The Public Domain Through Property's Lens

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David Fagundes, *Property Rhetoric and the Public Domain*, 94 **Minn. L. Rev.** 652 (2010).

Are patents and copyrights "property," and does it matter? While the question is not new in the field, David Fagundes provides a fresh perspective, arguing persuasively that the question should be understood as rhetorical rather than ontological, and that, yes, it does matter. In *Property Rhetoric and the Public Domain*, Professor Fagundes aims to build upon the work of scholars working in a tradition he labels the "social discourse of property" to reorient the use of property rhetoric with respect to "intellectual property" away from a solely private rights understanding of property. By doing so, he argues, advocates for a positive conception of the public domain will be better equipped to blunt the force of property rhetoric deployed to expand the subject matter, scope or duration of copyrights and patents.

This article follows a prior piece, *Crystals in the Public Domain*, 50 B. C. L. Rev. 139 (2009), in which he argues that *ex ante* uncertainty about user rights in copyright is a significant problem that could best be addressed by clearer boundaries between private and public rights in copyright law. While that argument addresses the *functional* advantages of clearer public rights to use another's copyrighted expression, this piece argues that there are significant *rhetorical* advantages to a more clearly defined public domain in copyright law. In his words, "[b]y framing their concern about the public domain as a concern about preserving public property (rather than simply resisting property), actors concerned about this issue can restore balance to this debate." (P. 701.)

The argument proceeds in three steps. First, Professor Fagundes argues that property rhetoric currently is understood through the lens of "ownership" discourse, which understands "property" to mean private rights that are good against the world. Exhibit A for this thesis is the very different public reactions to the Supreme Court's rulings in *Kelo* and *Eldred.* In each case, the Court held that the constitution did not protect members of the public from elected officials transferring their rights to another private party. Certain groups were outraged by the *Kelo* result because, in their view, the Court had fundamentally disregarded specific private owner's property rights. By contrast, the Act at issue in *Eldred* "took not just from the original plaintiff Eric Eldred, but from every member of the public the entitlement to use expired copyrighted materials for another twenty years." (P. 655.) This transfer, however, was greeted with a public yawn because it was not seen as a transfer of public property into private hands.

The second step in the argument is to introduce the "social" discourse of property as a contrasting rhetorical frame in which to understand both public and private entitlements. He draws attention to four distinctive features of this approach: (1) property is relational and a variety of actors have relevant interests in the resources covered by entitlements; (2) the scope of entitlements deserving the title "property" is broader than private rights against the world, including "new" property entitlements, such as a right to public assistance, as well as public or other forms of commonly-held entitlements; (3) publicly owned resources are valuable in their own right and also contribute to the value of private entitlements; and (4) the values that property ownership, whether public or private, supports include non-market values.

In the final step of the argument, Professor Fagundes seeks to show that this approach is particularly well suited for understanding "intellectual property." In his view, current discourse about patent and copyright divides between property romance and property anxiety, with the romantics embracing broad private entitlements and the anxious seeking to curtail the continued expansion of the subject matter, scope and duration of patents and copyrights. Professor Fagundes argues that if the anxious were to accept that information entitlements appropriately are denominated "property", they can then rely on the social discourse of property to recast the limiting doctrines in

copyright and patent law as not simply limits on privately owned entitlements but also as the border at which publicly owned entitlements begin.

Professor Fagundes makes a nice contribution to the literature by drawing upon the social or relational discourse of property to illuminate a rhetorical path for public domain enthusiasts to follow when engaging with the private rights discourse that dominates popular discussion of patent and copyright law. I will confess that I am not fully persuaded by the argument, and think that the discourse of liberty may supply greater rhetorical advantages with respect, at least, to limitations and exceptions to the rights under patent or copyright law. But, Professor Fagundes deserves recognition for the clarity and cogency with which he advances the argument for viewing the public domain through property's lens.

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