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Abstract: In this Response to Professor Fagundes's "Property Rhetoric and the Public Domain," Professor Perzanowski expresses skepticism about two assumptions underlying the argument for embracing property rhetoric to promote the public domain. This argument assumes, first, public recognition of social discourse theory as an account of property and, second, rhetorical advantages of social discourse theory that are comparable to those of more familiar notions of private property. Perzanowski concludes that the simple intuitive appeal of Blackstonian property cautions against styling the struggle for balanced copyright and patent policy as a debate over competing property interests.

Response

In Defense of Intellectual Property Anxiety: A Response to Professor Fagundes

Aaron K. Perzanowski†

In *Property Rhetoric and the Public Domain*, David Fagundes offers a powerfully descriptive account of the role the rhetoric of property has played—and failed to play—in shaping copyright and patent policy.[1] As he explains, rights holders have embraced property talk, harnessing its moral and rhetorical force to great effect. In recent decades, Congress and the courts have set copyright and patent protection on a trajectory of increasing breadth and length, often justifying those expansions in the language of property rights.[2]

Commentators critical of this trend have attempted to undermine the force of property rhetoric by challenging the notion that traditional conceptions of property map onto exclusive rights in intangibles. Fagundes refers to this resistance to the equation of intellectual property exclusivity and traditional property rights as property anxiety.[3] This anxiety, he argues, has led to missed opportunities to divert copyright and patent policy from the errant path of expansionism. Prescriptively, Fagundes suggests that, rather than distance copyright and patent law from property, advocates of the public domain and user rights should appropriate property talk as a means to tap into its rhetorical power and counter expansionist arguments.[4]

† Assistant Professor, Wayne State University Law School. My thanks to David Fagundes for his comments.

1. David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652 (2010).

2. *See, e.g.*, MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 961 (Breyer, J., concurring) ("[D]eliberate unlawful copying is no less an unlawful taking of property than garden-variety theft.").

3. Fagundes, *supra* note 1, at 667–72.

4. *Id.* at 705.

But this rhetorical jujitsu requires us to reevaluate our understanding of property. According to Fagundes, advocates of expansive intellectual property rights and those suffering from property anxiety share a preoccupation with an absolutist Blackstonian notion of property, one that focuses on the unassailable dominion exercised by the property owner.[5] Intellectual property expansionists adopt this romantic caricature of property, and the anxious accept it as their target.

Fagundes points to another property tradition, the social discourse of property, and argues that it more accurately describes the dynamics of intellectual property and lends a rhetorical upper hand to friends of the public domain. The social discourse of property recognizes a complex system of social relations that accounts for diverse and overlapping interests. Rather than focusing exclusively on private property, the social discourse perspective values commons and public property models as well. By framing arguments against expansion in terms of protecting public property, Fagundes envisions a proactive rhetorical strategy that articulates a positive account of the value of limiting IP rights, instead of merely chipping away at the foundations of the expansionist arguments.

I am deeply sympathetic to Fagundes's project and largely concur in his descriptive account. I agree that the simple intuitive rhetoric of Blackstonian property is a powerful tool that those of us who favor greater balance in the intellectual property system have yet to match. Likewise, I am persuaded that the social discourse account is a better descriptive fit for copyright and patent exclusivity than property absolutism. Perhaps most importantly, I recognize the normative pull generated by characterizing the public domain as a set of affirmative rights held by the public rather than a mere absence of rights.[6] This framing encourages a sense of ownership and responsibility for our shared cultural and scientific repository and confronts efforts to denigrate the public domain as a lightless chasm into which condemned works are cast.[7]

5. *Id.* at 675.

6. These are just two of many ways in which we can define the public domain. *See* Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L.J. 783 (2006) (discussing thirteen distinct definitions of the public domain).

7. The common phrase "falling into the public domain" suggests something regrettable. Characteristically, Jack Valenti put it in even starker terms: "A public domain work is an orphan. No one is responsible for its life. But everyone exploits its use, until that time certain when it becomes soiled

Despite these points of fundamental agreement, I count myself among the anxious. This anxiety reflects skepticism about two assumptions underlying the argument in favor of embracing social discourse property rhetoric. First, the argument assumes the relevant audiences will recognize social discourse as an account of property. Second, it assumes the social discourse account will yield the many rhetorical advantages of private property talk. Both of those assumptions deserve closer examination. Ultimately, I maintain that social discourse lacks the intuitive appeal of the oversimplified understanding of private property that accounts for the force property rhetoric.

I. SOCIAL DISCOURSE AND POPULAR NOTIONS OF PROPERTY

The argument for a shift to property rhetoric depends first on the recognition of social discourse as a legitimate description of what we talk about when we talk about property. To prove effective, social discourse rhetoric must appeal to a number of audiences. And the receptiveness of each of those audiences to the social discourse account of property is likely to vary substantially.

Ultimately, Fagundes aims to recast our understanding of property. But the public is not the only relevant audience in that effort. Scholars and courts play an important, if indirect, role in shaping our attitudes about property.

The task of convincing academics that social discourse is an account of property is a manageable one. The social discourse approach, even if not the dominant paradigm, boasts a long history and established theoretical justifications.[8]

But as the comparison of *Kelo*[9] and *Eldred*[10] and their respective public reactions suggest, scholars are not the most important audience.[11] Courts are one of the primary targets of the rhetorical power of property. Even at the highest levels of the judiciary, the allure of Blackstonian oversimplification remains

and haggard, barren of its previous virtues." *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989, H.R. 1248, and H.R. 1734 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 104th Cong. 55 (1995) (statement of Jack Valenti, President and CEO, Motion Picture Association of America).

8. *See* Fagundes, *supra* note 1, at 677–83.

9. Kelo v. City of New London, 545 U.S. 469 (2005).

10. Eldred v. Ashcroft, 537 U.S. 186 (2003).

11. *See* Fagundes, *supra* note 1, at 653–57.

strong.[12] Nonetheless, courts are a promising audience for social discourse rhetoric. Like legal academics, judges have a relatively high tolerance for nuance and possess the sophistication necessary to internalize the notion of property as a complex of social relations.

As *Eldred* makes all too clear, however, the ultimate arbiter of the fate of the public domain is Congress, a body far less concerned with the intricacies of the choice between property romanticism and social discourse.[13] Equally importantly, Congress faces strong incentives, in the form of well-funded and well-organized lobbies, to remain persuaded by the private property rhetoric of rights holders.[14]

Presumably, even congressional inertia will respond to sufficient numbers of vocal voters. The shift to a rhetoric of social discourse is most likely to succeed, therefore, if it can convince a substantial portion of the public that "property" encompasses not only familiar notions of private ownership but also an interrelated web of social relationships. At some level, social discourse is consistent with common understandings of property. We generally accept some restrictions on the use of private property for the benefit of the larger community.[15] The open question, however, is whether a model broad enough to contain the public domain and user rights in copyrighted and patented works is one the average citizen would recognize as property. Putting aside the question of whether we can expect the public to internalize the many nuances of social discourse theory, I remain unconvinced that the public will recognize the claims that flow from social discourse as claims about property interests. We should give careful consideration to the magnitude of the gap between the prevailing public understanding of property and social discourse before we attempt to bridge it.

II. THE RHETORICAL FORCE OF SOCIAL DISCOURSE

This brings us to the second assumption implicit in the case for social discourse: rhetoric. Presuming courts, Congress,

12. *Id.* at 661–62 (noting Justice Scalia's invocation of property romanticism during oral argument in *eBay v. MercExchange*, 547 U.S. 388 (2006)).

13. *Eldred*, 537 U.S. at 204 (noting the Court's substantial deference to Congress's determination of the appropriate duration of copyright protection).

14. Indeed, in the copyright context, rights holders and their representatives have traditionally served as the primary drafters of copyright legislation. *See* JESSICA LITMAN, DIGITAL COPYRIGHT 22–25 (2001).

15. Nuisance laws offer perhaps the most familiar example. *See* Fagundes, *supra* note 1, at 682.

and the public acknowledge social discourse as property, the argument in favor of property talk assumes that the social discourse model brings to bear the same rhetorical force as property absolutism. If the public outcry over *Kelo* and the success of IP expansionism are a function of the rhetorical power of property generally, then this is a safe assumption. But a number of considerations suggest that the power of property rhetoric is deeply intertwined with a romantic vision of private property. If this is the case, then the rhetorical power of property talk may not transfer to rhetoric cast in social discourse.

As Fagundes notes, the rhetoric of private property is simple.[16] Stealing the property of another is wrong. This pithy maxim provides property absolutism with an intuitive and immediately comprehensible rationale. By comparison, the social discourse model of property cannot make the same claim to simplicity. Treating works as public property after their copyrights expire has some intuitive resonance. But the notion that under some circumstances fair use or the idea/expression distinction renders aspects of protected works public property lacks the intuitive moral force of private ownership. Part of what is so powerful about property rhetoric is its ability to construct a simple caricature of the complexities of the property relationship. Social discourse sacrifices that simplicity for accuracy, diluting its rhetorical force as a result.

The interests advocated through social discourse rhetoric are also diffuse. The rhetorical punch of private property talk derives, in part, from the concentrated interests at stake. The deprivation of property in *Kelo* was felt acutely by a handful of property owners. Likewise, when copyright or patent protection expires, the rights holder can point to concentrated economic losses. Harms to the public domain, on the other hand, are distributed broadly across society. This fact does not lessen the magnitude of these harms, but it does give us reason to suspect the public consciousness will be less aroused by a shrinking public domain.

The public outcry over the closure of public parks offers a helpful counterpoint.[17] If citizens are willing to take to the streets, or at least e-mail their representatives, over the loss of public parks, why not the public domain? This question points to another distinction between the rhetorics of private property

16. *Id.* at 691.
17. *Id.* at 699.

and social discourse: the interests advocated by private property talk are typically concrete. In the minds of the public, the loss of tangible property entails palpable consequences. Given the centrality of land to notions of freedom and security, we are particularly sensitive to harms arising from losses of real property.

But Fagundes argues that intangible rights can create equally strong attachments, noting that authors and inventors express deep connections to their creations.[18] In this sense, creators are as deeply invested in their works as the family farmer is in his land. But society's interest in the public domain is far more abstract. To be clear, the public domain offers immense value. It provides raw material necessary for future creativity and innovation,[19] it lowers prices for copies of existing works, and it increases their availability.[20] For the average citizen, however, these benefits are simply not as immediate as more familiar interests in tangible property.

Fagundes responds to worries about the abstract and diffuse nature of our interest in the public domain by pointing to the controversy surrounding the efforts of the American Society of Composers, Authors and Publishers (ASCAP) to prevent unlicensed Girl Scout sing-a-longs of popular music.[21] This example is instructive because it suggests that interests in the public domain can motivate strong public sentiment. As an initial matter, however, I am not convinced that the public reaction to ASCAP is best understood in terms of defending public property. Although the Girls Scouts mistakenly believed the songs were in the public domain, the public did not necessarily share that belief. The widespread hostility to ASCAP is just as easily explained as a condemnation of its decision to assert admittedly valid rights against a nonprofit youth organization.

Even accepting the defense of the public domain as the motivation for popular opposition to ASCAP, the Girl Scouts example appears to be the exception that proves the rule. The interests at stake were both concentrated and concrete. The Girl Scouts wanted to sing *Puff the Magic Dragon* around the camp-

18. *Id.* at 696–97.

19. *See* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990) (describing the role the public domain plays in enabling future creativity).

20. Dennis S. Karjala, *Does Information Beget Information?*, 2007 DUKE L. & TECH. REV. 1, 19 (2007) ("The public domain has real economic value to the public in that works no longer subject to copyright are generally more broadly available and for a lower price.").

21. *See* Fagundes, *supra* note 1, at 697–98.

fire, and ASCAP demanded they pay for the privilege. As a result, a concrete and concentrated harm was inflicted. If property rhetoric was at work, it succeeded because these facts avoided the pitfalls of abstraction and diffusion that generally work against the rhetoric of social discourse.[22]

One final feature of property romanticism that gives it a rhetorical advantage over a social discourse account of the public domain is the popular conception that property entails enduring ownership. Property remains in the possession of its owner until that owner willingly parts with it, even in the face of competing public concerns. *Kelo* sparked such vocal public reactions largely because it offended this basic precept of the common understanding of property. Copyright holders, much like the plaintiffs in *Kelo*, are sympathetic when viewed through the potentially distorting lens of property rhetoric. The public domain demands that they surrender exclusive control over their property in the name of some broader social purpose, the value of which may be poorly understood by rights holders and the public generally. If *Kelo*'s aftermath teaches us anything, it is that this sort of unwilling transfer offends common sensibilities about property. Overcoming those sensibilities is no small task for social discourse rhetoric.

CONCLUSION

In the end, my anxiety grows out of my belief that a debate framed in terms of property rhetoric inevitably tilts the balance in favor of expansionism. Social discourse offers the virtues of accuracy and nuance. But as a rhetorical tool aimed at society generally, the simple intuitive force of property romanticism yields an undeniable, almost gravitational pull. The shift to property rhetoric forces a choice between the concentrated property interests of the author or inventor—themselves the subject of romantic notions of genius[23]—and the diffuse and abstract interests of society in the public domain. Ultimately, I lack confidence that given such a choice, the relevant audiences will choose wisely.

22. In this sense, the Girl Scouts example could provide a model for effective social discourse rhetoric. It must identify a discrete harm felt by a particular group, ideally a sympathetic one. The question is whether that model can be applied generally to the interests implicated by the public domain.

23. *See* James D.A. Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625, 632–43 (1988); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 455–63 (1991).

But Fagundes is quite right that those of us who favor more limited IP regimes need a simple and powerful positive account that presents the preservation and expansion of the public domain as a natural consequence of deeply held commitments. Property anxiety is not such an account. It counters property talk but is not itself a rhetorical alternative. Advocates of a robust public domain, however, can draw on other rhetorical frames.

The rhetoric of contract, while admittedly not new and arguably not successful, is one such alternative.[24] The notion that copyright and patent grants represent a quid pro quo, whereby creators are granted temporary exclusivity in exchange for disclosing or publishing[25] works that contribute to the public domain, is both descriptively accurate and rhetorically forceful.[26] Just as we all intuitively acknowledge the sanctity of property, we recognize the moral imperative of a promise. Contract rhetoric strikes at the same notion of fairness that gives property absolutism its persuasive force. But rather than balancing public property interests against private ones, contract rhetoric escapes the pull of private property romanticism by supplanting property rhetoric altogether.

Perhaps the only accurate measure of rhetorical merit emerges through practice. If so, time may well prove my anxiety unjustified. Regardless of the ultimate prospects of property talk, *Property Rhetoric and the Public Domain* highlights the

24. In *Eldred*, the Court accepted the basic proposition that the copyright represented a quid pro quo. The Court, however, concluded that the "this" received by the copyright holder included both the current term of protection as well as any subsequent extensions. Eldred v. Ashcroft, 537 U.S. 186, 214–15 (2003).

25. L. Ray Patterson, *Copyright Overextended: A Preliminary Inquiry Into the Need for a Federal Statute of Unfair Competition*, 17 U. DAYTON L. REV. 385, 392 (1992) (noting that after the Copyright Act of 1976, federal copyright law no longer required publication as part of the quid pro quo of copyright protection).

26. *See, e.g.*, James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 106 (1997) (describing fair use as part of the implicit quid pro quo of copyright); Rebecca S. Eisenberg, *Patents and the Progress of Science: Exclusive Rights and Experimental Use*, 56 U. CHI. L. REV. 1017, 1022 (1989) (noting judicial characterizations of the enabling disclosure of a patent as the quid pro quo of patent exclusivity); Pamela Samuelson, *CONTU Revisited: The Case Against Copyright Protection for Computer Programs in Machine-Readable Form*, 1984 DUKE L.J. 663, 705–06 (1984) (describing the contribution of "new ideas into the public domain [as] the quid pro quo the public received in exchange for the limited monopoly right the author received").

pressing need for advocates of more moderate IP policy to focus on crafting arguments that appeal not only to courts, but to the public as well.