and disposition of infringing articles), 509 (setting forth seizure and forfeiture remedies).

¹⁸ See *id.* § 502 (setting forth power to issue injunctions against infringement).

¹⁹ BLACK'S LAW DICTIONARY 1197 (6th ed. 1990) (giving first definition of "privilege").

²⁰ See 17 U.S.C. § 501 (defining actionable infringement).

²¹ See *id.* § 502 (providing for injunctions against copyright infringement).

²² See *id.* § 504 (providing for awards of damages and profits in copyright infringement cases).

²³ See BLACK'S LAW DICTIONARY 1197 (6th ed. 1990) (giving last definition of "privilege").

threatened to commit, or conspired with others to commit such wrongs. And, yet, the Copyright Act excuses those and other facial torts.

Courts²⁴ and commentators²⁵ have often enough called copyrights "privileges." It is not always clear what they mean, however. The term sometimes seems to serve more of a rhetorical function, denigrating the scope of copyright, than an analytical one. I do not intend to disparage copyright; I want us to understand it. The better we define copyright, the better we can assign it proper, and properly sharp, boundaries.²⁶ I thus propose that we describe copyright as follows:

A statutory exception to common law rights and obligations that grants special powers and immunities to copyright holders.

That definition qualifies copyright as a particular type of privilege—more precisely yet, as an "intellectual privilege."²⁷ The exact contours of copyright of course rely on the particular powers and immunities that the Copyright Act grants to copyright holders, a matter of no small complexity and of perplexing inconstancy. This definition of copyright-*qua*-privilege operates at a more general level, orienting us towards good public policy.²⁸

²⁴ See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (referring to copyright as a "monopoly privilege"); *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 346 (1908) (explaining that "copyright property under the Federal is wholly statutory," and referring to copyright rights as "privileges"); *Creative Technology v. Aztech Sys. PTE*, 61 F.3d 696, 708 (9th Cir. 1995) ("A United States copyright is a privilege bestowed by our government upon the author in order to reward creativity."); *Williams & Wilkins Co. v. United States*, 203 Ct. Cl. 74, 89 (1973) (describing copyright as a "privilege"); *Martinetti v. Maguire*, 16 F. Cas. 920, 922 (Cal. Cir. 1867) ("[T]he benefit of copyright is a privilege conferred by congress in pursuance of the constitution of the United States.").

²⁵ See, e.g., John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. DAVIS L. REV. 465, 493 (2005) (describing "the origin of copyright as a privilege that is bestowed through legislative act and that serves utilitarian purposes."); DRAHOS, *supra* note [[cite]].

²⁶ Perhaps calling copyright "privilege" will protect copyright's property-like features; perhaps it will have the opposite effect. See *infra*, Part [[cite]] (discussing rhetorical effect of "privilege" label).

²⁷ Patents most obviously fall under the label, too. We might also fold into, "intellectual privilege," those statutory modifications to, and amplifications of, the common law rights to fair competition, trade secrets, and privacy. See, e.g., *The Trademark Act of 1946 (Lanham Act) as Amended*, 15 U.S.C.A. §§ 1051-1127 (2002); *Economic Espionage Act of 1996*, 18 U.S.C.A. §§ 1831-1839 (1996); *The Paparazzi Harassment Act of 1998*, Cal. Civ. Code 1708.8 (West Supp. 2006).

²⁸ It does not, however, speak quite so generally as Drahos's definition: "The privilege that lies at the heart of all intellectual property is a state-based, rule-governed privilege to interfere in the negative liberties of others," he argues, adding more specifically that,

Does this use of "privilege" conform with Wesley Hohfeld's influential one?²⁹ He used the word interchangeably,³⁰ and confusingly,³¹ with "liberty."³² It would sorely mislead, however, to call copyrights, "copyliberties." If anything, that latter term better describes the rights that each of us enjoys—or, absent the Copyright Act, would enjoy—to freely use others' expressions.³³

Nonetheless, the definition tendered here does helpfully clarify that copyright holders claim special immunities from the obligations that each of us has, in a state of nature and at common law, to respect others' rights to peaceably enjoy their persons and properties.³⁴ As Hohfeld would say, in other words, "a [copy]privilege is the opposite of

"Intellectual property rights are a distinctive form of privilege that rely on the *creation* of a common disadvantage." DRAHOS, *supra* note [[cite]] at 213 (emphasis in the original).

²⁹ See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 36 (1913).

³⁰ *Id.* 36 (1913) (A 'liberty' considered as a legal relation . . . must mean, if it have any definite content at all, precisely the same thing as privilege . . .") (emphasis in the original). *But see id.* at 43 (explaining that he prefers to rely on "privilege" because "[liberty] is far more likely to be used in the sense of physical or personal freedom I.e., absence of *physical* restraint), as distinguished from a legal relation . . .").

³¹ See Lewis C. Cassidy, *Privilege: Its Past and Present Content*, 2 MISS. L.J. 322, 326 (1929-1930) (reviewing the standard meaning of "privilege" and noting, "Conceding [] the service which has been rendered legal science by the classifications of Professor Hohfeld . . . [it] has not as a whole fully commended itself to eminent present-day jurists . . .").

³² See JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 53-54 (1990) (criticizing Hohfeld's characterization of a liberty as identical to a privilege). Hohfeld's usage, Thomson explains, would have us say that when someone possesses a liberty to do something, such as travel to another state, we mean nothing more than that he has no duty *not* to travel to the other state. Instead, we mean that other persons have "a duty toward him to not interfere with his doing of it in some appropriately chosen set of ways." *Id.*

³³ *But see* Litman, *supra* note [[cite]], at 1903-07 (using "copy liberty" to describe certain limits, within copyright law, on copyright holders' powers). While I respect Litman's project, I fear that the usage she suggests would obscure the common law and natural origins of our freedoms to use others' expressions.

³⁴ For a contrasting approach, see Gordon, *supra* note [[cite]] at 1366 (applying Hohfeldian terminology to the Copyright Act to conclude that, "Because the section 106 grant includes an entitlement 'to do' the enumerated physical acts, creators have a *privilege* to use their creations in the manners specified.") (emphasis in the original). Gordon does not appear to consider copyright as a privilege against liability for violating the rights of defendants charged with infringement. It is not clear that her rather more limited application of Hohfeld's concept does much analytical work. She tacitly admits that the Act grants copyright owners no new privileges (in the Hohfeldian sense of immunity from legal interference). Why? Because absent the Act's special protections, everyone—whether authors or not—would have enjoy the same liberties to use expressive works. See *id.* at 1374-75 ("When the copyright holder loses the exclusive rights guaranteed by section 106 or they expire . . . she then shares the privileges with

a duty [to respect others' natural and common law rights], and the correlative of a 'no-right' [suffered by defendants in infringement suits.]"³⁵ That offers a more fully and fairly positivist description of copyright, and one more true to Hohfeld's project, than descriptions blandly observing that all rights limit each other.³⁶ To the contrary, our common law and natural rights carry more normative weight,³⁷ and thus more legal weight,³⁸ than the special rights created by the Copyright Act. A thoroughgoing positivist committed to clarity would therefore do best to call copyright not simply property, nor (with all due respect to Hohfeld) a liberty relation, but rather a type of privilege.

Privileges come in different flavors. The *copyprivilege* represents a statutory exception to common law rights and obligations that grants special powers and immunities to copyright holders. It thus stands in sharp contrast to another type of privilege: a fundamental civil right enacted to defend citizens' natural and common law rights. The next sub-part explains that latter sort of privilege and explains how it differs from the former.

B. Copyright as Not a Fundamental Civil Right

We can thank Adam Mossoff for rediscovering the legal history of privilege.³⁹ He convincingly argues that in the United States, in the Founding and Antebellum eras, commentators justified certain positive rights as privileges enacted to protect natural rights and liberties.⁴⁰ They counted among such fundamental civil rights judicial enforcement of contracts,⁴¹ trial by jury,⁴² and the writ of habeas corpus.⁴³ Less

everyone else.""). It thus seems as if Gordon says little more about copyright's privileges than that copyright owners can opt to not sue themselves for infringement.

³⁵ Hohfeld, *supra* note [[cite]], at 32.

³⁶ See Moore, *supra* note [[cite]] at 85 ("rights of all sorts restrict what individual can do with their bodies and property."); Gordon, *supra* note [[cite]] at 1423 ("All entitlements limit each other."). That conflation looks highly suspect on normative grounds, given the

³⁷ See, Palmer, *supra* note [[cite]] at 855-61 (explaining why rights to persons and tangible property carry special authority).

³⁸ See, e.g., *United States v. Texas*, 507 U.S. 529, 534 (1993) (explaining presumption that statutes do not contradict common law rights); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (statutes operate against a background of common law principles); *Norfolk Redevelopment and Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983) (clear and explicit statutory language required to repeal common law); U.S. CONST., Amend IX (protecting the rights "retained by the people.").

³⁹ See Adam Mossoff, *Who Cares What Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 CORNELL L. REV. 953 (2007).

⁴⁰ *Id.* at 967-76.

⁴¹ *Harrison v. Sterry*, 9 U.S. (5 Cranch) 289, 298 (1809) (referring to the "privilege to contracts").

⁴² James Madison explained that "Trial by jury cannot be considered a natural rights, but a right resulting from a social compact . . . as essential to secure the liberty of the people

convincingly, however, Mossoff argues that patents likewise qualify as privileges *qua* fundamental civil rights.

Mossoff does not dispute that patents have always qualified as a type of privilege.⁴⁴ But what kind? As he ably documents, legal usage during the eighteenth and early nineteenth centuries applied "privilege" both to fundamental civil rights and to special statutory benefits. He quotes no contemporaneous source, however, that put patents in the former category. In contrast, and as Mossoff generously admits, many commentators, past and present, have described patents as monopoly privileges.⁴⁵

Mossoff offers a valuable addition to privilege theory. His analysis serves to illustrate, however, why patents do not qualify as fundamental civil rights. By Mossoff's own account, privileges *qua* fundamental civil rights reinforce and protect natural rights.⁴⁶ The right to judicial enforcement of contracts renders personal vows more secure, for instance, while jury trials and the habeas corpus writ protect citizens from an overweening government. Such privileges, far from contradicting natural rights or liberties, safeguard them.⁴⁷

The same cannot be said of patents—nor, more vitally for present purposes, of copyrights. Those sorts of privileges violate the rights we naturally enjoy in our persons, estates, and chattels.⁴⁸ Perhaps they do so for good reason, and for the common good. So, too, do our natural rights suffer such indignities as regulation, taxation, and conscription. But that is only to say that patents and copyrights represent necessary evils; it is not to say that they represent fundamental civil rights. To the contrary, those intellectual privileges represent statutory exceptions to our common law and natural rights.

II. Questioning Copyright-*qua*-Property

as any one of the pre-existing rights of nature." 1 ANNALS OF CONG. 454 (Joseph Gales ed., 1789).

⁴³ *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823 (No. 3, 230) (including among those "privileges deemed to be fundamental" such rights as habeas corpus).

⁴⁴ See Mossoff, *supra* note [[cite to "Who Cares"]], at 969 (citing "the omniscient references to patents as privileges in the late eighteenth and early nineteenth centuries.").

⁴⁵ *Id.* at 975-76.

⁴⁶ *Id.* at 971-75

⁴⁷ See LOCKE, *supra* note [[cite]] at ch. XI, § 142, lines 1-20 (describing "the *Bounds* which the trust that is put in them by the Society, and the Law of God and Nature, have set to the *Legislative* Power of every Commonwealth, in all Forms of Government.") (emphasis in the original); PAINE, *supra* note [[cite]] at 39 (Noting that, "Every civil right has for its foundation some natural right pre-existing in the individual," but describing such rights only as "those which relate to security and protection.").

⁴⁸ DRAHOS, *supra* note [[cite]], at 212 ("Intellectual property rights create large patterns of interference in the freedom of others because abstract objects are a crucial kind of resource The analogy between intellectual property rights and other kinds of property rights is only superficial.").

Discussions of copyright have long included language casting it as property.⁴⁹ Some such talk has come in the form of rhetoric obviously aligned with its speaker's interests.⁵⁰ But even evidently disinterested parties have thoughtfully argued that copyrights, no less than real estate or chattels, fully qualify as property.⁵¹ That claim, even if it has not convinced many courts or commentators, merits consideration.

Under the view now prevalent among legal scholars and judges, property comprises a bundle of rights.⁵² Foremost among those rights, legal authorities rank the right to exclude non-owners. Other property rights include use, alienation, acquisition, preservation, and compensation for takings. On an alternative view, property sits at the center of a web of relationships with and around the owned object. This part tests each of those, the *properties of property*, against copyright's features. It finds, as have most courts and commentators, that "intellectual property" fits copyright only awkwardly, at best.

A. Right to Exclude

⁴⁹ See, e.g., *Fox Film Corp. v. Doyal*, 286 U.S. 123, 128 (1932) (calling it a "fact that a copyright is property derived from a grant by the United States . . ."); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 57 (1823) ("The protection of property . . . extends to literary property, the fruit of mental labour."). See also Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993, 1004-46 (finding many examples, over the past 200 years, of courts and commentators describing copyrights as property); Adam Mossoff, *Is Copyright Property?* 42 SAN DIEGO L. REV. 29, 36-37 (2005) (cataloging claims that copyrights constitute property rights).

⁵⁰ Thus, for instance, Jack Valenti, President of the Motion Picture Association of America, when advocating mandatory broadcast flag technology to prevent consumer copying of television programs, said, "We just want to protect private property from being pillaged." Edmund Sanders & Jube Shiver Jr., *Digital TV Copyright Concerns Tentatively Resolved by Group*, L.A. TIMES, Apr. 26, 2002, § 3, at 5 (quoting Valenti's speech before a congressional committee). Similarly, Hilary Rosen, President, Recording Industry Association of America, said of the unauthorized distribution of sound recordings, "It is simply not fair to take someone else's music and put it online for free distribution. No one wants their property taken from them and distributed without their permission." Doug Bedell, *Piracy Enforcement Flounders with Rise of MP3*, DALLAS MORNING NEWS, Aug. 11, 1999, at 1F (quoting Rosen).

⁵¹ See, e.g., Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J. L. & PUB. POL'Y 108 (1990); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990); AYN RAND, *Patents and Copyrights, in CAPITALISM: THE UNKNOWN IDEAL* 130-34 (1967).

⁵² See Black's Law Dictionary, 1216 (6th ed. 1990) (defining "property" as, "In the strict legal sense, an aggregated of rights which are guaranteed and protected by government."); O. Lee Reed, *What is "Property"?* 41 AM. BUS. L.J. 459, 471-72 (2004).

Legal authorities regard the right to exclude non-owners as property's signature attribute.⁵³ In contrast to tangible property, however, copyright holders would possess no power to exclude others absent the Copyright Act.⁵⁴ Even under the Act, moreover, copyright holders enjoy only relatively weak exclusion rights.

True, the Copyright Act defines certain rights as "exclusive."⁵⁵ It does so only subject to a very wide range of exceptions, however.⁵⁶ The Act does not exclude anyone from a broad (if vaguely defined) range of personal uses of a copyrighted work, for instance.⁵⁷ In many cases, the Act even allows use of a work over the objections of its holder.⁵⁸

⁵³ See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (describing the right to exclude as "one of the most essential sticks in the bundle of rights that are commonly characterized as property."); *College Savings Bank*, 527 U.S. 627, 673 (1999) ("The hallmark of a protected property interest is the right to exclude others."); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731 (1998) ("[T]he right to exclude others is a necessary and sufficient condition of identifying the existence of property."). But see Adam Mossoff, *What Is Property? Putting The Pieces Back Together*, 45 ARIZ. L. REV. 371 (2003) (criticizing the view that exclusion is the *sine qua non* of property, and arguing for also defining it in terms of acquisition, use, and disposal).

⁵⁴ See Mossoff, *supra* note [[cite]], at 39 ("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."). Notably, however, Mossoff argues that the orthodox view of property focuses too narrowly on exclusivity, and that a broader view of property's attributes might allow it to encompass copyright. *Id.* at 40-42.

⁵⁵ 18 U.S.C. § 106 (specifying that "the owner of copyright under this title has the exclusive right to do and to authorize any of" six uses of a work).

⁵⁶ *Id.* (stating that the exclusive rights defined in § 106 come only "[s]ubject to sections 107 through 122" of the Act).

⁵⁷ See Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1872, 1872 (2007) ("Copyright lawyers of all stripes agree that copyright includes a free zone in which individuals may make personal use of copyrighted works without legal liability. . . . [But] differently striped copyright lawyers will differ vehemently on whether a particular personal use is lawful or infringing.").

⁵⁸ See, e.g., 17 USC §§ 107 (defining fair use); 111(c)-(d) (specifying compulsory licensing of secondary transmissions by cable systems); § 112(e) (providing for the compulsory licensing of certain ephemeral recordings); § 114(d)(2), (e)-(f) (relating to compulsory licensing of performance of sound recordings publicly via digital audio transmissions); § 115 (describing compulsory licensing for the making and distribution of phonorecords); and § 118(b)(3), (d) (providing that Librarian of Congress may establish a binding schedule of rates and terms for use of certain copyrighted works by public broadcasting entities).

Copyright law thus offers even weaker exclusionary rights than does patent law, the other constitutionally authorized form of IP.⁵⁹ If the nominal owner of a plot of land had no power to prevent the public from putting it to *personal* use, nor to prevent competitors from putting the land to *profitable* use, would we confidently claim that she enjoyed an exclusive right to it? To speak frankly, we would do better to admit that she has at best only a limited privilege to that land. So, too, should we speak of those who hold copyrights⁶⁰—or, better yet, we should speak of them holding *copyprivileges*.

B. Use

Some scholars cast the right to use—to employ, to occupy, or to profit from⁶¹—property as one of its most fundamental attributes.⁶² That redefinition would do nothing to recast copyright as a natural property right. Absent the Copyright Act's extraordinary protections, the author of a fixed expressive work would have no more right to use it than anyone else.⁶³

Even as a matter of positive law, the Act's protections provide copyright holders with only limited use rights. Copyright holders must forbear not only unauthorized uses of their works,⁶⁴ but even unauthorized uses that profit others.⁶⁵ Even a more narrow characterization of copyright's use right—as the right to use a work profitably—thus does make it look much like property.⁶⁶ The yeoman farmer need not forebear others to plow, plant, and harvest his fields.⁶⁷ You can keep the producers of "Emeril!" from borrowing

⁵⁹ See Simone A. Rose, *On Purple Pills, Stem Cells, and Other Market Failures: A Case for a Limited Compulsory Licensing Scheme for Patent Property*, 48 HOW. L.J. 579, 614 n. 170 (2005) (summarizing patent law's experimental use and shop right doctrines).

⁶⁰ Of patent, too, I would argue. The patent-as-property model all the deficiencies of the copyright-as-property model, albeit sometimes to different degrees. Patent policy would likewise benefit from liberal application of the "intellectual privilege" label.

⁶¹ See BLACK'S LAW DICTIONARY 1541 (6th ed. 1990) (defining "use").

⁶² See, e.g., Mossoff, *supra* note [[cite to "Putting the Pieces Back Together"]] 381 (interpreting Grotius to claim, "Property evolves out of use-rights . . ."); *id.* at 385 (reading Pufendorf to recognize "the logical and historical primacy of use-rights in human development."); *id.* at 390-403 (arguing for an integrated theory of property that does not emphasize exclusion rights over use rights).

⁶³ Authors who keep their works unpublished of course enjoy special use rights, even in a state of nature. They find it hard to profit from such secret works, however. The Copyright Act thus allows authors to both publish their works and profit from them.

⁶⁴ See *supra*, notes [[cite to discussion of Act's limits on exclusive rights]].

⁶⁵ See *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994) (holding that popular song's parody of allegedly infringed work fell within the scope of the fair use defense).

⁶⁶ See Tom W. Bell & Adam Mossoff, *Life, Liberty, and Intellectual Property*, 2006 U. ILL. J.L. TECH. & POL'Y 92, 104 (Bell's response to Mossoff in edited transcript of their debate).

⁶⁷ Your property rights in your home likewise generally protect you from having soldiers quartered in your family room. See U.S. CONST., Amend III.

your cookware for their show. A composer, in contrast, cannot justly lay claim to all the profits generated by her work.

C. Alienation

Commentators understand the power of alienation—the power to transfer title to another party—as a fundamental feature of property. Copyright holders doubtless enjoy very broad alienation powers.⁶⁸ Indeed, that constitutes one of copyright's most salient virtues, one that encourages the efficient allocation of assets. Notably, however, copyright holders do not enjoy such broad alienation powers as do the owners of tangible property.

Several sections⁶⁹ of the Copyright Act allow authors⁷⁰ to terminate copyright rights that they have freely and willingly granted to others.⁷¹ Those termination rights appear somewhat exceptional when compared to the law's typical respect for voluntary transfers of rights.⁷² The Copyright Act neither respects any agreement contrary to a termination right⁷³ nor requires terminators to compensate losing grantees.⁷⁴ Copyright holders thus do not enjoy the full range of termination rights generally afforded to owners

⁶⁸ See 17 U.S.C. § 201 (describing ownership and transfer of copyrights).

⁶⁹ *Id.* at §§ 203, 304(c), and 304(d).

⁷⁰ They also allow certain members of dead authors' estates to exercise termination rights. See 17 U.S.C.A. §§ 203(a)(1)-(2); *id.* § 304(c)-(d) (referencing parties defined in § 304(a)(1)(C)).

⁷¹ Those termination rights come with strings attached, granted. See 17 U.S.C.A. §§ 203(a)(3), 304(c)(3), 304(d)(2) (specifying that they last for only five years); §§ 203(a)(3), 304(c)(1), (3) (providing that termination rights do not arise before thirty-five years after the grant); and §§ 203(a)(4), 304(c)(4), 304(d)(1) (limiting form and timing of notice of termination). Nonetheless, termination rights remain very real.

⁷² See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979) (describing comparatively narrow conditions under which a court might refuse to enforce a contract on grounds of unconscionability and relatively constrained termination of rights effectuated in such cases).

⁷³ 17 U.S.C.A. §§ 203(a)(5), 304(c)(5) (West Supp. 2003) (“Termination . . . may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.”); *id.* § 304(d)(1) (incorporating the conditions of § 304(c)(5) by reference). *But see id.* §§ 203(b)(4), § 304(c)(6)(D), 304(d)(1) (allowing for enforceability of post-termination grant or of agreement to make such a grant if such grant or agreement occurs between certain parties and after proper notice of termination has been given).

⁷⁴ Sections 203, 304(c), and 304(d) do not speak to the requirement to make compensation, pro or con. No authority has found such a requirement, however, and those provisions of the Act apparently assume that terminating owners take nothing because, as the Act defines copyright, they give nothing. Query, though, whether a terminatee might on the proper facts have a claim for promissory estoppel, mistake, or fraud against a terminator.

of tangible property.⁷⁵ Copyright holders may even find that the Act bars them from donating a work to the public domain.⁷⁶

D. Acquisition

As Richard Epstein observes, the natural rights arguments typically applied to justify tangible property do not fit copyright.⁷⁷ Copyright can be acquired, of course. In contrast to tangible property, however, the acquisition of copyright rights requires legislative backing.⁷⁸ Absent the Copyright Act, authorship would garner title only to tangible copies of expressive works—perhaps protected by trade secrets, contracts, or automated rights management schemes, but not protected against infringement. To acquire *that*, the heart of copyright's power, authors require a special statutory right to invoke state power in violation of others' natural and common law rights.⁷⁹ Authors require, in other words, a privilege.

⁷⁵ See also, *Davis v Blige*, ___ F.3d ___, 2007 U.S. App. LEXIS 23375 (2d Cir. Oct. 5, 2007) (holding that, while a copyright co-owner can license exclusive rights in the co-owned work without permission of other co-owners, a copyright co-owner's retroactive licensing of such rights cannot foreclose co-owners from suing the licensee for infringement). As William Patry points out, the opinion "broadly eliminates one of the central tenets of the 1976 Act: the alienability of one co-owner's rights without the permission of the other co-author(s)." William Patry, *Second Circuit Goes to the Dark Side*, COPYRIGHT BLOG, October 8, 2007, <http://williampatry.blogspot.com/2007/10/second-circuit-goes-to-dark-side.html>.

⁷⁶ See Lydia Pallas Loren, *Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*, 14 GEO. MASON L. REV. 271, 321-22 (2007) (interpreting cases and commentary to hold that copyright owners cannot abandon only a portion of their rights); Robert A. Kreiss, *Abandoning Copyrights to Try to Cut Off Termination Rights*, 58 MO. L. REV. 85, 111-23 (1993) (arguing that the Copyright Act's termination provisions should limit the effectiveness of an abandonment made prior to the vesting of any contingent reversionary rights).

⁷⁷ Richard Epstein, *Liberty versus Property? Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. REV. 1, 20 (2005) (observing that, "It is easy to imagine how a system of property rights is natural, in the sense that it does not take any state agency to mark off the rights in question," but concluding, "That solution [] is not possible with copyright."). Epstein goes on to defend copyright on consequentialist grounds, saying, "On balance, as with tangible objects, the pairing of liberty and property seems to survive, even if it does not exactly prosper." *Id.* at 24.

⁷⁸ Dreazy reads Locke's correspondence to indicate that "Locke himself did not consider his theory of property extended to intellectual properties such as copyrights and patents," instead recognizing that it could exist only grace of Parliamentary action. DREAZY, *supra* note [[cite]] at 144 n. 32.

⁷⁹ See *supra* Part I.A.

E. Preservation

Nobody stands to lose real estate or chattel goods after some specified term. To the contrary, we assume that those tangible properties may remain privately owned indefinitely, through the years and across the generations. Not so with regard to such intellectual privileges as copyrights and patents. They persist only for specified statutory terms, thereafter to lapse into the public domain, unowned and unownable.⁸⁰ Tangible property endures; intellectual "property" evaporates.

Copyright holders have objected to that second-class treatment, arguing that they deserve the same potentially unlimited term of preservation afforded to property owners.⁸¹ That such pleas have not been fulfilled—and under the U.S. Constitution can not be fulfilled⁸²—indicates yet again how copyrights differ materially from property rights.

F. Compensation for Takings

The right to receive just compensation for governmental takings⁸³ has long represented a hallmark of property.⁸⁴ Does copyright afford such a right? The exact question remains as yet unlitigated and, thus, still subject to dispute.⁸⁵ By holding that no

⁸⁰ See 35 U.S.C.A. § 154(a)(2) (2000 & West Supp. 2006) (specifying limits of patent term); 17 U.S.C.A. § 302 (West Supp. 2003) (specifying limits of copyright term). *But see* Eldred v. Ashcroft, 537 U.S. 186 (2003) (upholding constitutionality of retroactive copyright term extension).

⁸¹ Mark Twain, for instance, complained, "You might just as well, after you had discovered a coal-mine and worked it twenty-eight years, have the Government step in and take it away" Arguments Before the Committees on Patents on S. 6330 and H.R. 19853, 59th Cong. 116 (1906) (statement of Samuel L. Clemens, author). He also claimed that, "When I appeared before [a] committee of the House of Lords the chairman asked me what limit I would propose [to copyright's term]. I said, 'Perpetuity.'" SAMUEL CLEMENS, *Copyright*, in MARK TWAIN'S SPEECHES 323, 324-27 (1910). *See also*, 144 Cong. Rec. H9946, 9952 (1998) (statement of Mary Bono that "Sonny [Bono] wanted the term of copyright protection to last forever.").

⁸² U.S. CONST., art. I, § 8, cl. 8. (authorizing Congress to secure for only "limited Times" authors' rights).

⁸³ U.S. CONST., Amend V.

⁸⁴ See Reed, *supra* note [[cite]], at 473-83.

⁸⁵ Thomas F. Cotter, *Do Federal Uses of Intellectual Property Implicate the Fifth Amendment?* 50 FLA. L. REV. 529, 532 (1998) (observing that the issue "has evoked wildly differing responses, ranging from the view that virtually all government uses of intellectual property constitute takings to the view that virtually none of them do.") (footnote omitted).

such right attaches to patents, however, the recent case of *Zoltek Corp. v. United States*⁸⁶ strongly suggests that the same outcome would obtain for copyrights.⁸⁷

The Supreme Court denied certiorari to *Zoltek*, thereby letting the case stand.⁸⁸ The Court has elsewhere noted, however, that "property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."⁸⁹ Given that copyrights exist only grace of the Constitution,⁹⁰ the Court's definition of "property" appears not to shelter copyright.

G. Property as a Web of Relations

In contrast to the bundle of sticks model discussed above, some commentators argue that we should view property as a web of relationships.⁹¹ Anthony ("Tony") Arnold explains that, "The web is a set of interconnections among persons, groups, and entities each with some stake in an identifiable (but either tangible or intangible) object,

⁸⁶ 442 F.3d 1345 (Fed. Cir. 2006), *reh'g den.* 464 F.3d 1335, 1350 (Fed. Cir. 2006) (holding that patent infringement by the federal government does not constitute a taking under the Fifth Amendment), *cert. den.* 127 S. Ct. 2936, 168 L. Ed. 2d 262 (2007).

⁸⁷ Notably, most commentary arguing that copyright takings merit compensation under the Fifth Amendment predates *Zoltek*. See, e.g., Laurie Messerly, "Taking" Away Music Copyrights: Does Compulsory Licensing of Music on the Internet Violate the Fifth Amendment's Takings Clause? (2001) at http://www.cfif.org/htdocs/freedomline/current/guest_commentary/free_line_copyright.htm; Eugene Volokh, *Sovereign Immunity and Intellectual Property*, 73 S. CAL. L. REV. 1161, 1163 fn. 5 (2000); Cotter, *supra* note [[cite]], at 532. But see Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under The Takings Clause*, 87 BOSTON U. L. REV. 689 (2007). Mossoff, writing after the Federal Circuit decided *Zoltek* but before the Supreme Court denied certiorari, admits that "most agree that the status of patents as constitutional private property is far from clear," *id.* at 695, but attributes that to a misunderstanding of patent law's history.

⁸⁸ 127 S. Ct. 2936, 168 L. Ed. 2d 262 (2007).

⁸⁹ *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (citations omitted).

⁹⁰ U.S. CONST., art. I, § 8, cl. 8.

⁹¹ See, e.g., Madhavi Sunder, *IP3*, 59 STAN. L. REV. 257, 315 n. 325 (2006) ("During the last quarter century . . . property law has been reconceived from the static terms of absolute ownership to a 'web of social relations,' a complex and dynamic set of legal rights and responsibilities among various social actors.); Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 331-341 (2002) (suggesting that we view property as a web of interests rather than as a bundle of rights); Jeff C. Dodd, *Rights in Information: Conversion and Misappropriation Causes of Action in Intellectual Property Cases*, 32 HOUS. L. REV. 459, 465-66 (1995) ("One school of thought defines property as the web of relationships created by one's status. . . . This is one of the oldest theories of property . . .") (footnotes omitted).

which is at the center of the web."⁹²

The object at the center of such a web—the property—"must be relatively identifiable and definite."⁹³ That requirement alone should raise doubts whether copyright, which suffers notoriously vague boundaries,⁹⁴ qualifies as property under the "web of relationships" metaphor. Consider, too, that owners and consumers often have radically different views of what does or, more generally *should*, qualify as copyright infringement.⁹⁵ Can a web so weak and one-sided support the burden of proving that copyright constitutes property? Arnold, for one, cautions that "property law principles may not be appropriate" for copyright.⁹⁶

III. Policy Impacts of Using "Intellectual Privilege"

This part considers the policy impacts of using "intellectual privilege." Sub-part A argues that that the phrase would help to protect the primary meaning of "property," as it has traditionally applied to real estate and chattels. Sub-part B suggests that to speak of copyright as privilege rather property would help to check the public choice pressures that threaten to throw copyright policy out of balance. Sub-part C considers and rejects the claim that declining to call copyright "property" would embolden lawmakers to meddle with what ought to be well-defined statutory rights.

A. Defending Propertysm

Especially among academics, much of the skepticism expressed about copyright-*qua*-property appears to reflect skepticism about property rights in general. Thus, for instance, Peter Drahos inveighs not only against intellectual property, but also against the

⁹² Arnold, *supra* note [[cite]]. at 333.

⁹³ *Id.* at 335 (footnote omitted).

⁹⁴ See Hughes, *supra* note [[cite *Copyright and Incomplete Historiographies*]] at 997 (observing that "copyright has long had fuzzy boundaries . . ."); Alfred C. Yen, Eldred, *the First Amendment, and Aggressive Copyright Claims*, 40 Hous. L. Rev. 673, 678 (2003) ("Doctrinal limits on the reach of copyright exist, but those limits are frustratingly vague.").

⁹⁵ See James Gibson, *Once and Future Copyright*, 81 NOTRE DAME L. REV. 167, 230 (2005) ("piracy is rampant and that surveys show the prevailing attitude toward copyright is one of either incomprehension or disrespect.") (footnote omitted); Andrew P. Lycans, *Cyberdemons: Regulating a Truly World-Wide Web*, 101 MICH. L. REV. 1925, 1941 (2003) (reviewing STUART BIEGEL, *BEYOND OUR CONTROL?: CONFRONTING THE LIMITS OF OUR LEGAL SYSTEM IN THE AGE OF CYBERSPACE* (2001) (admitting that "the prevailing social norms in cyberspace do reflect a belief that copyright laws somehow do not apply there" but arguing that "this does not mean that society should abandon copyright law on the web as it now stands because of these social norms.") (footnote omitted).

⁹⁶ Arnold, *supra* note [[cite]], at 363 (footnote omitted).

notion that *any* form of property can qualify as a fundamental value⁹⁷ or natural right.⁹⁸ Anyone with that point of view will doubtless find it easy—comforting, even—to regard copyright as privilege rather than property.

Friends of property should also regard copyright skeptically, however. As discussed above, the powers wielded by copyright holders come only at the expense of the property rights the rest of us hold in our persons, estates, and chattels.⁹⁹ That irreconcilable conflict should alone cause anyone who cares about property rights to cast a suspicious eye on copyright.¹⁰⁰

Copyright's corrosive effect on property goes deeper than mere inconsistency, however. In the guise of "intellectual property," copyright assumes a title to which it has scant claim. In so doing, copyright does harm to the very idea of property, eroding its distinctiveness, popularity, and, ultimately, strength.

Were this a case for unfair competition law,¹⁰¹ we would regard "property" as a service mark, made distinctive by dint of long use, designating such rights as exclusion, use, alienation, and so forth.¹⁰² Copyright embodies those characteristics imperfectly, if at all. To call it "intellectual property" confuses consumers of the law—citizens, attorneys, academics, judges, and lawmakers—about the nature of copyright. Worse yet, it confuses them about the nature of property. The "property" mark suffers not merely *dilution* from copyright's infringing use, but *tarnishment*, too.¹⁰³

As a relative latecomer to the law, copyright has no just claim to property's good name. To protect property, we must protect "property." To protect "property," we must enjoin "*intellectual* property."

⁹⁷ DRAHOS, *supra* note [[cite]] at 215 (advocating "property instrumentalism" and observing, "Property cannot, in an instrumentalist theory of property, operate as a fundamental value or right, for this would push the theory in proprietarian directions.").

⁹⁸ *Id.* at 216 ("The property instrumentalism we are developing proposes a limited negative metaphysical thesis: there are not natural rights of property. This thesis has a corollary. Property instrumentalism embraces a radical skepticism about the nature of property.").

⁹⁹ See *supra*, Part I.A.

¹⁰⁰ That untoward effect of creating a special copyright right should surprise no one, however; as Randy E. Barnett warned, we should "temper our enthusiasm for recognizing rights. For the background rights that define justice serve also to legitimate the use of force or violence to secure compliance. *The more rights we recognize the more violence we legitimate.*" RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY* 200 (1998) (emphasis in the original).

¹⁰¹ It is not, of course, as no entity can lay just claim to selling goods or services under the distinctive mark, "property"; I speak here only by analogy.

¹⁰² See *supra*, Part II (cataloging legal characteristics of property).

¹⁰³ See Michael W. Carroll, *Whose Music Is It Anyway?: How We Came to View Musical Expression as a Form Of Property*, 72 U. CIN. L. REV. 1405, 1406-07 (2004) (describing views of copyright expressed Internet users who exchange music files); Laura N. Gasaway, *The New Access Right and Its Impact on Libraries and Library Users*, 10 J. INTELL. PROP. L. 269, 291 (2003) ("[M]any believe that "information wants to be free" since the majority of the **public** fails to respect **copyright** law and instead **ignores** it.").

B. Rebalancing Copyright

A delicate balancing of the many interests affected by copyright may well exceed lawmakers powers, to say nothing of their motives.¹⁰⁴ Still, though, we might aspire to *roughly* balance the public choice pressures that affect copyright. Casting copyrights as intellectual privileges would help in that effort. To cast them as *copyprivileges*, not owned but *held*, could help still more.

We can employ such clarifying terminology without intending any slight to the copyright-as-property model. Copyrights admittedly exhibit some property-like features, which property-talk does a fair job of portraying. But trapping copyrights within the rhetoric of property courts confusion and ignorance. To call copyright "property" risks vesting copyright holders with more powers than they deserve.¹⁰⁵ To call it "privilege" offers a rhetorical counterbalance, reminding copyright holders of what they owe to the public and recalling lawmakers to their duties.¹⁰⁶

C. The Risk of Encouraging Meddling

Would casting copyrights privileges encourage untoward policy meddling? Perhaps the rhetoric of property discourages politicians from chipping away at the rights and remedies afforded by the Copyright Act or, worse yet, clogging the statute with

¹⁰⁴ See Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 780 (2001) ("At best [] the Copyright Act represents a political bargain between the various special interests that lobby Congress. But the Act does not, will not, and cannot strike a delicate balance between all the public and private interests that it affects profoundly. Even if legislators wanted to strike such a balance, they would necessarily lack the information to do so.") (footnote omitted).

¹⁰⁵ See DEAZLEY, *supra* note [[cite]] at 144 ("The harm lies in the creeping reification of the intellectual property domain which such language facilitates . . ."); DRAHOS, *supra* note [[cite]] at 211 ("Proprietarian sentiments lie behind the expansion of intellectual property rights. This expansion threatens the core of negative liberty.") (footnote omitted). *But see* Hughes, *supra* note [[cite to *Copyright and Incomplete Historiographies*]], at 1046-67 (disputing the propertization analysis of trends in copyright policy).

¹⁰⁶ See U.S. CONST., preamble (specifying aim to "promote the general Welfare," in contrast to special interests); Art. I, § 8, cl. 8 (permitting copyrights only "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors" rights to their writings); Art. II, § 1, cl. 9 (specifying that president shall take an oath or affirmation to uphold the Constitution); Art. VI, cl. 3 (same for senators and representatives); U.S. CONST., Amend I-VII (protecting certain common law and natural rights); IX (protecting, notwithstanding those enumerated rights, those "retained by the people.").

peculiar favors.¹⁰⁷ Lawmakers would not dare to pass a law, say, giving horticultural fairs special powers to possess and use private real property, after all.¹⁰⁸ The title of "property" works a protective legal charm, discouraging such statutory mischief.

On that measure, though, lawmakers long ago stopped treating copyright like property. The Copyright Act already gives nonprofit horticultural fairs a special power to perform nondramatic musical works without suffering copyright infringement, for instance.¹⁰⁹ The Act includes many other proofs that copyright presents nothing like property's intimidating battlements.¹¹⁰

To invoke the language of privilege thus runs little risk of unduly complicating copyright law. To the contrary, calling it a "privilege" stands to better protect copyright from the public choice pressures that have bloated its scope and term, and from the public opinion reactions that have cast copyright in shame. Using more accurate terminology can only improve public policy.

Nor need talk of intellectual privileges result in flabby and weak copyrights. We can define privileges sharply and defend them vigorously. Insofar as we trust political actors to promote the common good, we should respect the boundaries that they set on copyrights. That "if" looms gigantic, granted. Regardless, even if the perfect copyright policy remains elusive, we can aim at *better* copyright policy. Speaking of copyrights as privileges can help that effort by offering a counterweight to copyright-as-property rhetoric.

IV. Merely Semantics?

To call an argument "merely semantic" reduces its impact, marking it as not materially important. In the law, however, semantics matter. Legal engineers use words as construction material; legal artists use words like paint. They can make little of value without dependable words.¹¹¹

Words do not suffice to make good law, of course. No less can concrete or ochre acrylic spontaneously form a McMansion or a portrait. But words certainly prove vital in the jurisprudential sciences. If we want good, solid laws, we have to start with good, solid words.

¹⁰⁷ See Hughes, *supra* note [[cite *Copyright and Incomplete Historiographies*]] at 1082 (arguing that treating copyrights like property helps to give them sharper boundaries).

¹⁰⁸ *But see* Kelo v. City of New London, 545 U.S. 469 (2005) (allowing, in effect, the taking of private property for private use).

¹⁰⁹ 17 U.S.C. § 110(6).

¹¹⁰ See Bell, *supra* note [[cite to *Escape from Copyright*]], at 784-85 (cataloging special interest exceptions to copyright rights).

¹¹¹ See William A. Gregory, *The Fiduciary Duty of Care: A Perversion of Words*, 38 AKRON L. REV. 181, 183 (2005) ("Using legal terms with fixed meanings that have developed over centuries in different ways leads only to confusion and chaos.")

I also grant that no word stands alone, and the ideal of precise definition remains no more than a shimmering vision.¹¹² The legal meaning of a text—and even the meaning of "legal meaning"—remains open to debate.¹¹³ But the fact of dusk does not mean that night equals day. A word can have *some* meaning, and it can have a sufficiently clear and distinct meaning to serve the law quite admirably.

The rule of law requires that words rule. It requires that "speech" not become "battery," nor "election" become "war." Dependable words—especially legal words—help prevent the rule of law from degenerating into the rule of power. At the farthest extreme, defending our liberties requires us to defend our language.¹¹⁴

The world's fate does not turn on whether "property" or "privilege" best describes copyright, admittedly. But the choice *does* matter. It matters to those of us keen to best understand and describe copyright. It matters to how the public at large views the proper scope of copyright. It matters to authors, publishers, and consumers of fixed expressive works. Eventually, assuming our constitutional republic works as advertised, what the rest of us mean by "copyright" matters to lawmakers, lawyers, and judges. A great deal thereby depends on whether we describe copyright as "intellectual property" or "intellectual privilege."¹¹⁵

Conclusion

Why care about finding the right name for copyright? Because words can work legal magic, transmuting intentions into actions. Words influence what the public thinks, what lawyers argue, and what courts decide. To call copyright "intellectual property" invites misunderstanding. Calling it "intellectual privilege" describes copyright more modestly and accurately, helping to inform and improve public policy.

¹¹² See, e.g., Lawrence Solum, *Constitutional Texting*, 44 SAN DIEGO L. REV. 123, 149 (2007) ("[I]t is perfectly obvious that texts can have multiple meanings—speaker's meaning, sentence meaning, and reader's meanings.").

¹¹³ Solum, for instance argues that "in those cases in which the original public meaning of the Constitution has been swept away by a shift in the linguistic winds, the clause meaning is the 'sentence meaning' that would have been assigned at the time the Constitution was ratified and not the sentence meaning that we would assign based on contemporary linguistic practices." *Id.* at 150. Analogizing the constitution to a contract between present political actors and those they govern suggests, in contrast, that we should interpret its text in terms of its present, public meaning. See Tom W. Bell, *The Constitution as Contract*, Agoraphilia, Tuesday, September 5, 2006, at <http://agoraphilia.blogspot.com/2006/09/constitution-as-contract.html>.

¹¹⁴ See generally, GEORGE ORWELL, *Politics and the English Language*, in A COLLECTION OF ESSAYS 156 (Harvest Books 1981) (1946).

¹¹⁵ See DREAZY, *supra* note [[cite]] at 7-8 (discussing impact of rhetoric on copyright policy).

But why care about copyright policy? It hardly seems a matter of life or death whether, for instance, ringtones qualify as public performances.¹¹⁶ Still, though, copyright policy strongly shapes where we find our amusements, what we learn from others, and how we express ourselves. Matters of life or death those perhaps are not. Certainly, though, they are not mere trifles.

Copyright policy can moreover teach us broader lessons. Consider the parallels between copyright and government. Both represent natural monopolies. The average cost of providing vital government services¹¹⁷ declines over a very large range of outputs. So, too, the average cost of producing expressive works.¹¹⁸ Both copyright and government provide public goods; expressive works in the one case, peace and prosperity in the other. Theory suggests that we who benefit from those goods tend to shirk paying for their full value.¹¹⁹ It suggests, however, that both government agents and copyright holders have incentives and powers to extract from us monopoly rents.¹²⁰ Wise public policy calls for balancing those two factors. Even if we cannot put them into equipoise, we might at least aim at keeping them in dynamic disequilibrium.

Copyright's lessons for good governance go beyond dry economics, moreover. Modern justifications of statism typically call it an institution necessary to promote the public welfare.¹²¹ So, too, runs the most popular justification of copyright.¹²² In either case, we pay for the common good with our individual rights.¹²³ Both the benefits of

¹¹⁶ See *In re Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding*, Register of Copyrights, Memorandum Opinion, Docket No. RF 2006-1 (October 16, 2006), <http://www.copyright.gov/docs/ringtone-decision.pdf> (ruling that cellphone ringtones qualify as digital phonorecord deliveries as defined in 17 U.S.C. § 115).

¹¹⁷ I here speak of the rule of law, domestic peace, protection from foreign aggressors, and the protection of certain rights and liberties.

¹¹⁸ See Stephen Breyer, *The Uneasy Case for Copyright: A study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

¹¹⁹ See Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation* 155 Penn. L. Rev. 635, 670-71 (2007).

¹²⁰ As the Founders recognized, government actors threaten to use their monopoly power to the detriment of we, the people; hence such constitutional mechanisms as divided government, enumerated powers, and retained rights.

¹²¹ So predominant is this view that its exception—regarding statist institutions as good per se, even at the cost of net human suffering—has become an epithet: fascism. For the classic exposition of that view, see Benito Mussolini, *The Doctrine of Fascism*, in *THE SOCIAL AND POLITICAL DOCTRINES OF CONTEMPORARY EUROPE* 166 (Michael Oakeshott ed., 2d ed. 1941).

¹²² See Bell, *supra* note [[cite to *Escape from Copyright*]], at 758-760.

¹²³ See, e.g., LOCKE, *supra* note [[cite]] at ch. VII, § 89, lines 1-4 ("Where-ever therefore any number of Men are so united into one Society, as to quit everyone his Executive Power of the Law of Nature, and to resign it to the publick, there and there only is a *Political, or Civil Society.*"); PAINE, *supra* note [[cite]] at 40 (concluding, "That civil power, property considered as such, is made up of the aggregate of that class of the natural rights of man, which becomes defective in the individual in point of power, and

good government and the boons copyright thus come at some cost to our freedoms. Perhaps we come out ahead in that grand bargain; perhaps not. That remains a question of fact—a question that we ignore at our peril. Viewing copyright as privilege, rather than as property, wakens us to its full price and encourages us to negotiate a better deal. What we learn from thereby recalibrating copyright might teach us something about improving government.

answers not to his purpose, but when collected in a focus, becomes competent to the purpose of every one.").