INTELLECTUAL PROPERTY, THE RIGHT TO HEALTH, AND HUMAN RIGHTS

Conference Proceedings
Panel Discussion

I. INTRODUCTION

As technology and society progress, the issues and relevancy of intellectual property change. The pages following this introduction contain the transcripts of a panel discussion and a debate that occurred at the Crowne Plaza Hotel in Indianapolis, Indiana on October 12, 2005 to address issues presented by these changes. The following comments have been edited slightly to provide background sources and for grammar. Each speaker was given the opportunity to edit his or her own comments. This transcript is published with the generous permission of each speaker.

First, the Federalist Society's Intellectual Property Practice Group and the Indianapolis Lawyers Chapter presented a discussion entitled "Intellectual Property and International Human Rights." Panelists included: John S. Gardner, former General Counsel, U.S. Agency for International Development, and former Deputy Assistant to President George W. Bush; Robin Gross, Executive Director and Attorney, IP Justice; and Robert Sherwood, International Issues Advisor, the Federalist Society Intellectual Property Practice Group. Professor F. Scott Kieff, Associate Professor at Washington University in St. Louis School of Law, moderated. Topics included the problems associated with defining health care as an international human right, copyright extensions and enforcement mechanisms, and intellectual property protection as a tool of economic development.

Second, the Federalist Society presented "Life, Liberty, and Intellectual Property," which included comments by Professor Tom W. Bell, Professor of Law, Chapman University Law School and Professor Adam Mossoff, Assistant Professor of Law, Michigan State University College of Law with Professor Mark Schultz, Professor at Southern Illinois University School of Law, moderating. Professor Bell advocated minimal intellectual property protections due to the inherent violations

of natural rights that such protections oppose, while Professor Mossoff described the traditional natural rights justification for IP rights.

II. INTELLECTUAL PROPERTY AND INTERNATIONAL HUMAN RIGHTS PRESENTED BY THE FEDERALIST SOCIETY'S INTELLECTUAL PROPERTY PRACTICE GROUP AND THE INDIANAPOLIS LAWYERS CHAPTER

PANELISTS:

Mr. John S. Gardner, Former General Counsel, U.S. Agency for International Development, and former Deputy Assistant to President George W. Bush

Ms. Robin Gross, Executive Director and Attorney, IP Justice

Mr. Robert Sherwood, International Issues Advisor, The Federalist Society Intellectual Property Practice Group

Professor F. Scott Kieff, Associate Professor, School of Law, Washington University in St. Louis and Research Fellow, Hoover Institution, Stanford University (*moderator*)

PROFESSOR KIEFF: Let me welcome the group that is here and also the group that is not here but will be listening to the recording that we are now making of the Intellectual Property Right to Health and Human Rights panel.

What we're going to do is have a conversation. We want to encourage the panelists to talk to each other, and people in the audience to talk to the panelists. We are recording so that the transcript can be published in the *University of Illinois Journal of Law, Technology & Policy*, and also on the Federalist Society Web page. We will circulate drafts of the transcript to everyone who's recorded in the transcript to give them a chance to make sure that their remarks are as clear and precise as they hope they can be.

You're really here to hear the panelists, not hear me. So, let me just begin by giving you the ground rules. We'll go for fifteen minutes each and then we'll open up to conversation. We'll go in order from the audience's left to right, and I'll just give a brief introduction for each person before he or she speaks.

We're going to begin with John Gardner. John served as general counsel at USAID from 2001 to 2005. There, he was involved with the Agency's efforts in Afghanistan and Iraq, and the response to the Asian tsunami. He served as U.S. representative for the governance committee of the Global Fund to Fight AIDS, TB and Malaria, and was co-founder of its ethics committee. Before being at USAID, he served as deputy assistant to the President, and deputy staff secretary, and in that capacity

with Harriet Miers' deputy. We all now know who she is. He also served as special assistant to President George Bush from 1989 to 1992. A *cum laude* graduate of Harvard Law School, he was a Food and Drug Law Institute scholar and published the first academic treatment of the European Medicines Evaluation Agency in 1996. Mr. Gardner was also an associate with the firm of Davis Polk & Wardwell in New York.

Let's turn the mic over to Mr. Gardner.

MR. GARDNER: Thanks very much. It's very much in the spirit of what Scott had to say. . . . If [my speech is] too basic for the audience here, please don't hesitate to tell me, and I'll focus on some other areas.

. . . [W]hat I'm offering today is very much an American perspective on this issue. The European perspective is quite different. It is one that, as we'll discuss, is focused a lot more on the application of certain parts of customary law. There are voices in Europe, even in some European governments, who are willing to move toward heightened international jurisdiction on some of these areas,[1] whereas the United States, while being a signatory to some of the international human rights treaties that I'm going to discuss today, has only ratified the Race and Discrimination Convention.[2] And that had some significant reservations having to do with the nature of the federal system.[3]

So, let me just start by talking about the classic conception of international law versus what is happening today in some [areas of] international human rights law. In the classic conception of international law, the subject is properly considered as concerning the rights and obligations of sovereigns rather than private actors.[4] The Third Restatement of Foreign Relations Law in the United States states that a rule of international law is one that has been accepted as such by the international community, "(a) in the form of customary law;" (b) by international agreements and treaties, or (c) "by derivation from general principles common to the nature of the legal systems of the world."[5] The crucial idea here, of course, is that acceptance [is based on a] community of states rather than private actors, or even international organizations that are themselves the preachers, if you will, of states that make a particular doctrine part of international law.

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1. Treaty establishing a Constitution for Europe, Dec. 16, 2004, O.J. C 310/1 (2004) (not yet ratified).

2. International Convention on the Elimination of all Forms of Racial Discrimination, G.A. Res. 2106 (XX), ¶ 5, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014 (1965) [hereinafter CERD].

3. *See* Office of the High Commissioner for Human Rights, Declarations and Reservations for the International Convention on the Elimination of All Forms of Racial Discrimination, http://www.unhchr.ch/html/menu3/b/treaty2_asp.htm (last visited Sept. 15, 2006).

4. PHILIP ALSTON, THE 'NOT-A-CAT' SYNDROME: CAN THE INTERNATIONAL HUMAN RIGHTS REGIME ACCOMMODATE NON-STATE ACTORS?, *in* NON-STATE ACTORS AND HUMAN RIGHTS 3, 19–25 (2005).

5. Restatement (Third) of Foreign Relations Law of the United States § 102(1) (1987).

States have the right to incorporate private actors into their scheme of international law, but it requires affirmative action from [those] states. The two best examples of this are the International Federation of the Red Cross and the Red Crescent Societies.[6] In many countries of the world, the Red Cross is not intrinsically part of the government. In others, [it is]. And yet, the Federation of the Red Cross is seen as an international personality, and it is treated as an international organization for all purposes. . . .

The conception of international law as based on custom, treaties, or state practice is equally applicable to human rights law. Human rights law is traditionally concerned with certain obligations and threats against governments—not private actors.[7] Human rights include basic civil political rights: guarantees against slavery, torture, arbitrary detention, extrajudicial killing, and governments acting with impunity against their citizens.

But the question of whether governments can be required, as a matter of international law, to enforce these principles is a question. The traditional answer is that they cannot, except through a treaty that binds the subject government. If governments take the action against citizens of another country, international law principles could be invoked by the government of the affected country, [permitting it] to take action. But international law as such had no real enforcement mechanisms against governments for violations of their own citizens' rights, say, in war. After the Second World War, the adoption of the U.N. Charter, the Universal Declaration of Human Rights,[8] and other documents opened the way to human rights law as a subject of international law.

Recently, on the basis of these documents, the proposition has been advanced that international law, which includes international human rights law, broadly encompasses socioeconomic rights, such as the right to work, the right to housing, the right to education, and the right to healthcare. So far, this is relatively uncontroversial, yet there is a push to take this still further. For instance, Louise Arbour, who is the relevant U.N. Commissioner on these issues, opened the 61st session of the U.N. Commission on Human Rights this past spring by declaring that [courts have been bringing socioeconomic rights] "from the realm of charity to the reach of justice, and developing a body of ever-growing jurisprudence by which we can be guided in bringing these vital rights to the reality of people's lives."[9]

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6. *See generally* International Federation of Red Cross and Red Crescent Societies, Home, http://www.ifrc.org (last visited Sept. 16, 2006).

7. *See* Administrative Comm. on Coordination, Consultative Comm. on Programme and Operational Questions, Feb. 29 – Mar. 2, 2000, Report of the Consultative Committee on Programme and Operational Questions, U.N. Doc. ACC/2000/7 (Apr. 25, 2000).

8. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948).

9. Louise Arbour, High Commissioner for Human Rights, United Nations, Opening Remarks

This statement is as audacious as it is open-ended. How could an appropriate level of socioeconomic rights justifying intervention by international [law] be taught? Or, how can these rights or the decisions of the international community, in this context, be enforced? Will national officials come to trial as indicted war criminals to the Hague? Would an indictment or a conviction . . . end the responsibility of national governments? More recently, would states seek to assure a higher standard of living for their own people? Is that really charity or is it the working of representative government? The [representative government] system is designed to ensure governments keep the welfare of their citizens as the highest priority.

The question, also, as to whether these rights form [part of] international law cannot simply be answered by invoking international systems. Even though over one hundred countries have enshrined the right of healthcare in their own constitutions, the absence of consistency and practice in this area surely shows us that it does not, of itself, form a part of customary international law, other than the admission [that a right exists]. Rather, a right to healthcare can arise from the agreements of states through the treaties and conventions to which they declare themselves subjects. And it is from this process that the right to healthcare and international law exists.

In 1948, the same year as the Universal Declaration was signed, the WHO, the World Health Organization, came into existence and its constitution was ratified.[10] Its establishment had foreseen that some entity in the U.N., which does provide the opportunity under Article 1.3 of its Charter,[11] would promote the achievement of international cooperation for solving problems of an economic, social, culture, or humanitarian nature.[12] And Article 55 states that the U.N. shall promote solutions of international economic, social, and health and related problems.[13] With respect to the WHO, the preamble to its constitution declares that "[h]ealth is a state of complete physical, mental, and social well-being, and not merely the absence of disease or infirmity. [It is t]he enjoyment of"—and this is the crucial phrase—"the highest attainable standard of health . . . . [I]t is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."[14] In Article 1 of the WHO constitution,

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at the 61st Session of the Commission on Human Rights (Mar. 14, 2005), *available at* http://www.unhchr.ch/huricane/huricane.nsf/view01/527ED2F6E7DD06ADC1256FC400406C8D.

10. Constitution of the World Health Organization, July 22, 1946, 62 Stat. 2679, 14 U.N.T.S. 186 (*ratified* Apr. 7, 1948), *available at* http://www.searo.who.int/LinkFiles/About_SEARO_const.pdf.

11. U.N. Charter art. 1, para 3.

12. *Id.*

13. *Id.* art. 55.

14. *Id.*

the achievement of the highest obtainable standard of health is the objective.[15]

Similarly, Article 12 of the International Covenant of Economic, Social and Cultural Rights of 1966 sets forth the principle of the "highest attainable standard of physical and mental health."[16] Among the more modern treaties comprising international human rights law, the right to health is addressed in Article 24 of the Convention of the Rights of the Child,[17] Article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women,[18] and Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination.[19]

Among the major industrialized nations, Italy, France, Germany, Canada, Germany, Switzerland, and Japan have ratified each of the treaties discussed above, and none of those states entered reservations to the conventions with respect to the application of the right to health of all peoples under their jurisdictions. The states party to these conventions are obliged to make periodic reports to the committees that oversee these countries and justify their approach for an action.

On the other hand, the United States, which at least signed all the treaties, has chosen to ratify only the last. As I said earlier, it made significant reservations, including a reservation involving the instance of the right to health. And the United States and the United Kingdom have pledged separately to cooperate with the U.N. to achieve the human rights contained in the declaration, but that is not in itself in a legally binding covenant, nor are the U.S. and U.K. declarations themselves legally binding.

What the U.S. declaration has, therefore, is the position that international human rights, and indeed international law more generally, should be [described in a] well-defined rather than fluid document, and [it should be] treaty-based. . . . But scholars such as Paul Hunt, who is the U.N. Special Rapporteur on the Right to Health, and activists and some non-member organizations, have sought to read these texts to establish the socioeconomic rights more broadly in international law.[20]

Hunt summarized as his right to health as absolute. It includes the right to healthcare, but it goes beyond the right to healthcare to accomplish adequate sanitation, healthy conditions at work, and access to [relevant] information, including [information] on sexual and

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15. *Id.* art. 1.

16. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), ¶ 12, U.N. Doc A/6316 (Dec. 16, 1966).

17. Convention on the Rights of the Child, G.A. Res. 44/25, ¶ 24, U.N. Doc. A/44/49 (1989).

18. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, ¶ 12, U.N. Doc. A/34/46 (1981).

19. CERD, *supra* note 2, at ¶ 5.

20. *See, e.g.*, Paul Hunt, Special Rapporteur on the Right to Health, Panel Discussion on the Rights to Sexual and Reproductive Health (Oct. 28, 2003), http://www.acpd.ca/acpd.cfm/en/section/csih/articleid/223.

reproductive health. It includes freedoms as well as entitlements, such as the right to assisted health protection. The right to health has numerous elements. For example, it would give the child total reproductive health. Like other human rights, the right to health is a particular preoccupation of the disadvantaged, vulnerable, and those living in poverty. Although subject to progressive realization, it contains obligations and [permits] immediate attack [for lack of progress]. It demands indicators and benchmarks to indicate progressive realization of the right, and developed states have some responsibilities toward realization of the right to health in poor countries. Obviously, what the governments are going to agree to do [will vary widely]. I think it's important for Americans to understand that it is a full system of U.N. governance here, largely through the committees that interpret and monitor state practice in those various treaties, by which the treaties and their obligations are suddenly expanded. The U.S. did not sit on these committees—obviously because we have not ratified any relevant treaties other than the CERD.

But the question arises, how can these committees be determinative that way? Well, it's clear that [these committees can interpret the treaties to some extent]. Nevertheless, the U.N. has decided that the other states party to human rights treaties . . . do have a clear role of interpreting these treaties themselves, and [the states may] provide an interpretation that can change over time.

The danger, of course, is that it is possible to distort the not-so-broadened nature of the rights, such as the right to health, agreed to by the states when they ratify the various conventions. And more specifically with regard to the right to healthcare, there is a clear [issue] not only of citizens' rights relating to their own sovereignty, but also the supposed obligation towards the international community.

Let me be clear. The right to health in international law exists for those states that have chosen to ratify these pacts. It does not—indeed, cannot—apply to those states that have not; [it applies] still less for private actors such as the pharmaceutical industry. The rights are not part of customary international law both because important nations such as the United States declined to ratify the conventions . . . and because state practice among many of the states that have ratified the conventions shows that they are, in many instances, practically unenforced.

From the traditional perspective of international law, the new focus on socioeconomic rights, as well as the interpretation of these rights as obligations toward the international community, has several important consequences. First, in the international context, gross human rights abuse [exists] in traditional areas of political and civil rights, including

the right to create life and security for the person.[21] Second, [a focus on socioeconomic rights] weakens the structure of international law where it goes into the elevated structure of binding law, because the rights are not readily susceptible to enforcement.[22] Third, particularly with the right to health, there's a danger that the new focus on socioeconomic rights could permit states asserting this right on behalf of their own citizens to criticize private actors who have supposedly violated this right by not [surrendering] research, information, and products, even though doing so would have the deeply deleterious effect of retarding innovation and thus hinder the ability of the private sector to advance the health of millions of people around the world.

Specifically with regard to the pharmaceutical and similarly affected industries, this broad right to health may have additional consequences. First, [there is] the increasingly common view that the industry has an obligation to ensure the availability and accessibility of essential medicines as defined by national governments or some portion of the international community.[23] Second, there is a new developing premise that patent protection itself is infringing on the right of the developing world or even the developed world.[24] Thus, [this premise indicates that] decisions on international [patent] rights should be limited and perhaps eliminated in certain cases, and that pharmaceutical companies do not have an absolute right to price their products [in order to] recoup their investments. Let me make one final point here, which is that under these treaties, there could be an alternative strategy for countries to slant the treaties, which would permit the use of rights of the treaties in favor of protecting intellectual property, specifically Article 15 of the Covenant on Economic, Social, and Cultural Rights[25] and rights about academic freedom,[26] because there is nothing in the treaties themselves that privilege the right to health over the other enumerated rights. International human rights law recognizes both property rights and socioeconomic rights themselves.

And finally, I will simply call your attention to the many various industry responses to this issue, where industry has acted very generously to share its products all over the world.

PROFESSOR KIEFF: Thank you very much. We'll turn now to our second speaker, Robin Gross. Robin is the Executive Director of IP Justice, where she also serves as one of their lawyers. IP Justice, I think

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21. Central European University, Human Rights Center, http://www.ceu.hu/human_rights_center.html (last visited Sept. 16, 2006).

22. David Held, Violence, Law and Justice in a Global Age (Nov. 5, 2001), http://www.ssrc.org/sept11/essays/held.htm.

23. *See, e.g.*, John E. Calfee, *Patently Wrong: Free Drugs Are No Panacea for Poor Nations*, WASH. TIMES, Jan. 28, 2003.

24. Robert P. Merges, *Intellectual Property Rights and Bargaining Breakdown: The Case of Blocking Patents*, 62 TENN. L. REV. 74–106 (1994).

25. International Covenant on Economic, Social and Cultural Rights, *supra* note 16, at ¶ 15.

26. *Id*.

can be fairly thought of as an international civil liberties advocacy group.[27] They focus a lot on international treaties. They work with WIPO[28] and other organizations, and they focus on issues including free trade and intellectual property. Robin Gross is a California lawyer, having been trained at Santa Clara University School of Law. But she's a native of the Midwest, having also attended Michigan State University. Before joining the team at IP Justice, and in fact leading the team at IP Justice, she was the first IP attorney at the Electronic Frontier Foundation,[29] which founded its IP program back in 1999. She also does work with ICANN,[30] where she represents non-commercial users. And she'll be talking to us today about an important set of views for us to consider.

MS. GROSS: I'm here to talk about how copyright in particular impacts human rights. And I think when we talk about copyrights, it's important to say that a copyright is important. It's important for innovation and creativity, but it's all about getting the levels right. It's all about [finding] the appropriate level of copyright law. You go too far when you grant too many rights, excessive copyrights, and you end up threatening civil liberties. Particularly in the information age, in the digital environment, we find a conflict between the additional granting of intellectual property rights and existing traditional freedom of expression rights, privacy rights, and other kind of traditional civil liberties.

It's somewhat interesting because it's the nature of digital technology that makes this clash so important. . . . Every time you want to use a piece of work that's stored in digital format, whether it's music or a movie or a book that's stored in a digital format, if you want to use it, access it, you have to get a new copy of it. And therefore, copyright rules and regulations are triggered. So, it's sort of this accident, if you will, that now copyright law has become king . . . in an information society.

So we've seen, in recent years, a great ratcheting up of the rights granted to publishers and authors, and we've seen fewer rights granted to consumers and the public. Again, it's always about finding the right balance, the appropriate level, so you give just enough protection to authors and creators to encourage them to create, but not so much that you end up stifling [other] creativity and innovation.

I want to talk about a few different trends that we're seeing in international copyright law in particular that are having a profound effect of wrecking traditional civil liberties. One of the most troubling are

27. IP Justice, http://www.ipjustice.org (last visited Sept. 16, 2006).

28. *See* World Intellectual Property Organization, http://www.wipo.int/portal/index.html.en (last visited Sept. 16, 2006).

29. *See* Electronic Frontier Foundation, http://www.eff.org (last visited Sept. 16, 2006).

30. Internet Corporation For Assigned Names and Numbers, http://www.icann.org (last visited Sept. 16, 2006).

these new anti-circumvention laws.[31] Basically, these are laws that prohibit you from unlocking digital locks in order to access works that are stored in a digital format. These locks are designed to enforce technical restrictions on things. For instance, you can't make a copy of your CD, [and] you can't play your DVD in a DVD player that was purchased overseas. It's often now illegal to bypass or to help someone else to bypass by providing tools or even information allowing them to bypass those [digital locks].

In the United States, we have fair use rights, which allow us to make personal-use copies of something, or copy something for educational purposes—usually in a noncommercial context.[32] They're a part of the copyright bargain, if you will, whereby consumers, the public, and individuals are granted certain rights in the copyright, and we're seeing a shrinking of the fair use [of] private and personal copying.

We're seeing greater liability for innocent third parties—those who provide tools, those who provide services, who don't themselves violate any copyright laws. But those tools or those services down the road can be used by others . . . to violate copyright laws. We find greater liability for those who provide or make those tools and services.

We're seeing greater pushes for exclusive rights over databases and the information that is contained within them.[33] Under traditional U.S. copyright law, [one cannot] copyright facts or information,[34] but these new database rights are sort of impeding the freedom and free flow of information in terms of information and facts in databases.

We're seeing stronger IP enforcement measures. Penalties, particularly criminal penalties, are being increased, in order to grant greater protections and stronger enforcement of violations of intellectual property rights.[35] We're seeing longer and longer terms of copyright being granted.[36] The term of copyright back in 1790 was thirteen years; now we're at a point where we've got seventy years plus the actual life of the author.[37] So we're seeing this dramatic ratcheting up of the term of copyright.

And another issue is that we're seeing, particularly in WIPO broadcasters' rights, the creation of a new right for broadcasting

31. *See* Digital Millennium Copyright Act, 17 U.S.C. § 1201 (2000).

32. *See* Copyright Act of 1976, 17 U.S.C. § 107 (2000).

33. *Database and Collections of Information Misappropriation Act of 2003: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Committee on the Judiciary and the Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. on Energy and Commerce*, 108th Cong. (2003) (statement of David O. Carson, General Counsel, United States Copyright Office).

34. Michael Steven Green, *Copyrighting Facts*, 78 IND. L. J. 919 (2003).

35. *See, e.g.*, 17 U.S.C. §§ 501–513 (2000).

36. *Id.*

37. *Id.*

companies that [represents] an additional layer to the existing copyright laws.[38] I'll talk more specifically about all these as we go forward.

These anti-circumvention laws—sometimes they're called digital rights management, DRM, schemes[39]—can be used to restrict what would otherwise be a lawful use. For example, if you want to make a personal use copy of that CD, copyright law would grant you the right to do so. But these DRM technologies forbid you from doing it, and it's illegal to bypass these DRM technologies. So we're seeing a restriction of what the public's rights are, and what the public is entitled to, under copyright law.

This also has the effect of controlling private performances and private experiences of works. We're seeing lawsuits being filed against companies who try to cut out the dirty words, if you will, of some movies because certain people don't want to have to watch that. Well, we're seeing copyright laws being used to try to prevent people from controlling their own private experience, how they actually experience these works.

These anti-circumvention laws are also outlawing traditional rights like reverse engineering. Basically, [reverse engineering occurs when] you take something apart, figure out how it works, try to make it better, [and] get it to interoperate with existing systems or new systems. In order to do that, you have to circumvent these technological restrictions. And again, it's a violation of these new anti-circumvention laws.

Another problem here is that it's impeding competition. We're creating monopolies on adjacent products. There [is a] productive freedom of expression about the critical technical weaknesses of these technologies, and if you're not allowed to discuss the vulnerabilities of these technologies because it helps someone else to bypass them, our free speech rights are dramatically harmed.

That also has the effect of stifling scientific innovation—the liability is just too risky. Scientists don't want to find themselves in jail or threatened with a lawsuit for studying these DRM technologies and revealing what their vulnerabilities are. We've seen several lawsuits in this area so far since these laws have been passed. And again, these prevent the works from passing into the public domain. These DRM schemes are not set up to unlock the work once the movie or the music is supposed to fall into the public domain; it stays locked up forever. Again, it's illegal to bypass these restrictions, and so we're losing public domain by enacting these anti-circumvention laws.

Some examples . . . are the WIPO treaties from 1996,[40] and then the national implementation of that in the United States was the U.S. Digital Millennium Copyright Act.[41] In Europe, they have the Copyright

38. Letter from James Love, CPTech, to Jule L. Sigall, United States Copyright Office (Sept. 15, 2005), http://www.cptech.org/wipo/15sep05letter2usptoloc.html.

39. E.W. Felten, *A Skeptical View of DRM and Fair Use*, 46 COMMS. OF THE ACM 57, 59 (2003).

Directive.[42] There's a proposal in the Free Trade Area of the Americas Treaty ["FTAA"] to incorporate types of anti-circumvention laws into international and national laws.[43]

So again, we're seeing a shrinking of our private copying rights. Traditionally, copying for research, education, commentary, criticism, and personal use are lawful, but they're controlled or altogether prevented by DRM schemes. In U.S. copyright laws, the Supreme Court says fair use is important to create this breathing space that is required for copyright, to avoid a conflict in freedom of expression guarantees.[44] But it's illegal to bypass these technological restrictions, even to engage in a lawful use.

Again, the FTAA has a proposal that would limit personal use copies to only a single copy, only for use by one person, and only under limited circumstances.[45] So again, we're seeing a narrowing of the traditional fair use, [a right] that the public has. One of the rationales that is often given for this is . . . that digital [format] is special. You can't have fair use rights in a digital environment. It's just too dangerous for the public to be able to copy things, because they could wind up on the Internet.

I mentioned the enhanced liability for third parties who provide tools and services that could help others to make copies of things. Internet service providers are being required to police and control their systems, and even turn over their customer information for prosecution.[46] Being liable for the infringing activities of others is creating a real chilling effect on freedom of expression. Device and equipment manufacturers are being held liable for infringing uses that happen down the road with their products. This has the effect [of forcing] device and equipment manufacturers to check with Hollywood lawyers to make sure that they're okay with the technology before they can engineer or build devices that can interoperate . . . the DVDs or the CDs that are put out by major studios. And so, that has a negative effect on innovation, if you have to check with lawyers before you can build technologies.

We're finding that software tools that are legitimate, or that are necessary for legitimate uses, are also being outlawed. Archiving, library tools, and providers of those are being sued because others could copy or access content. [For example,] Google has recently been sued by some

40. World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 11 Stat. 2860, 36 I.L.M. 65, *available at* http://www.wipo.int/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf.

41. Digital Millennium Copyright Act, 17 U.S.C. §§ 1201–1205 (2000).

42. EU Council Directive 2001/29/EC, 2001 O.J. (LL 167) 10.

43. IP Justice: Stop the FTAA Information Lockdown, Delete the IP Chapter of the FTAA Treaty, http://ipjustice.org/wp/campaigns/ftaa (last visited Sept. 27, 2006); Free Trade of the Americas, Third Draft Agreement, Nov. 21, 2003 [hereinafter FTAA], *available at* http://www.ftaa-alca.org/FTAADraft03/Index_e.asp.

44. MGM Studios, Inc. v. Grokster, Ltd., 125 S. Ct. 2764 (2005).

45. FTAA, *supra* note 43, at Ch. XX, art. 7, § B.2.c.

46. *See* Online Copyright Infringement Liability Limitation Act, 17 U.S.C. § 512 (2000).

publishers' organizations for providing information, [in the form of the complete text of] books on the Internet, even though users can't read the whole book: they can only search particular text strings of it.[47] 321 Studios was sued for distributing and making copying tools.[48] You've all heard [about] the U.S. Supreme Court's ruling this year in the *MGM v. Grokster* case that held [Grokster] liable for the illegal file-sharing activities of others.[49]

Database rights include ownership over facts, over information and ideas, and over scientific data. These types of rights are really brand-new; they're newly created. First, they only existed in the E.U., and only very recently with the E.U. Database Directive.[50] [In] the famous U.S. Supreme Court case, *Feist Publications v. Rural Telephone*, the U.S. Supreme Court ruled that these exclusive rights on facts are unconstitutional, that you can only copyright the arrangement or selection of facts, not the facts themselves.[51]

We're seeing greater severity in the enforcement of intellectual property rights. In particular, it concerns criminalizing non-commercial infringements, which means you can go to jail for making a copy of something, even in a non-commercial context where you don't have a financial motive, or if you don't benefit financially from making a copy.[52] The laws are being changed to allow you to go to jail anyway.

We're seeing new subpoena powers being granted to obtain personal information about users of systems based on mere allegations of infringement.[53] There isn't a need for a finding by a judge that there is a likelihood that infringement has occurred before the information must be turned over to content providers. This is a change in the traditional system that required some weighing of a judge to say [that] there's a likelihood that there might be some infringement, [and only then would someone need to turn user] information over.

We're seeing new powers being granted to destroy property and equipment that are used in infringement.[54] In some cases, there's no need for a private complaint to be filed before police can bring charges in an infringement case.

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47. Field v. Google Inc., 412 F. Supp. 2d 1106 (D. Nev. 2006). *See also* BBC News, Google Is Sued by Book Publishers, http://news.bbc.co.uk/2/hi/business/4358768.stm (last modified Oct. 19, 2005).

48. 321 Studios, v. MGM Studios, Inc., 307 F. Supp. 2d 1085 (N.D. Cal. 2004); Paramount Pictures Corp. v. 321 Studios, 69 U.S.P.Q. 2d 2023 (S.D.N.Y. 2004).

49. *MGM Studios*, 125 S. Ct. at 2782.

50. David Mirchin, *The European Database Directive Sets the Worldwide Agenda*, 39-1 NFA/S NEWSLETTER 7–12 (1997).

51. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

52. 17 U.S.C. §§ 501–513 (2000).

53. *Id.*

54. 17 U.S.C. § 509.

I mentioned the copyright term extensions. The GATT Round and the WTO [provide] the international standard on these issues.[55] The standard is fifty years after the life of the author for exclusive rights.[56] In the United States, as I mentioned, after 1998 we've got now seventy years after the life of the author generally.[57] There was a legal challenge to this by Larry Lessig out of Stanford.[58] Unfortunately, the Supreme Court denied that challenge and upheld the copyright term extension as constitutional, although the Court did question Congress's wisdom of continually extending the grant of protection.[59]

Again, I mentioned this whole new layer of broadcasters' rights that WIPO in particular is really pushing hard on.[60] This support would grant new transmission rights for broadcasters for information they neither create nor own. This is a new layer of rights that sits on top of existing rights. Artists and movie studios are ironically against this because it would require them to have to [obtain] permission from the broadcasters to use their own performances in other ways. We're talking about a fifty-year exclusive right to material passing over wires and satellites. And the United States' proposal at the WIPO for the Broadcaster Treaty is also to include Internet transmissions, to regulate what they call Web casting, in addition to traditional broadcasting.[61]

I'll move along here. So, what would be an appropriate balance to set for copyright and human rights in a digital environment for the information age? Well, I would argue that in this world, in today's world, communication rights are human rights. And how did it get there? Well, I think it's important that nations [have tried] to retain sovereignty over their domestic information policies. It's not appropriate for the United States to force other countries to adopt our laws. It's not appropriate for WIPO to encourage countries to adopt the laws that WIPO would like. It must be a true democratic process, where national sovereignty can be retained. We must retain a protection for intellectual comments. Remember that the public domain is important. We want to enrich that. It's a valuable resource that we all share together.

Artists are harmed the most by [limitations on] the public domain because they rely upon it more than anyone for education and

55. General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1197 [hereinafter GATT].

56. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter TRIPS Agreement].

57. Sonny Bono Copyright Term Extension Act, 17 U.S.C. § 303 (2000).

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

59. *Id.* at 199–201.

60. *World Intellectual Property Org., Standing Committee on Protection of the Rights of Broadcasting Organizations, Copyright and Related Issues, Second Session* (1999).

61. *See Copyright: United States v. WIPO's Development Agenda*, CORANTE, Mar. 25, 2005, http://copyfight.corante.com/archives/2005/03/25/united_states_v_wipos_development_agenda.php.

inspiration. I think the IP rules should promote, not inhibit, creativity. We have to remember that too much protection ends up choke-holding innovation, inhibiting the spread of knowledge in culture, and stifling artistic development.

Another important form of this would be promoting free and open-source software models as alternatives to proprietary systems. I'm just going to skip over some of these in the interest of time. I think it's important we recognize that IP rules should shrink, not increase, the knowledge gap. If we are moving into a pay-per-view society at a time when there's zero cost to disseminate knowledge, I think we're going in the wrong direction. We need to ensure that our private copying rights are retained. Remember that most copies are not infringements, although you will hear the copyright industries talking as if they were. And it's important that we have access to the tools that are necessary to engage in these private copying rights, if the rights are to have any meaning. Imagine if in the famous *Sony Betamax* case,[62] the Supreme Court would have said, "Yes, of course making home tapings is legal, but using VCRs is illegal."[63] It would be quite a discord, and that's basically what we're moving into now with these anti-circumvention laws, where in theory we still have these rights, but in practice we're not granted the tools that we need to actually effectuate them.

We need to retain protection for intellectual freedoms: freedom of thought, freedom of expression. They require access to ideas and to information. Freedom of scientific research: we need to retain our ability to reverse-engineer technologies. Remember that education rights are a big part of this. We have a right to learn, to teach ourselves how to do things. So, I want to argue that communication rights are human rights in an information society. Freedom of expression, freedom of the press, scientific research: our minds require knowledge to function and develop, just as our bodies need food and medicine. So, access to knowledge is key in an information society.

There are a couple of international instruments that give us a little bolstering of this, and one of the most important is the U.N. Declaration of Human Rights, Article 19, which says everyone has the right to freedom of opinion and expression.[64] This right includes freedom to seek, receive, and impart information and ideas through any medium, regardless of frontiers.[65] It doesn't say that we have our rights only in an analog environment, but instead also in a digital environment, regardless of frontiers and in any medium.

62. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).
63. *Id.*
64. Universal Declaration of Human Rights, *supra* note 8, at art. 19.
65. *Id.*

The International Covenant of Economic, Social and Cultural Rights also has a few articles that can bolster this claim.[66] Article 13 talks about the universal right to education.[67] I think the Internet is an important component to educating the world [today]. Article 15 is the universal right to benefit from scientific progress and applications, and to be able to take part in culture.[68] It states that the goal is a diffusion of science and culture.[69] It also talks about the need to respect the freedom indispensable for scientific research and creative activity.[70]

And so, all these things together, tie into a conclusion that in a digital environment and information age, communication rights are human rights.

With that, I will conclude.

PROFESSOR KIEFF: Thank you very much for a different important perspective on this complex issue.

What we'll do now is turn to a third perspective offered by Robert Sherwood, who is an author and a consultant with a legal background, and who does research and writing about intellectual property issues. He's done work focusing on IP issues in more than twenty developing countries and has served as a consultant to the World Bank, the USAID, and to a number of U.S. and U.K. corporations. A graduate of Harvard College and Harvard Law School, he is now working on a new initiative to research the judicial system performance in a number of developing countries. And he has a recent paper that he presented at the meeting of the International Society for New Institutional Economics in Barcelona, Spain this fall, that's now available on his Web site, http://www.kreative.net/ipbenefits.

So, if I may now turn to Robert Sherwood.

MR. SHERWOOD: Thank you, Scott. I've learned a lot from the two previous speakers this morning. Thank you very much. I'm going to shift to a different perspective. My presentation is based very much on the experience that I have had, which has been to have spent an awful lot of frequent flyer miles getting to a whole bunch of different countries, a lot of them in Latin America, but also in other parts of the world.

What I found is that throughout the world, in every country, there are individuals capable of creative and inventive activity. Some of that is indeed at a world-class level. And my favorite example comes from Nicaragua. I was there, I think, for the Inter-American Development Bank, and I happened to learn of the melon saver. The melon saver is an oversized golf tee with a couple of supplemental legs. A farmer there realized that melons grow on the ground on vines, and as they approach

66. International Covenant on Economic, Social and Cultural Rights, *supra* note 16, at 49.
67. *Id.* at art. 13.
68. *Id.* at art. 15.
69. *Id.*
70. *Id.*

ripeness, a lot of bacteria and vermin attack the melons from the soil. Well, the concept of the melon saver is simply that as the melons ripen, you pick them up and set them on this little melon saver stand. It's cheap plastic. The fellow got a patent in Nicaragua and in the United States, and because of the patent he was able to go to commercial production.

Another fellow on the mission with me in Nicaragua on that particular trip was a World Bank consultant in agriculture. He'd been all around the world for many, many years. And when I got back to the hotel that night, I told him of the melon saver. He was astonished. He said, "I wish I had thought of that." I haven't been back to know exactly what's happened subsequently, but I like the example because it shows the way human creativity and inventiveness can play an important part in advancing the economy, and presumably that farmer's a bit better off as well.

These inventive people are, I would assert, a national resource for these countries. And indeed today, when knowledge, as Robin has been pointing out very well, is becoming more and more of a driving force in economic development, these creative people are a tremendous resource for an awful lot of countries.

If you have some background in economics, you're aware of Robert Solow, who found that the injection of new technology into the American economy between, I think it was 1909 and 1949, accounted for something close to half of the economic growth over that period of time.[71] This puzzled the economists at first, but new technology has become accepted more widely as indeed one of this country's major economic boosters. This underscores the importance of intellectual property and leads to considering more deeply how more robust IP would benefit developing countries.

Intellectual property is very ancient. It's not something that the United States invented with the GATT Round.[72] I've come across stories about water jugs in the Middle East that go back many thousands of years. Some of the potters found ways to preserve water better and for a longer time by developing particular jugs that had long necks to them. The villages in the Middle East recognized the value to the total community of having such jugs, and they awarded the potters the right to place certain marks on the bottoms of their jugs so that others couldn't copy them. I make two points here. One is the insight that you ought to encourage creative and inventive people. And the reason for this first point is the second point: everyone benefits.

When I was in Islamabad a few years back, I asked to speak to some of the local business leaders, and that was a lot of fun. The President of the Chamber of Commerce there listened to me talk for a little while

71. *See* Robert M. Solow, *Technical Change and Aggregate Production Function*, 39 REV. ECON. & STAT. 312 (1957).

72. *See* GATT, *supra* note 55.

about intellectual property, then he interrupted and said, "Oh, I know all about intellectual property. My family is in the rug business. Our rugs are famous for their vivid blue dye. And currently, only I and one of my sons know the secret of acquiring the ingredients for this blue dye. It's also well known in this area that if anyone steals that secret, they will be killed." This Pakistani fellow had a keen understanding of the need to take all precautions reasonable under the circumstances for protecting his trade secret. Would that stronger legal protection for trade secrets were available to him.

Now I want to show a chart [of Table 1][73] that is meant to indicate that different things happen at different levels of protection. The chart shows a scale of 1 to 100, and the position of the eighteen countries on that scale indicates the degree of effectiveness of the protection of intellectual property in those countries.

I don't have time to go into the methodology by which I derived these numbers. Suffice to say that I spent a lot of time in each of these countries interviewing lawyers, business people, government officials, visiting the patent office, and so forth. This is on-the-ground research, rather than library research. There are other indices of intellectual property systems but as far as I know, they're all library research. This one differs from some of those precisely because I did spend time in these countries. And what's on the books doesn't necessarily reflect what happens in the marketplace. There's quite a difference.

Professor Edwin Mansfield did some work for the World Bank a few years back, and I appropriated his findings and cross-correlated them with mine here.[74] When a country has achieved a fairly high level of intellectual property protection, such as South Korea, you find that research and development is supported by the intellectual property system. Down at the level of Guatemala, Nicaragua, and some of those countries, intellectual property doesn't support much of anything. What you find characteristic of those economies is little more than sales and distribution.

There are several different things, then, that happen at the higher levels of protection, as in South Korea. First, investment tends to be durable. That is, there is very little salvage value to the type of installation that you build to conduct research and development, and so you don't throw one of those things up quickly. Whereas, if you're down at the Guatemala level, you're investing in a shed, so it's easy in and easy out. You've basically got a thatched roof over something and a lot of people sitting at tables sewing things together.

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73. *See* Tbl. 1, *infra*. The table comes from Robert M. Sherwood, *Intellectual Property Systems and Investment Stimulation: The Rating of Systems in Eighteen Developing Countries*, 37 IDEA 261, 355 (1997).

74. *See* Edwin Mansfield, *Intellectual Property Protection, Direct Investment, and Technology Transfer: Germany, Japan, and the United States*, IFC DISCUSSION PAPER NO. 27 (1995), *available at* http://www.indecopi.gob.pe/bvirtual/colec/emansfield.pdf.

Another consequence of different things happening at different levels of protection is that, in terms of public debate, at the lower levels, down in the lower ranges here, you have articulation only by voices that want to keep intellectual property at a very reduced level. The voices of those who would benefit from higher levels typically are not present or not well organized enough to be heard in the public debate.

From a human rights point of view, if you will, at the low levels employers do not want to train their people in anything much, other than the very rudimentary skills that they're using. At the higher protection levels, however, it becomes not only possible but also highly desirable to train your employees, and often companies in the upper ranges here provide a kind of postgraduate-level training. Having reached the present high level of protection in South Korea, firms there have found that they're able to attract back high-level scientific people who had gone to the United States or Europe to work. Research careers in lower-level countries are very stunted, whereas in the upper levels, they're attractive.

I've met a lot of university-age students who started at a university thinking they were going to become engineers, scientists, or chemists. But by the end of their first year, they've switched into other fields because they've found that there simply aren't any jobs for graduate engineers, scientists, and whatnot.

How do we know whether an intellectual property system has reached a level that's adequate enough to encourage inventive people? There are several different litmus tests here. One is the ability of start-up companies to attract private capital. Another is whether university science research results reach the marketplace, and still another is whether established firms do R&D.

I will list just a couple of case examples to illustrate a bit of this. The ability of new companies to attract private capital was illustrated for me in the early nineties by a Brazilian venture capital company. Its executives told me that they didn't get enough candidates coming in the door, but when they did come they wouldn't tell them what their technology was. They'd boast about the sales they expected and who their people were but wouldn't reveal their technology. And the venture capital company became frustrated. When I started talking with them, I said that's probably because the little companies are afraid you're going to steal their technology. There was no effective means under Brazil's intellectual property system to protect against that. And the venture capital firm thought about it for a while, and went to a Brazilian lawyer and said, "Can't we give a written promise not to steal?" And the Brazilian lawyer correctly said, "Yes, you can write such an instrument, but it won't be enforceable by the courts here." So, in part because of my meetings with them, this venture capital company shifted away from venture capital to merchant banking.

When I was growing up as a kid in a small town in western New York, one of my friends had a father, a Danish engineer. He worked for Worthington Pumps selling pumps to industry around the country and, in the course of that, discovered that a reciprocating pump that didn't exist was needed. And so he invented one. And because he got a patent on that, he was able to go to a bank in that little town and get some money to start a company. The bank had no trouble offering funds based on the patent as a security. The company never got very big, I think maybe $2 or $3 million in sales over ten years, and it employed fifteen or twenty people. It was a small business. But it was an increment to the national economy. And it's the kind of thing that just doesn't happen in countries with low levels of intellectual property protection.

In terms of university research results reaching the market place, I visited Costa Rica for the World Bank and decided I would visit the University of Costa Rica. It is quite a fine university with good science and so forth. I asked to see the technology office manager. He was just setting up the office. He said that he had surveyed the university campus and found about 600 science research projects that had some potential for inventions and had found thirty inventions that had immediate commercial potential. One was a molecule that looked promising in HIV suppression, and the other was the identification of a gene in tropical corn, which apparently was the host for a virulent pathogen. He then considered what to do to facilitate the commercialization of these inventions, or possible inventions, and concluded that under the patent law of Costa Rica, it didn't make any sense to ask the University for funds to obtain patents. And so instead, they sent the professor who had found the corn gene to Mexico, to Monterrey, to disclose everything he knew to a research unit there. In effect, they gave away the technology. And, in the other case, they gave the knowledge that they had of the HIV molecule to a Canadian research center in Toronto. In both cases, there were people in Costa Rica capable of developing those inventions for commercialization, but weak IP defeated those possibilities. So I can only wonder what that might mean for human rights in a broad sense. The loss in Costa Rica, I think, was quite considerable.

One more example from Brazil explores whether established firms do research or not. An automobile parts supplier licensed a new metal forging technology in about 1990. The owner of the company did what any good Brazilian business manager would do to protect newly acquired technology. He subdivided his forging line into five discrete units with separate teams of people. He told me he did this so that no one person would gain knowledge of the entire technology. This worked well to prevent its loss to a competitor, but it also meant the company was not able to apply the Japanese business techniques of total quality management, or TQM. The Japanese techniques gather all the employees together to discuss ways to improve the technology. This

would have acquainted many employees with the entire technology, making them candidates for hiring away by competitor companies.

So this technology remained frozen in time in Brazil, whereas the same technology had been licensed to other companies elsewhere in the world, and they had applied TQM to advance the technology. Ultimately, that Brazilian company went out of business, and so there was a loss to the Brazilian economy. And you can trace that back to weaknesses in intellectual property protection there.

Well, I had more examples, but I'm going to skip them.

A few years ago, a friend of mine, Carlos Alberto Primo Braga, who's now a senior official at the World Bank, and I would appear on panels regarding intellectual property. And he'd say, whether intellectual property helps or harms developing countries is an empirical question. It is like sex. You can talk about it, but until you experience it, you don't really know what it's like. I would speak next on the panel, and I would say intellectual property without a judicial system that works well is simply a fantasy. And since about eighty percent of the world has judicial systems that don't work very well, I have to say that, unfortunately, intellectual property hasn't been tried yet in most developing countries.

I want to take the last minute here to talk about judicial systems. A lot of World Bank missions go to developing countries and, in the backs of their minds, is the tacit assumption that the judicial system works. A lot of economic development theory also rests on the supposition that there is a judicial system in the background that works. When you go to a lot of the developing and transition countries, however, the population assumes the contrary: that there's a judicial system and it doesn't work. And so, they take matters into their own hands and operate in a manner that is really quite different from the way that the United States or the advanced European countries work. That is, they do their business through their social networks.

The new institutional economics has given us new eyeglasses that permit us to see social network transacting.[75] It's really a vast, sophisticated, and all-pervasive institution, and it is the way many countries function. Because people feel that they are successful in avoiding courts by dealing with their friends, they don't care about whether their judicial systems work well or not, except perhaps if their car is stolen.

Because people feel that they survive fairly well without the judicial system, they're not aware of the severe constraints imposed on economic

75. Robert M. Sherwood, Social Network Transacting Versus Judicial Systems: An Obstacle to Development?, http://www.kreative.net/ipbenefits/tucson/isnie2005/ISNIE2005.htm (last visited May 30, 2006).

development.[76] Judicial dysfunction imposes significant negatives in these developing and transition countries, and among the losses is support for intellectual property. And so, much of the current debate about intellectual property has an unreality to it. Until the judicial systems function a good deal better in these countries, we don't really have the possibility of effective intellectual property protection. . . . And, therefore, that natural resource of bright and inventive people is largely wasted.

PROFESSOR KIEFF: Excellent. Thank you very much. What I think makes sense for us to do now is to open up the conversation both to the audience and to the other panelists. And I think it's best to think of this as a conversation. You can ask questions to each other; you can make comments in addition to your own or in response to others. But let me begin by engaging the audience, if there are questions from the audience. We have a microphone. We're just going to ask that, when you get the mic, please give us your name and your affiliation so that we can track you down to get you to approve your comments for the record later. And of course, you have the option to strike your comments from the record after you reflect on them, or to change them if you want, as each of the speakers does. So, the same privilege for each of the audience members.

So, any comments or questions from the audience?

Yes. Let me just pass the mic back.

AUDIENCE PARTICIPANT: I'm George Curtis, and I am a member of the History Department at Hanover College. I have a question for all three, in a way. There's been a theme here: Does law drive the kind of rights that Mr. Sherwood talked about, or does technology drive the law? . . .

MR. SHERWOOD: I was an historian as an undergraduate, so there's a resonance to your question, and my mind goes in four or five different directions. Does law drive events and shape things, or do events shape the law? Both are at work, I think.

When I first started my project in Brazil to improve the intellectual property system there, Brazilians kept saying, "Oh, you've got to change the culture before you change the law." For a long time, I was baffled by that and thought that can't be right. But my experience in a lot of these countries is that laws are passed for different motivations, different energies that come to bear, and a lot of these laws don't have any traction. It's a phrase that I hear throughout Latin America. "Yeah, it's on the books but there's no traction." "It's ignored." Or "the congress or the ministry never got around to writing the regulations, and we can't

76. Robert M. Sherwood et al., Judicial Systems and Economic Performance, http://www.kreative.net/ipbenefits/jsep2005/jsep2005.htm (last visited May 31, 2006). For an abbreviated version, see Robert M. Sherwood et al., *Judicial Systems and Economic Performance*, 34 Q. REV. ECON. & FIN. 101 (1994).

enforce the law until we have some regulations." There are other excuses, but in any event there's just no traction.

One day, however, in São Paolo, the governor decided that seatbelts mattered. And so, he passed an ordinance, or the city council passed an ordinance saying, "Thou shalt wear your seatbelt while driving." And then [the governor] told the police to go out and impose fines on taxi drivers who hadn't insisted that their passengers put on their seatbelts. By noon that day, after several dozen arrests, the word spread like wildfire among the taxis. And, I remember that afternoon getting into a taxi and immediately the driver implored me to put on my seatbelt. And the culture changed rather rapidly, overnight.

But to give you more serious examples, . . . [students] are always asking me, well, if South Korea looks pretty good at [an IP protection rating of] 74 [on Table 1, *infra*], what about the U.S., the Japanese, the European intellectual property systems—how do you rate those? And I say, that would be an enormous job and I haven't done it, but just off the top of my head it's probably somewhere in the range of 75 to 90. And then I always make the point that no intellectual property system is going to get a 100 percent rating because the technology today is simply moving so fast. In a lot of cases, we don't even know what the questions are.

When you get into genomics, where new things are happening, the Brazilians who came up with the [first] genomic map [in] the world for the *Xylella fastidiosa*, which is a citrus canker, a plant pathogen, talked with me for a long time as they were completing the map.[77] They said, "What can we do with this now?," "Is there a commercial potential to this?," "What could Venter[78] do up in Washington once he had the human genome map?" We're hardly aware of the issues in some of these cases. It's as if the lawyers are sort of running as fast as they can to try to keep track and catch up with the technology as it emerges.

But there are many different ways of looking at that, and I don't know if I'm answering the question, but at least I hope I've pushed it forward a little bit.

PROFESSOR KIEFF: Other comments?

MS. GROSS: Yes, I really like that question, particularly as it relates to copyright. "How do law and technology play off each other?," which is what I would say they do. U.S. copyright law comes from the [English] copyright system, which ironically was created after the invention of the printing press because the king decided this is a dangerous new technology, this printing press; this is going to spread all kinds of seditious ideas, ideas that the king didn't want it to spread. So

77. *See Xylella fastidiosa* Genome Project, http://aeg.lbi.ic.unicamp.br/xf/ (last visited Sept. 10, 2006).

78. J. Craig Venter Institute Home Page, http://www.venterinstitute.org (last visited May 31, 2006).

he created what was called the Stationers' Copyright, which was given by the king to particular publishing companies in order to control the kinds of information that could be printed and that could spread.[79] So that's the origin of copyright in the [English] system.

Now, in 1710, that was changed by the Statute of Anne to make copyright more about creating an incentive for artists and benefiting the public.[80] That was the great transition from its . . . origin as a response to this frightening new technology, the printing press. And we needed some way to control the kinds of information that can be spread in society.

I think if you look at today, we're seeing very much the same thing. With digital technology and the Internet, we're seeing a lot of laws trying to catch up, if you will, trying to react, trying to do something about controlling the things that are different, the properties that are different, the ease of copy and the ease of distribution that the Internet and digital technology create.

I think the lessons of history in this respect are very educational. When piano rolls were first created in the U.S., the music publishers wanted to outlaw that technology. When radio was first created, music publishers again wanted to outlaw the technology. With MP3 players there was a famous case in 1999, *Diamond Rio*, trying to outlaw MP3 players.[81]

We all know the famous VCR case, *Sony Betamax*,[82] which I mentioned before. The movie studios said, "We can't possibly allow the American public to have access to these VCRs; my goodness, they're going to make entire copies of copyrighted movies and television programs without our permission. These are tools of piracy." . . . In fact, Jack Valenti, the President of the Motion Picture Association of America, stood before the U.S. Congress in his pleas to ask them to outlaw these technologies and said the VCR is to the American film industry what the Boston strangler is to the woman home alone.[83] They were frightened of these new technologies.

Well, unfortunately for Mr. Valenti, the courts and Congress disagreed with him. On one vote, the Supreme Court allowed us to have VCRs, and as a result, VCR tape rentals and sales turned out to be the most profitable segment of their industry. It's a good thing that they lost that case. But they didn't see that at first. The reaction is always to be frightened of new technologies, and to try to control it. But again, the

79. JAMES WESTFALL THOMPSON, THE MEDIEVAL LIBRARY 643 (1939).

80. An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, During the Times Therein Mentioned, 8 Anne, c. 19 (1709) (Eng.).

81. Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., 180 F.3d 1072 (9th Cir. 1999).

82. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

83. *See Jack Valenti*, WIKIPEDIA: THE FREE ENCYCLOPEDIA (May 31, 2006), http://en.wikipedia.org/wiki/Jack_Valenti.

lessons of history show that, with time, we can work these technologies into our system and find new ways—new business models—to profit from them, and we'll all be better off as a result.

MR. GARDNER: Yes, very briefly. Obviously, it works both ways. Specifically, and with regard to the pharmaceutical industry, which I've been focusing on, . . . it is the very availability of some of these products—specifically the ARBs for AIDS[84] and things like that—that in fact do create demand for greater access, equal access. So without that kind of technological progress, we wouldn't have half the pressures that we are in fact seeing . . . .

PROFESSOR KIEFF: Maybe a question for each of you, and then we'll go back to the audience. I'll ask the question in order and then go back and give you a chance to answer the question in order.

For John Gardner, part of the punch line in your paper, I take it, was that if there is a fundamental right here that's being harmed, we should not focus on the corporations or the IP owners as the ones doing the harm, but rather on the domestic national governments. And if that's a correct statement of at least one of the points of the paper, then I wanted to ask two questions.

First, how do you respond to people who say, "We're just not going to be effective in getting the local national governments to do a better job, so we're targeting the corporations and the property owners, because even if they are not the biggest part of the cause, they're part of the cause and at least we can tag those folks, so we're kind of going after them because they're a practical solution for us." That seems to be one question they would ask.

And then the other comment people may have, which I know may sound a little unfair, is to say, even if you are effective in getting the national governments to act, that's because you are being a global hegemon in making them act the way you want them to act, not the way they want to act.

How do you respond to those two questions?

MR. GARDNER: First of all, that was a correct statement, and the point of my paper. The treaties are very clear that the right pertains to governments.[85] And you do have some scholars and activists who are trying to [place] greater obligations on private actors, which would include companies. But we're not there yet as a statement of positive law.

With respect to the first question, I think the answer is severalfold. First, there have been a number of instances of the private sector trying to work with national governments. For instance, in the anti-retroviral

84. Internet Drug News.com, Angiotensin Receptor Blockers, http://www.coreynahman.com/angiotensinreceptorblockers_ARBS.html (last visited May 31, 2006).

85. *See, e.g.*, Universal Declaration of Human Rights, *supra* note 8.

area for AIDS, the price of anti-retroviral treatment has just come down dramatically in the last several years. Part of that is the increasing use of generics in the developing world. But even among [patent-protected] products, the price has come down quite significantly. Again, I think the danger, simply as a matter of economics, is that if governments try to [take] licenses, so that the companies cannot recoup the value of their investments and make a reasonable profit, much of which is just plowed back into research and development—innovation—could stop. And that obviously has a very high social cost as well.

We all have tremendous sympathy for the people who are suffering from these diseases in the developing world, but I guess the bottom line is [profits]. . . . It's a simple fact that you can't have corporate social responsibility if there's no corporation. There's a limit to how much governments can push before these companies and other actors will seek to exit that market.

Second, with respect to the issue about global measurements and things like that, I just don't see that really as being a factor right now. I think that where these pressures are coming from in the developing world is not companies [forcing] developing world governments . . . into buying particular products. The national health budgets are low. They're not as high as they should be, hence the pressure to try to seek alternative sources of revenue.

PROFESSOR KIEFF: Okay. We'll move on down. I'll ask a question to Robin Gross that I hope is complementary to her talk.

You talk about a number of potential bad results. The example you gave in answer to the earlier question was that, had Betamax been shut down, had the VCR been shut down, we would have had no VCR. To what extent do you really think it's true that when the decision is made by the court about whether an activity can continue or cannot continue, it actually says anything about whether that activity can continue or not continue? Doesn't it really say something about which of the two parties gets to make the decision about whether that activity continues? But it doesn't itself control whether the activity continues.

To give a clear example, in the old days, we presumably had a broad fair use exemption for copying software. And yet, there was a time when in the days of the old floppy disk, you would buy software and it would have an anti-copy device associated with it. And so, the law said you could copy, but the seller said you couldn't. And eventually, by the way, the customers stopped buying that software, and then the sellers said you could copy again.

So, I wonder whether the kind of statement by the court has the strong effect that you're attributing to it, or whether it only has the effect of allocating the decision-making or bargaining power between the two parties. And even in that case, for the software owner to make that choice doesn't mean the software owner gets to keep her choice because,

in fact, she abdicated her choice. She first used copy protection and realized that her customers became totally annoyed with the software. In fact, the software sellers found that they were bearing those costs because their tech support lines were being tied up with customers complaining that, "I bought a computer," or "I want to reinstall this," or "I want to make another copy." The right answer seemed to be shifting back and forth between consumer and producer, regardless of what the court was doing.

MS. GROSS: Well, the software example is a good one because it's just that when a lot of software was first introduced, it did come with these anti-copy technologies and turned out to be burdensome to the companies. Well, the difference between that and now are these anti-circumvention laws,[86] [making] it now illegal to actually try to bypass these anti-copy technologies. Even though it might have been difficult and burdensome in the olden days, you wouldn't be prosecuted for [circumvention].

But in today's world, under these anti-circumvention laws, if you bypass those anti-copying restrictions, you can be held liable, even if you only provide someone with information about the vulnerabilities of the technologies [and someone else] figures out how to make that copy. So there's sort of a difference between then and now. But I also think it's important to realize that it isn't stopping some people. There's a lot of young hackers, old hackers, white hat, black hat, you name it, and they're all taking apart these technologies, figuring out how they work, and making their copies of them. And so the law might now forbid that, and many, many people are frightened from doing that, but not everyone. Some people are still able to go ahead and bypass those restrictions.

So, I'm not sure that the law is really able to reach the real result that it's aiming for. There's this old legal maxim that the law should somehow be based in reality. And I think the problem we have now with these anti-circumvention laws is they don't really address the reality of the world, which is that people can use these technologies, and they will use these technologies, and the laws and the business models are going to be the ones that are going to have to evolve in the end. That's just my opinion.

PROFESSOR KIEFF: Okay, and the third question is for our third panelist, Robert Sherwood. You talked about the inventive people in developing countries as a natural resource of those countries. That's an attractive model, but what is needed in order to put this resource to use? And more particularly, or sharply, with the question of putting this native inventive talent to the best use, does that native inventive talent need access to education and other intellectual property resources in order to be fully realized? And, even if it doesn't need that perpetual

86. Digital Millenium Copyright Act, 17 U.S.C. § 1201 (1998).

access to the subject matter covered by IP rights, does it at least need it to prime the pump, so to speak?

MR. SHERWOOD: You've just repaired my remarks. I wanted to make that point clearer and didn't, in the rush of time. But thank you—very good question.

The natural resource that's there in every country is indeed a wasted resource unless intellectual property protection is up at the level of 70 or 75.[87] That is to say, until the system is capable of supporting research and development, it is ineffective. What that means, in fact, is that there has to be, in the country, a kind of generalized confidence that intellectual property works, makes sense and is present. And that's the kind of view, information, or just common sense that swirls around in the dorms, in the bars—wherever inventive people are getting together and talking.

It's after the ordinance changed in São Paolo that all the taxi drivers just knew that you'd better buckle up. So, it takes a lot to shift the mindset of the country, that sort of generalized attitude, so that people feel protected when they innovate. These are the people who are inventive but don't know a lot about the details of intellectual property, and they're very fuzzy about copyright or patents in other countries. But as I say, it's more of an attitude toward it.

Education is not necessarily a part of it. Often, inventors do better without formal education, so it's the impulse to think creatively.[88] It's the impulse to solve problems that's the critical thing. If you go into the street markets in a lot of the developing countries, you see incredible inventiveness. Apply that, redirect that to more serious solutions in the industrial and agricultural base, and you'd be putting a lot of energy into those economies, it seems to me. And you'd be giving people new encouragement. Otherwise, there is brain drain: the smarter ones just get up and leave.

So, I'd say it's more of an atmosphere that you need to create, but behind that there has to be an intellectual property system that, both on paper and in fact, is quite good, and behind that there has to be a judicial system that works.

MR. GARDNER: Can I just make one comment in the spirit of conversation? I'm not sure if you agree with this, but I'm rather struck by your concluding remarks [on] the need to focus and preserve natural sovereignty, which is obviously something I was talking about quite considerably as well.

Obviously, there are results in each case. We at Harvard would probably say the effect of [preserving natural sovereignty] is to make some of those countries that choose not to establish . . . a high level of intellectual property [lose] national wealth. But just going back on the

87. *See* Tbl. 1, *infra*.

88. *See generally* Robert M. Sherwood, Intellectual Property for Latin America: How Soon Will It Work?, http://www.kreative.net/ipbenefits/iplatam/default.htm (last visited May 31, 2006).

theoretical level, I think it shows that there really is still some currency in the United States for what we would regard as a traditional conception of international law: if states have sovereignty, that they concede that sovereignty through treaties. But this really does require some form of affirmative acts by states, and I just thought that was kind of an interesting perspective.

MS. GROSS: Well, I think that democracy only works, it's only legitimate, if you have the consent of the governed. That is how true democracy works. So if you've got a country where the people don't consent, don't believe, don't want a particular law, I think you've got some flawed democratic processes at play here.

MR. GARDNER: And that would surely apply to international law as well.

AUDIENCE PARTICIPANT: Mark Schultz. I'm a professor at Southern Illinois University Law School. My question is largely for Bob [Sherwood]. In light of your remarks and answers to some of the questions so far, I've been thinking about the effectiveness of the TRIPS approach.[89] For well over a decade now, we tied intellectual property protection to participation in the world trade system, hoping that by tying into this strange marriage, we could persuade developing countries to adopt stronger IP protection. And what we've often said is, first of all, this will benefit IP owners in developed countries because they'll get greater protection abroad, but we've also argued that it will also benefit the economies of developing countries that adopt greater IP protection.

I'm wondering about the efficacy of this, though, because if you don't have internal support for IP rights, you get a law perhaps, but you don't have an effective judicial system; you don't have real support; you don't have effective enforcement, as you've talked about, Bob. . . .

Do we have a chicken-and-egg problem? How do we get to the point where we get enough domestic support for effective IP rights? Is the TRIPS system the best way to impose these rights?

MR. SHERWOOD: That was a very useful question, Mark. Thank you. Permit me to now include some things I didn't have time to say before. On the chart on the screen here, you will see that in my system I rate the TRIPS agreement at a fifty-five, only about the middle of the chart.[90] And it gets this mediocre score largely because one of the articles says that a country doesn't have to devote more resources to a judicial system relative to intellectual property than it devotes to anything else. That's sort of a huge gap.

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89. *See generally* Robert M. Sherwood, *Agreement on Trade-Related Aspects of Intellectual Property Systems and Investment Stimulation: The Rating of Systems in Eighteen Developing Countries*, 37 IDEA 261 (1997) (discussing effectiveness of TRIPS Agreement in developing countries); TRIPS Agreement, *supra* note 56.

90. *See* Tbl. 1, *infra*.

But much beyond that, it just goes back to your question. . . . In my view, the TRIPS Agreement springing from the GATT Round, the Uruguay Round, was not a mistake; it was the only tool available. But you have to keep in mind that the objective there was to reduce trade friction, not enhance economic development. People negotiating didn't have economic development in mind. They were simply bargaining over a level of intellectual property that would facilitate trading, and that's a different animal, in my view. . . .

There were some companies that decided it would be good if the U.S. included intellectual property in [the GATT] agenda because it seemed that the trade agreements were the only game in the globe, if you will, that could be negotiated and have some effect. But again, it's a treaty; it's a negotiation between countries that wanted strong intellectual property, on the one hand, and countries that were strongly opposed, on the other hand. So it's one of those compromise outcomes and it seems to me that it's a long way from what's needed to really build a positive attitude [towards] intellectual property within the developing countries.

PROFESSOR KIEFF: Thank you very much. We are going to break now, so that we have time to get lunch and then come back for the next panel. Please join me in thanking each of the panelists very much for their interesting and thought-provoking views, both standing alone, and as they pertain to each other.

III. LIFE, LIBERTY, AND INTELLECTUAL PROPERTY
PRESENTED BY
THE FEDERALIST SOCIETY

PANELISTS:

Professor Tom W. Bell, Professor of Law, Chapman University Law School

Professor Adam Mossoff, Assistant Professor of Law, Michigan State University College of Law

Professor Mark Schultz, Professor of Law, Southern Illinois University School of Law *(moderator)*

PROFESSOR SCHULTZ: We'll be having a debate entitled "Life, Liberty and Intellectual Property" between Professor Adam Mossoff and Professor Tom Bell. I am Professor Mark Schultz from Southern Illinois University School of Law.

Property rights are important to Americans. If we needed any reminder of that fact, the popular outrage regarding the holding in *Kelo* is an excellent demonstration of the continuing political and

philosophical vitality of property in American public discourse.[91] It's thus no surprise that the issue of whether intellectual property is really property is of great rhetorical and philosophical significance in modern debates regarding intellectual property rights.

There is stark disagreement as to whether intellectual property is really property.[92] Advocates for strong intellectual property rights assert that intellectual property is no different form any other kind of property. For example, they liken unauthorized copying to shoplifting. Others assert that intellectual property is not like other kinds of property and is, in fact, better thought of as industrial policy. The participants in this debate often talk past one another, because they mean very different things when they discuss property rights.[93] One way to advance this debate may be to go back to first principles.

Today's debate will consider what the Founders meant by property and property rights and how these understandings apply to intellectual property. The Founders were steeped in the Lockean tradition, which saw life, liberty, and property as inseparably linked.[94] In the words of James Madison, "In its larger and juster meaning, [property] embraces every thing to which a man may attach a value and have a right . . . ."[95] "In [this] . . . sense," Madison said, "a man has a property in his opinions . . .[,] in the safety and liberty of his person . . .[,] in the free use of his faculties and free choice of the objects on which to employ them. . . . In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights."[96]

Madison's expansive view of property raises many interesting questions regarding intellectual property. Does intellectual property correspond to a property in the free use of one's faculties and free choice of the objects in which to employ them? Or is intellectual property instead, as some modern critics contend, an interference with that right? Are IP rights morally justified by the owner's right to life and liberty?

We are fortunate to have with us two scholars who have thought long and hard about the Lockean philosophy of property as applied to intellectual property. I could think of no two scholars better qualified to address the topic of today's debate. We will hear from Professor Tom Bell and Professor Adam Mossoff. Professors Bell and Mossoff have a

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91. *See* Kelo v. City of New London, 126 S. Ct. 326 (2005).

92. *See generally* David McGowan, *Copyright Nonconsequentialism,* 69 Missouri L. Rev. 1 (2004) (describing how the participants debates regarding intellectual property proceed from very different first principles).

93. *Id.*

94. For more information about Locke's principles on ownership, see JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, *in* TWO TREATISES OF GOVERNMENT 22–51, 283–302 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

95. James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, at 174, *in* 14 THE PAPERS OF JAMES MADISON 266 (R.A. Rutland & Thomas A. Mason, eds., 1983).

96. *Id*.

lot in common, and I hazard to say they agree about many things, except the topic of today's debate.

Adam Mossoff has a B.A. from the University of Michigan, a Masters in Philosophy from Columbia, and a J.D. from the University of Chicago Law School.[97] He clerked on the United States Court of Appeals for the Fifth Circuit for the Honorable Jacques Weiner. He has published a number of papers on property theory and patent law in such journals as the *University of Arizona Law Review*, *Hastings Law Journal*, and *San Diego Law Review*.[98]

Tom Bell has a bachelor's degree from the University of Kansas.[99] He has a Masters in Philosophy from the University of Southern California, as well as a J.D. from the University of Chicago.[100] He has published papers in the *Brooklyn Law Review*, the *Cincinnati Law Review*, the *Minnesota Law Review*, and the *University of Michigan Law Review*.[101] Previously he served at the Cato Institute as its director of telecommunications and technology studies. He now is on the faculty of the Chapman University School of Law.

Welcome Professor Bell and Professor Mossoff. We'll start the debate by hearing from each participant for ten minutes—first Professor Bell, then Professor Mossoff. Then they will have about three minutes each to respond to one another. Then we will open it up for dialogue with the audience. So I hand it now to Tom. Thank you.

PROFESSOR BELL: Thank you, Mark. Thank you very much. Thanks for inviting me here to debate Adam as well. I only recently had the pleasure of meeting Adam, and I said when I first met him—you heard about our backgrounds—I said, "Golly, you're just like me but with better credentials!" So he'll probably make hay of me today, but it's for a good cause.

Adam and I share more than our common backgrounds. We also both respect property rights a great deal. Perhaps more so than Adam, I need to emphasize that I come to you today as a friend of property rights. I moreover regard property rights as natural rights, not just the inventions of social engineers.

Nonetheless, I regard copyrights and patents as no more than necessary evils at best. Why? In part because I take a "small-C" conservative approach to the law. Courts and commentators agree in characterizing copyrights and patents not as natural property rights, but

97. Michigan State University College of Law, Adam Mossoff, http://www.law.msu.edu/faculty_staff/profile.php?prof=324 (last visited Jun. 1, 2006).

98. MSU Law Faculty: Publications, http://www.law.msu.edu/faculty_staff/publications.php?prof=324 (last visited Apr. 1, 2006).

99. Chapman University School of Law, Tom W. Bell, http://www.chapman.edu/law/faculty/bell.asp (last visited Jun. 1, 2006).

100. *Id.*

101. Chapman University School of Law, Professor Tom W. Bell, http://www.chapman.edu/law/administration/bellPub.asp (last visited Jun. 1, 2006).

rather as statutory creations designed to maximize public welfare.[102] Who am I to second guess?

More importantly, however, I regard copyrights and patents skeptically because I hold our natural and customary common law rights to tangible property in such high regard. To call copyrights and patents "property" risks diluting that term.[103] Under so lax a definition we might end up characterizing taxi cab medallions or welfare benefits as property rights, too. In that event, the meaning of "property," and of our property rights, would have precious little meaning at all. We would find our natural rights to our persons, realty, and chattels transgressed on all sides, whittled away to satisfy a host of unnatural, artificial, statutory rights.[104]

Allow me to explain. I'll briefly relate the consensus view of copyrights and patents, which regards them, again, as statutory remedies to a looming market failure. Time permitting, I'll then explain why friends of natural property rights should regard copyrights and patents as no better than necessary evils.

For the consensus view of copyrights and patents under U.S. law, you can start and finish with the plain language of the Constitution. Article 1, section 8, clause 8, grants Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[105]

The Constitution thus sets forth a utilitarian justification for copyright and patent protection—to promote the arts and sciences—with nary a mention of any natural right. The express demand that copyrights and patents exist only for limited times likewise demonstrates that the Founders did not have natural rights in mind. Natural rights face no such limits.

I could give you quote after quote after quote demonstrating how cases and commentators join in reading the U.S. Constitution to create no natural property rights to copyrights and patents but only strictly limited, socially useful statutory rights. Given the press of time, though, I'll offer you just one such quote.

The Supreme Court said, in *Mazer v. Stein*, "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual efforts by personal gain is the best way to advance public welfare through the

102. *See* Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 762–64 (2001).

103. *See* Tom W. Bell, *Indelicate Imbalancing in Copyright and Patent Law*, *in* COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE 1 (Adam Thierer & Wayne Crews, eds 2002).

104. *Id.*

105. U.S. CONST. art. I, § 8, cl. 8.

talents of authors and inventors in 'Science and useful Arts.'"[106] (The Supreme Court there quoted the U.S. Constitution.)

As the Court's reference to economic philosophy indicates, copyrights and patents differ crucially from tangible property.[107] They are nonrivalrous in consumption, as economists would say.[108] If I sing your copyrighted song or build your patented machine, I in no way interfere with your use and enjoyment of your creations. You can still sing your song. You can still build your machine.

In contrast, we cannot simultaneously use and enjoy the same real or chattel property. If I build on your land or eat your apple, you cannot do the same. Such tangible goods are rivalrous in consumption.[109] That crucial economic difference justifies giving copyrights and patents different legal treatment from tangible property. Property law limits access to tangible goods in order to protect them from a tragedy of the commons.[110] Without such rights, we would enjoy no wealth at all, really.

In contrast, no tragedy of the commons threatens copyrights or patents. Because they are nonrivalrous in consumption, we can all enjoy them simultaneously. As Thomas Jefferson put it, an idea is like a lighted taper.[111] We can pass its flame from candle to candle without diminishing its source, thereby illuminating the entire world.[112] That's a wonderful thing.

Insofar as the law limits free access to copyrights and patents, it imposes a dead weight social cost on all of us: the lost opportunity to enjoy the free and universal use of expressions and inventions.[113] Why then does the law impose such limits? Not in defense of natural rights; no natural rights to copyrights or patents exist. The law limits access to copyrights and patents to forestall a market failure.[114]

In addition to being nonrivalrous in consumption, copyrights and patents differ from tangible property in yet another crucial way. Authors and inventors find it relatively difficult—I won't say "impossible"—to prevent the unauthorized use of their creations.[115] They thus fear, quite reasonably, that they will not recoup their production costs without a statutory right to limit the unauthorized use of their expressions and

106. Mazer v. Stein, 347 U.S. 201, 219 n.19 (1954) (quoting U.S. CONST. art. I, § 8, cl. 8).

107. *Id.*

108. ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 107–08 (4th ed. 2004).

109. *Id.*

110. For more information on the tragedy of the commons, see Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

111. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* 6 WORKS OF THOMAS JEFFERSON, at 181–82 (Washington ed., 1857), *available at* http://press-pubs.uchicago.edu/founders/documents/a1_8_8s12.html (last visited Jun. 29, 2006).

112. *Id*.

113. *See* Bell, *supra* note 103.

114. *Id*.

115. *Id*.

inventions.[116] Hence the utilitarian justification for granting copyright and patent protection.[117]

I often tell my students to imagine a would-be author walking up the stairs of his garret to write the great American novel. In a world without copyright protection, the author gets halfway up the stairs and realizes: "Once I've sunk two years of my life into writing this novel, the first person who reads it is going to make a copy and I won't make enough money to recoup my years of labor." That's a good reason—though perhaps not an ultimately convincing one—to give the would-be novelist copyright protection. Similar arguments apply to patents.

Copyrights and patents, of course, share many features of property rights generally. Adam will no doubt highlight those similarities. But for reasons I've detailed, and for other reasons I might add, copyrights and patents differ crucially from our natural rights to person and property. Like a flat map of our spherical earth, property theory illustrates some truths about copyrights and patents even as, however, it imposes misleading distortions.

To better understand copyrights and patents, we need other metaphors. We need a whole grab bag of metaphors. I suggest, for instance, considering copyrights and patents as akin to welfare programs. Like the welfare system, the copyright and patent system redistributes rights from the public to particular beneficiaries—authors and inventors.[118] Like the welfare system, the copyright and patent system can lay fair claim to serving both equity and efficiency.[119]

But, as with welfare, we should not forget that copyrights and patents represent, at best, necessary evils. We should always aim at a world where recipients of the public's largesse learn to support themselves, relying not on special statutory protections, but rather on the same general rights to persons, property, and promises that the rest of us rely on to make our way through the world. We should, in other words, aim at ending copyrights and patents as we know them—a phrase recently applied to good effect in the struggle to reform public welfare.

It might not be entirely clear to you why I think copyrights and patents violate natural rights. Allow me to explain briefly. Copyrights and patents exist only at the expense of our natural rights to person and property. Copyrights limit your peaceable enjoyment of your printing press and throat, for example, restraining you from publishing or singing in echo of another. Patents likewise constrain how you use your laboratory or machine shop. Copyright rights and patent rights thus do

116. *Id.*
117. *Id.*
118. For a more detailed discussion expanding this concept, see Tom W. Bell, *Authors' Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 BROOKLYN L. REV. 229 (2003).
119. *Id.*

not come out of thin air. They exist only because the government has redistributed some of our natural rights to authors and inventors.[120]

Such transgressions do not necessarily render copyrights and patents per se invalid. I am not anti-copyright or anti-patent. We routinely suffer violations of our natural rights in order to enjoy the fruits of government.[121] Although it feels like simple theft, we endure taxation because it serves such important ends as national defense and public welfare.[122]

Perhaps the rights redistributed by copyright and patent law prevent a looming market failure. We certainly enjoy a great abundance of expressions and inventions in the United States, which is an effect, no doubt, of copyright and patent law. But let us not forget that we pay a price for those boons. Let us not forget that once no longer necessary, a necessary evil becomes, simply, an evil.

Thank you.

PROFESSOR MOSSOFF: Thank you to Mark and to the Federalist Society for hosting this fantastic debate. I'm looking forward to this exchange of ideas. Now I shall illustrate the exact first principles Mark talked about in introducing us.

I'll begin by asking a question—although it will largely be a rhetorical question, so I will not be expecting an answer from the audience. What is property? We have to first establish a proper understanding of this concept before we can assess whether *intellectual* property belongs within a category that we identify as property.

It's important to ask this question, because today, in the twenty-first century, we have a very different conception of property than people had in the eighteenth or nineteenth centuries, or even earlier than that.[123] Today, property represents simply the right to exclude. As the Supreme Court said in *Kaiser Aetna v. United States*,[124] the right to exclude is "the most essential stick[] in the bundle of rights" that we call "property."[125] Thus, for most legal scholars and jurists, property is simply the right to exclude other people from your goods.[126]

This conception of property derives from the work of the legal realists at the turn of the last century; they redefined *property* as a set of

120. Tom W. Bell, *Authors' Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 BROOKLYN L. REV. 229 (2003).

121. *Id.*

122. *Id.*

123. *See generally* Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV 371 (2003).

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

125. *Id.* at 176.

126. *See, e.g.*, College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 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, 730 (1998) ("[T]he right to exclude others is more than just 'one of the most essential' constituents of property—it is the *sine qua non*.").

"social relations."[127] Since all legal rights are predicated on relationships between people, what differentiates property as a legal right from other legal rights, according to this modern theory, is that property is necessarily *exclusive* against the world.[128]

This immediately creates a problem for classifying intellectual property as "property," because there is no natural exclusion for intellectual property in the real world. As Tom rightly points out, intellectual property, in the economists' terms, is nonrivalrous. Thus, exclusion for intellectual property is created solely by legislative fiat.[129] It's merely a social artifact, which, in our post-legal realist world today, causes us to think of intellectual property as simply a regulatory regime in which we balance different duties and freedoms in the same way that we balance similar entitlements in the other economic regulations governing our behavior.[130]

This is the dominant sense of property as it is understood today, both with respect to tangible property and intellectual property. Well, you have to set that aside if you're going to understand what potentially constitutes a natural rights justification for property. You have to go to an earlier time, when thinking about "property" was very different.

So, to quote from one of my favorite pieces of intellectual property, at least before it was repeatedly modified and destroyed by its creator, I have to take you to a galaxy far, far away where people did not think of property simply as a contingent set of social relations founded on only the right to exclude others; rather, property was defined in more substantive terms. In this earlier era, property referred to the rights to acquire, create, use, and dispose of things in the world, and the law secured these substantive rights of acquisition, use, and disposal by making them exclusive.[131]

This is the classic natural rights formulation of property: property is the exclusive rights of acquisition, use, and disposal.[132] Notably, exclusion

127. *See* Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 361–63 (1954). *See also* RESTATEMENT (FIRST) OF PROPERTY ch. 1, introductory cmt. (1936) (noting that "[t]he word 'property' is used in this Restatement to denote legal relations between persons with respect to a thing"); Wallace Hamilton, *Property*, 11 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 528 (1937) (defining "property" as "a euphonious collection of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth").

128. *See* Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L. J. 357, 374 (2001) (noting that securing "property rights" means protecting "rights that give one person (the owner) the ability to exclude all other claimants to the resource").

129. *See, e.g.*, 35 U.S.C. § 154 (stating that every patent provides a patentee with "the right to exclude others from making, using, offering for sale, or selling the invention").

130. *See* Shubha Ghosh, *Patents and the Regulatory State: Rethinking the Patent Bargain Metaphor After* Eldred, 19 BERKELEY TECH. L.J. 1315, 1317 (2004) (noting that the "move towards treating patent law as a system of regulation parallels the evolution of legal thinking in other areas").

131. *See generally* Mossoff, *supra* note 123, at 393–403 (discussing the right to exclude as a "formal" right that has meaning only by reference to more fundamental "substantive" rights of acquisition, use and disposal).

132. *See* Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (1795) (Patterson, J.) ("[T]he right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and

is merely an *adjective* in this definition. It's a formal right that's understood only by reference to pre-existing substantive rights of creation or acquisition, use, and disposal.

Why did this make sense to these earlier thinkers and jurists? Because they were working in a historical, social, and political context defined by natural rights philosophy.[133] We mostly understand natural rights philosophy today in terms of John Locke's political theory,[134] but Locke was building on the earlier work of Hugo Grotius and Samuel Pufendorf, who first set forth the now classic natural rights framework of life, liberty, and property.[135]

It is important to first understand this framework of life, liberty, and property in order to appreciate how they viewed property, because they considered these three rights not only as logically integrated, but also as temporally related to each other. To begin, you start with the right to life. If you have the right to life, the argument went, then this means you are justified in acting to support that life; in other words, your right to life has a logical consequent—the right to liberty. Ultimately, in taking the actions necessary to support your life, in exercising your right to liberty, you must create the things that support and maintain your life, i.e., you must create property. Therefore, according to seventeenth-century natural rights philosophy, a right to property follows logically and temporally from the rights to life and liberty.[136]

Unfortunately, I don't have time to go into details, but that's a broad, superficial summary of the traditional, natural rights justification for how property derived from liberty and life. It's interesting to note how this justificatory framework is inherent in the very structure of the *Second Treatise*, in which Locke does not even discuss property until Chapter Five. The reason why property appears so late in the game, despite its obvious important to Locke, is clear: Locke cannot talk about property until he has first established the natural law obligation of maintaining one's life, which creates the right to life. This then justifies the action necessary to maintain one's life (the right to liberty) and the property created by these actions. Of course, this leads to conflicts in the state of nature, which ultimately leads to the creation of civil society.

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unalienable rights of man."); McKeon v. Bisbee, 9 Cal. 137, 142 (Cal. 1858) ("Property is the exclusive right of possessing, enjoying, and disposing of a thing."); Eaton v. Boston C. & M. R.R., 51 N.H. 504, 511 (N.H. 1872) ("Property is the right of any person to possess, use, enjoy, and dispose of a thing.").

133. *See* Mossoff, *supra* note 123, at 378, 404–05.

134. *See, e.g.*, Richard A. Epstein, *No New Property*, 56 BROOKLYN L. REV. 747, 750 (1990) (stating that we are the "inheritors of the Lockean tradition").

135. *See* SAMUEL PUFENDORF, ON THE LAW OF NATURE AND NATIONS (C.H. Oldfather & W.A. Oldfather trans., 1934) (1672); HUGO GROTIUS, ON THE LAW OF WAR AND PEACE (Francis W. Kelsey trans., Legal Classics Library 1984) (1625). *See also* Mossoff, *supra* note 123, at 379 (noting that it is in Grotius's work that we "find the first exposition on what is now considered the 'traditional' triad of political rights—the rights to life, liberty and property").

136. *See* Locke, *supra* note 94, at 323 (explaining that a person who acts to "preserve his Property" acts to preserve "his Life, Liberty and Estate"). *See also* Mossoff, *supra* note 123, at 377–403 (discussing same).

And the purpose of civil society? The protection of life, liberty, and property.[137]

When one looks closer at Chapter Five of the *Second Treatise*, this justificatory framework is further revealed in how Locke illustrates his now famous "mixing labor" metaphor for creating property.[138] All of his examples constitute the types of productive activities necessary for one to live: making clothes, turning deer into steaks, building houses, and, perhaps most importantly, the production of beer and wine, which certainly do not occur naturally.[139] All of these things have to be *created* by humans. This is why Locke notes that 99 percent of the value of property comes from *labor*,[140] because for Locke this term refers to the transformative activity of creating the things necessary to use in the maintenance of one's life.

It's very interesting that Locke actually foresaw the vast cattle ranches in the American Midwest.[141] In the *Second Treatise*, he references the fact that there's all this land in America that's not being used. If people enclosed the land and then recognized the property interests that followed from these actions, he writes, they then could raise cattle, and this could feed the world.[142] Historically, it's interesting to note that that's actually what occurs approximately 150–200 years after the publication of the *Second Treatise*.

Obviously the traditional natural rights analysis of property was applied only in the context of *tangible* things. Locke talks about steaks, food, clothing, and land—tangible property. But this framework also recognizes and provides a justification for intellectual property. It recognizes intellectual property as created values, something that became much more important one hundred years after Locke wrote, when the industrial revolution was getting started at the end of the eighteenth century. As Mark quoted James Madison in his introduction: property has a "larger and juster meaning, [in which] it embraces everything to which a man may attach a value and have a right."[143] The framework set forth by Locke and the earlier natural rights philosophers underlies this seemingly simple statement.

Moreover, the natural rights justification for property was explicitly connected to intellectual property. New Hampshire, Rhode Island, and Massachusetts all passed copyrights and patents statutes in the early 1780s that stated that copyrights should be protected because "[t]here

137. *Id.* at 350 (explaining that people enter into civil society "for the mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general Name, *Property*").

138. *Id.* at 287.

139. *Id.* at 286–91, 294–300. *See also* Adam Mossoff, *Locke's Labor Lost*, 9 U. CHI. L. SCH. ROUNDTABLE 155 (2002) (discussing this feature of Locke's justification for property).

140. Locke, *supra* note 94, at 296.

141. *Id.* at 301.

142. *Id.*

143. Madison, *supra* note 95.

being no property more peculiarly a man's own than that which is produced by the labor of his mind."[144] In introducing a patent bill in the House of Representatives in 1824, Daniel Webster declared:

> He need not argue that the right of the inventor is a high property; it is the fruit of his mind—it belongs to him more than any other property. He does not inherit it. He takes it by no man's gift. It peculiarly belongs to him, and he ought to be protected in the enjoyment of it.[145]

It's notable that Webster's interlocutors in the legislative debate on his proposed bill argued with him on grounds other than this claim to the property status of patents. Specifically, Representative Buchanan went out of his way to state his agreement in principle with Webster that Congress should protect the just rights of patentees by securing "the property which an inventor has in that which is the product of his own genius."[146]

I could cite numerous other examples from the nineteenth century that the creation of values in intellectual property represented property interests. As such, the reasoning went, the government should recognize these property rights by making their use and disposal exclusive, securing to the creator of intellectual property the fruits (profits) of their labors.[147] This is why, for instance, you see the phrase "intellectual property" arise in mid-nineteenth century. It's first used in the early 1840s in a patent decision by Justice Woodbury, who states that the law should "protect intellectual property, the labors of the mind, . . . [which is] as much the fruit of his honest industry, as the wheat he cultivates, or the flocks he rears."[148] Similarly, in 1883, the Paris Convention starts referring to intellectual property as "industrial property."[149]

Of course, this was not the only view of intellectual property. Jefferson and others did view patents and copyrights as monopolies, or at least as regulatory regimes that ran counter to our natural and customary common-law rights.[150] The reason why some of them viewed intellectual property rights in this way is because the history of these legal entitlements is undeniably rooted in state monopoly grants.[151] In fact, I have written on the evolution of patents from royal privileges granted to

144. COPYRIGHT ENACTMENTS OF THE UNITED STATES, 1783–1906, at 4, 8–9 (Thorvald Solberg ed., rev. 2d ed. 1906) (reprinting 1783 copyright statutes).

145. 41 ANNALS OF CONG. 934 (1824).

146. *Id.* at 936.

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

148. *See* Davoll v. Brown, 7 F. Cas. 197, 199 (C.C.D. Mass. 1845) (No. 3662).

149. Paris Convention for the Protection of Industrial Property, art. 13(2)(a)(ii), Mar. 20, 1883, *available at* http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html.

150. *See* Letter from Thomas Jefferson to Isaac McPherson, *supra* note 111, at 296; Bloomer v. McQuewan, 55 U.S. (14 How.) 539, 549 (1852) (Taney, C.J.).

151. *See* WILLIAM BLACKSTONE, 2 COMMENTARIES *1–115.

inventors or importers of new trades in England.[152] So Jefferson and the other politicians and jurists who viewed these rights as monopoly grants were simply recognizing these entitlements in the context of their historical status. But that does not mean that natural rights philosophy did not recognize and justify intellectual property as a property right deserving of protection along with tangible property rights in civil society.

Thank you.

PROFESSOR SCHULTZ: All right. Tom will have three minutes.

PROFESSOR BELL: Well, Adam, if we were talking past each other up to this point, we're going to get to bang heads now.

PROFESSOR MOSSOFF: Yes.

PROFESSOR BELL: I have three points. I'll address them quickly. First, let me address this argument: "Because rhetoric linking copyrights and patents to natural rights sometimes surfaced in the Founding Era, in common usage, in the writings of the period, and in the state legislative acts, these sources should somehow inform our understanding of the Founders' views on copyrights." I agree completely with that claim.

But *how* should that claim inform our understanding of the Founders' views of copyrights and patents? By way of *expressio unius*. The Founders must have known about the attempt to justify copyrights and patents as natural rights. They thus rejected that theory by declining to reference it when they wrote the Constitution.

We always start with the plain text. There's nothing but utilitarianism in the Constitution's copyright and patent clause.[153] If we go beyond that plain text, we have to conclude that the Founders considered, declined to say anything about, and so impliedly rejected a natural rights justification of copyrights and patents.

Secondly, although Adam rightly focuses on the arguments of Locke and Grotius and Pufendorf—he's written some wonderful work, from which I've learned a lot, and I suggest you all read it—there remain other arguments for natural rights. We should go beyond mere analytical explanations of natural rights; we should also invoke Hayek's spontaneous order approach to explaining natural rights.[154]

Hayek says that natural rights are natural to a society[155] in that they help its members survive and thrive peaceably together. Under that approach, copyrights and patents probably don't qualify as natural rights. If you look at a wide variety of traditional and customary societies, you

152. Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550–1800*, 52 HASTINGS L.J. 1255, 1259–60 (2001).

153. Tom W. Bell, *Indelicate Imbalancing in Copyright and Patent Law*, *in* COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE 8 (Adam Theirer & Wayne Crews, eds., 2002).

154. *See generally* FRIEDRICH HAYEK, RULES AND ORDER (1973).

155. *Id.*

will see that they've managed to do quite well without copyrights and patents. What they required and did have were rights to tangible property.

Another approach to natural rights—another justification—is they are those rights that we can enjoy in a state of nature. They are those rights that we bring to the bargaining table when we form the social compact. Copyrights and patents again fail to qualify. Our rights to tangible property—our rights to our persons, our chattel, and real property—we can defend in a state of nature. We can defend them with force of arms or even cooperative arrangements between our neighbors. You just can't protect copyrights and patents the same way.

Now to my third point: Even on Adam's own approach to natural rights, which I salute, copyrights and patents do not qualify as property rights. I now agree with Adam—on this count, he's convinced me—that when we justify property rights should start not with the power to exclude but rather with the power to use. Use is the most important thing with regards to property rights. Adam in his writings says that exclusion is necessary but not sufficient in defining property rights, and at any rate it's sort of ancillary or secondary to use. I agree.

But as I've noted, copyrights and patents are nonrivalrous in consumption. If you come up with a song, and I hear you sing it, I in no way prevent you from using your song if I walk away humming it. A similar argument applies to patents.

Adam has a counterargument. He can say, "I may get to still *sing* my song, but I don't get to make a lot of money with it." To that, I'd reply, "You get to make *some* money. There are business models that allow you to make money off of your expressions and inventions without the use of intellectual property."

Granted, Adam might not make as much money off his song as he'd like to. But guess what? I don't get to make as much money with my gun as I'd like to—unless I get to use it to rob people. So does my property right in my gun include the right to use it to rob others? No. Why not? Because those rights are not compatible. Your rights to your person and property cannot coexist with my supposed right to use my gun threateningly. Ditto copyrights and patents.

Copyright and patents transgress natural, preexisting, customary, common law rights to tangible property. Perhaps we can excuse that violation. We cannot do so by invoking natural rights, however. Rather, we can excuse copyrights and patents only under the same sort of argument that excuse taxation.

Thank you.

PROFESSOR MOSSOFF: I get three minutes?

PROFESSOR SCHULTZ: Yes, you do.

PROFESSOR MOSSOFF: All right. This is the part that I really enjoy. The interim remarks are just to get to the direct exchange of

ideas. It's great that Tom refers to all of these usages of labor justifications of intellectual property as rhetoric, because that is the common way that people refer to the omnipresence of natural rights discourse in the historical record. That was just judicial rhetoric, the argument goes. When the courts and legislators got down to business and began deciding disputes, they were actually engaging in utilitarian balancing of the public domain versus the work of the inventor.

But this claim is predicated upon an improper understanding of natural rights philosophy and how it defines the rights secured in civil society. I don't claim, and no one who advances the traditional Lockean labor justification for intellectual property claims, that intellectual property is a natural right, meaning it's a right that precedes the creation of civil society.

But the majority of our rights in civil society are not natural rights in that sense. The only natural rights that you have are rights to life, liberty, and immediate tangible property in the state of nature. After you enter into a civil society, natural rights philosophy actually has a very sophisticated understanding of what were called civil rights or "privileges." These were rights secured only after the creation of civil society, but rights that nonetheless were justifiable because they were necessary and logical requirements of the creation of civil society in the first place, such as the right to jury trial, the right to vote, rights of contract and others. In the historical record, these are often referred to as *privileges* or *civil rights* in the sense that they were not rights that people had pre-civil society. They couldn't be. You don't have juries in a state of nature, because there's no civil government to hold trials. But the right to a jury trial is nonetheless a necessary right.

In the nineteenth century, patents, copyrights and other intellectual property rights were viewed in a very similar sense. They weren't natural rights because of what economists would now call their nonrivalrousness, and thus they could not be enforced in the state of nature, but nonetheless they were considered justified and necessary to secure once we entered into civil society. Where you get the strongest statements on this view of patents in the nineteenth century are the cases applying the Takings Clause[156] to patents.[157] In all of these cases, the courts adopted a very strong natural rights labor-based justification for patents as property. In an 1878 takings case, *McKeever v. U.S.*, the court declared that patents are "property in the mind-work of the inventor"[158] and explicitly distinguished American patent law from the English patent practice on several grounds. For instance, in distinguishing American patent law from English practice (where patents were royal privileges),

156. U.S. CONST. amend V.

157. *See* Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents under the Takings Clause*, 87 BOSTON UNIV. L. REV. (forthcoming 2007).

158. McKeever v. United States (McKeever's Case), 14 Ct. Cl. 396, 417–18 (1878).

the *McKeever* court noted that the word "patent" wasn't even put into the Constitution.[159] The Constitution mentions "exclusive Right,"[160] which fits with the natural rights understanding of what is secured to an inventor or an author after the creation of civil society: the exclusive right to control the unauthorized uses of their creations.

Moreover, courts recognized that the protection of patents by statute didn't necessarily undermine this argument. In another takings case in 1879, *Campbell v. James*, the court explicitly acknowledged the argument that patents are secured by statute and are not common-law or natural rights.[161] The court responded: "[The patent] was granted by express law of congress, pursuant to the constitution, without which it could not exist. But, all property is upheld by law, either expressly or impliedly enacted or adopted, all of which is the law of the land, the same as the statutes upholding patents are. This property, like all other private property recognized by law, is exempt from being taken for public use without just compensation" under the Fifth Amendment of the Constitution.[162]

So in this sense arguing that patents are statutory rights and flow simply out of or are created by the civil compact does not undermine, necessarily, the natural rights justification for patents or copyrights as property rights.

PROFESSOR SCHULTZ: Thank you. I will take questions from the audience now. Do we have any questions from the audience? Well, please, if you do, please identify yourself.

I'll ask some questions of our participants. Tom, you quote the letter from Thomas Jefferson to Isaac McPherson,[163] so I will ask the question that Adam asked rhetorically in the title of one of his papers: who cares what Thomas Jefferson thinks about patents? He didn't participate in the drafting of the Constitution. I'll let Adam make his own argument, but I think perhaps by the time Jefferson wrote that letter to McPherson some of his ideas had departed from his earlier thinking. This was not the Thomas Jefferson who drafted the Declaration. His ideas had been heavily influenced by the French Revolution at that point. Should we really focus on Jefferson?

PROFESSOR BELL: I cite Jefferson in that instance to illustrate—regardless of what you think of the substance of his views, he was a skilled writer—the notion of nonrivalry in consumption. However, because you brought up Jefferson, I will cite some correspondence

159. *Id.* at 420.

160. U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

161. Campell v. James, 4 F. Cas. 1168, 1172 (C.C.S.D.N.Y. 1879) (No. 2361), *rev'd on other grounds*, 104 U.S. 356 (1882).

162. *Id.*

163. Letter from Thomas Jefferson to Isaac McPherson, *supra* note 111, at 333–35.

between Jefferson and Madison that I think is very illustrative, not only about what Jefferson thought about copyrights and patents, but more importantly what Madison thought about copyrights and patents.

Jefferson writes to Madison from France concerning the Constitution saying, in effect, "I'm a little worried about the monopolies you've put in there."[164] Jefferson says the benefit of even limited monopolies is too doubtful to be opposed to that of their general suppression.[165] He suggests that Madison ought to put something in the Bill of Rights preventing monopolies.

When Madison writes back, he speaks solely in terms of utilitarianism.[166] He's writing to *Jefferson* and he doesn't say anything about natural rights![167] If you're trying to convince Jefferson about the benefits of copyrights and patents, are you going to skip saying anything about natural rights? Not if you think you've got a good argument.

Just to take one quote from Madison's letter, he says, "Monopolies are sacrifices of the many to the few."[168] Madison goes on to evince skepticism that it's even a good deal, on balance, for the many.[169] But he reassures Jefferson that things will probably work out all right.[170] I think that shows that Madison did not regard copyrights and patents as natural rights.

PROFESSOR SCHULTZ: Adam, do you have a response?

PROFESSOR MOSSOFF: It's interesting, the letter that Tom just quoted from. I don't deny it exists. It was published posthumously after Madison died, which is very interesting because these letters typically were shared and publicized. Jefferson's letter to Isaac McPherson was publicized quite widely at the time. It was known, even though the Supreme Court didn't discover it until 1966 when it issued its decision in *Graham v. John Deere*,[171] but Madison wouldn't argue a natural rights justification for inventions to Jefferson because he was responding to Jefferson's point in which Jefferson had already made it clear that he thought [inventions] were monopolies.[172]

So arguing natural rights with Thomas Jefferson wouldn't be addressing the point that Jefferson had made initially in his letter to Madison about his concern about these monopolies. If Madison is going to convince Jefferson and talk to Jefferson, he's going to do so in his language and try to convince him on his terms, rather than try to move

164. Letter from Thomas Jefferson to James Madison (July 31, 1788), *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch14s46.html.

165. *Id.*

166. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch14s47.html.

167. *Id.*

168. *Id.*

169. *See id.*

170. *See id.*

171. Graham v. John Deere Co., 383 U.S. 1, 8–9 (1966).

172. Letter from James Madison to Thomas Jefferson, *supra* note 166.

him completely off of the monopoly model, which is what Jefferson was working on at that time, [and] which Jefferson had already evidenced in his writings and in his thinking on the subject.

Generally, I think Tom raises a really good point, too, about the fact that these are different rights. Writings and inventions are not the same thing as land or tangible things. That's certainly right. That has to be acknowledged and recognized. But I believe that it was recognized by the courts and legislatures at the time, because they already recognized that there were differences between even tangible resources.

They created a whole different set of rights for water, which is a nonrivalrous resource in a certain sense. They made it rivalrous by creating a regime which stated you can use water here, but you can't use water there, or the first use of water creates presumptions against later uses of water. In a sense that's exactly what they're doing with intellectual property. They're creating, through our legal regime, a way that people can define property rights in inventions and in written works.

The same thing happened with wild animals. The courts adopted different rules for recognizing rights in animals,[173] although those are rivalrous resources, than they did for land.[174] It was recognized at that time that different subject-matter property claims required different rules.

Therefore, we shouldn't be surprised that they had different rules for copyrights and patents than they had from land than they had from animals than they had from water.

PROFESSOR BELL: Do I get to reply to that?

PROFESSOR SCHULTZ: I think Scott has a question.

AUDIENCE MEMBER: I'm Scott Kieff. I'm an academic, too. I'm not a master of philosophy, nor I guess am I master of anything, so these are totally naïve questions.

Tom, you made a big deal about the rivalrousness and lack of limits associated with property and intellectual property, or real estate and ideas, just to delete the word property from the discussion, because I guess it would be assuming too much to use the word property. I have a hard time understanding in what way those things matter. Those are differences. Sure, I recognize them. I just don't understand why they matter to the analysis. If anything, they seem to matter to me in opposite ways than they seem to matter to you.

So it seems to me that the rest of the world's use of Blackacre would interfere with the owner's use of Blackacre. Presumably there's Whiteacre, Greenacre, and other things. But presumably those are

173. *Compare* Ghen v. Rich, 8 F. 159 (D. Mass. 1881) (applying non-capture-based business custom for claiming property in a whale) *with* Pierson v. Post, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805) (applying capture rule for claiming property in wild animals).

174. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (applying first possession doctrine as basis for acquiring title to land).

limited by the surface area of the earth. There's only that surface area available to create real estate—again to not use the word property.

But unless you think we're really, really smart, there's presumably an unlimited set of ideas. So, sure you can't sing my song if I have a copyright on it without my permission. But you can sing an infinite set of other songs. Your [reduction in] freedom, it seems to me, by a property right in an idea that I own is less than your [reduction in] freedom in a property right in land that I own. But again, you seem to be making the opposite conclusion, which was somehow the freedom limitations cut the other way.

PROFESSOR BELL: I think, Scott, you're raising a different point. I should emphasize that, although I may not have explained it very well, the comments with regards to the policy behind copyrights and patents and the references to non-excludability are quite conventional. There's nothing controversial there. You can ask any economist and most legal commentators who study this, and they'll say, yes, that's why we treat copyrights and patents the way we do: because they are nonrivalrous in consumption so they're wonderful to have around. But people have problems producing them, bearing the cost. So we give this limited statutory monopoly to encourage the creation of these wonderful, wonderful things.[175]

You're raising a different point. Actually, I expect Adam to pipe up here because we're talking about whether or not you're leaving enough and as good in kind. That is an interesting feature of intellectual property, although I should note that it's premised on how broadly you define the claim. If you get a particularly broad patent, say—think of Alexander Bell's first patent on the telephone, extraordinarily broad; or the one-click patent to use a more recent example—you have not actually left a lot of terrain for other people to grab. If you have a monopoly on one-click shopping, you have grabbed an enormous amount of this supposed realm of ideas. It's not clear to me that you are leaving enough room for other competitors. It's true, competitors could use other types of shopping. But it's also clear that doing so would put them at a distinct competitive disadvantage.

AUDIENCE MEMBER: Follow up?

PROFESSOR BELL: Sure.

AUDIENCE MEMBER: Making nothing other than the obvious response, which is to say: if patent law is working well, I've by definition not in any way interfered with your *ex ante* liberty set when I get a valid patent, because if you were doing it, it wasn't patentable. We're only giving patents on things that you are not doing.

175. *See* Tom W. Bell, The Prediction Exchange: Progress in Promoting the Sciences and Useful Arts (Mar. 11, 2006) (unpublished paper), *available at* http://www.tomwbell.com/writings/SPEx.pdf.

What I'm worried about is that there a lot of straw men in, I think, the argument you're making. If you assume an invalid patent, then you're right. But not a valid one.

PROFESSOR BELL: But I think you're assuming a lot—if you say patent law is working well. The point that deserves emphasis is the different origins of these rights. With regard to our tangible rights to person and property, they're customary and based in common law. Where do the copyrights and patents come from? From the legislative process.[176]

In this crowd, do I need to point out that there may be some problems, some public choice problems, with the legislative process? The fact that Amazon did get this patent claim, notwithstanding widespread recognition that it was probably overbroad, shows that there are problems with the patent system. We should not be surprised that there are problems with the copyright and patent system given the source of the rights so defined. They come out of the legislature.[177] People like Disney helped define those rights.[178]

Lawmakers may be doing it right. They may be doing it wrong. But I think we have reason to be skeptical that they're hitting just the right balance of public benefits and private rights.

PROFESSOR SCHULTZ: Please, Adam, go ahead.

PROFESSOR MOSSOFF: Just a couple of quick points. First, the difference between rights that come out of the legislative process and rights that are customary or rooted in common law, is a distinction which doesn't carry you very far, because as the Court in *Campbell* recognized, lots of our rights—including what we would normally think of as customary rights—are rooted also in the legislative process.[179]

To take just one example, adverse possession is a statutory right. It's defined by statute. One could argue that you have the same problems potentially there as you would have with the definition of patents and copyrights in the legislative process. Yet, no one seems to be arguing that, "Oh my God, there are public choice issues and problems with respect to the legislative process with respect to adverse possession."

Second, I acknowledge that the patent system does not function ideally, that there are lots of patents that get out that shouldn't get out. I even question from a labor-based perspective of the patent system the legitimacy of business method patents. However, the patent system has never functioned in an ideal way. In the nineteenth century, someone

176. *Id.* at 16 ("[P]romoting progress . . . justifies the statutory creation of copyright and patent rights.").

177. *Id.*

178. *See generally* Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557 (1988).

179. *See supra* notes 161–62 and accompanying text.

got a patent for bubblegum. The courts threw it out.[180] Someone tried to get a patent for a new method of putting blocks of ice together. The courts threw it out.[181] You can always cite to silly, absurd patents—the one-click patent, the bubblegum patent—throughout history.

But it's not the silly or absurd patents that we should be focusing on. It's the fact that, at the core of the many patents that issue every day, are these patents reflecting what I think Scott [Kieff] identified in his question: are they novel, useful, and non-obvious, which are the conditions of patentability? In other words, they weren't obvious in the prior art, people did not know them, and they were new.

So, in that sense, proper patents are not taking away from the public domain. They are not taking away from what people had already done. They are new additions in that respect. There are not restrictions on *pre-existing* liberty rights.

PROFESSOR SCHULTZ: Yes, sir.

AUDIENCE MEMBER: George Curtis. If we can maybe a little bit get off of the debate business just for me, the historian, but if we could go back to this morning with Mr. Sherwood's observation about judicial systems around the world and comparing and contrasting. How come in American history, the United States government declared a monopoly on patents? Why was that particular enterprise restricted to the United States?

PROFESSOR SCHULTZ: Can you restate the question, please?

AUDIENCE MEMBER: Is it not true that the United States has a monopoly on granting patents? Or is there such a thing as state-based?

PROFESSOR MOSSOFF: Patents are territorial, which means that they're issued by the respective governments. They only apply within the jurisdictions of the governments. The United States issues patents for within the U.S.

PROFESSOR BELL: I think he's talking about the Supremacy Clause.[182] Are you saying the federal government has the sole monopoly?

PROFESSOR MOSSOFF: Okay.

PROFESSOR BELL: That's because of the Supremacy Clause. The notion is that if states got involved in issuing patents, it would interfere with the federal government's authority.[183]

PROFESSOR MOSSOFF: I believe he's asking why did it come about that way. Unfortunately, when what became the Copyright and Patent Clause was introduced at the Constitutional Convention in 1787,

180. Adams v. Loft, 1 F. Cas. 135 (C.C.N.J. 1879) (No. 61) (accepting affirmative defense of lack of novelty against patent infringement claim).

181. In re Kemper, 14 F. Cas. 286 (C.C.D.C. 1841) (No. 7687) (affirming rejection of patent application by patent commissioner on basis of non-patentable subject matter and lack of novelty).

182. U.S. CONST. art. VI, cl.2.

183. Tom W. Bell, *Virtual Trade Dress: A Very Real Problem*, 56 MD. L. REV. 384, 418 (1997).

there wasn't much discussion about it. So there's very little known about why we have the Copyright and Patent Clause.

However, the arguments that suggest why it got put into the Constitution largely are based upon efficiency problems with state enforcement of patents and copyrights. Patents and copyrights were the first examples of interstate or national property interests. There were lots of problems—the experience with Daniel Webster trying to get copyright protection for his dictionary—in securing protection at the state level. So you could secure protection in Virginia, but your copyright or patent wasn't protected in New Jersey. So you were having problems in that respect. So the operative idea was that, in order to secure effective protection of these intellectual property entitlements, they should be secured at the national or federal level.

PROFESSOR BELL: That's not actually in the Constitution. It came out in later case law.[184]

PROFESSOR MOSSOFF: Right.

PROFESSOR BELL: So the patent statute still doesn't have a sort of Supremacy Clause statement. It's just presumed.

PROFESSOR MOSSOFF: But it's implicit in the fact that the Supremacy Clause is in the Constitution itself. The Supreme Court has interpreted it that way.

PROFESSOR BELL: The Copyright Act does have Section 301.[185] It says states can't mess with copyrights.

PROFESSOR MOSSOFF: Well, I think the reason why it has that provision in the '76 Copyright Act is because states did have copyright regimes. So it was state common law . . .

PROFESSOR BELL: That's true.

PROFESSOR MOSSOFF: . . . where there never was state common law patent rights.

PROFESSOR SCHULTZ: Yes, sir, did you have a follow up?

AUDIENCE MEMBER: Not really, thank you.

PROFESSOR SCHULTZ: Would you like to make any concluding remarks?

PROFESSOR BELL: Yes, I'll just say something and give you the last word.

PROFESSOR MOSSOFF: Well, you started with the first word, so I'll give you the last word.

PROFESSOR BELL: Okay.

PROFESSOR MOSSOFF: This has been a great discussion. I think that a lot of interesting ideas have come up. I think it's also important to emphasize that, at least from my perspective, and I think for a lot of the traditional advocates for patents and copyrights from a natural rights or

184. *Id.*
185. *See* 17 U.S.C. § 301(a) (2000).

labor-based perspective, is that they did not view themselves as being in conflict with a consequentialist or ultimately utilitarian defense [of these rights]. They viewed these as very much complementary approaches that were to reward or secure the fruits of people's labors, both intangible property and intellectual property, and this has the ancillary and reinforcing benefit of making everyone better off.

I think in today's debates—because today we focus so much on the utility side of things, again coming out of the largely dominant fact that utilitarianism is our primary model for analyzing private rights today—we forget this. That's why I was very appreciative of Justice Ginsburg in her *Eldred*[186] decision, much maligned by people in IP today, but in her footnote 18 in the *Eldred* decision, she emphasizes the fact that the utilitarian approach and the rewarding labor approach in justifying intellectual property are—she uses the word—"complementary" of each other.[187] I think that really is true.

So when I give my remarks and I emphasize so heavily the labor-based justifications for intellectual property, I'm not doing that in exclusion of the consequentialist or utilitarian justifications. I only emphasize it so strongly because they tend to be misunderstood or downplayed because utilitarianism is so dominant today.[188]

So with that, I think I'd just like to pass off to Tom who should rightly have the last word today.

PROFESSOR BELL: You're very kind, Adam. Well, let me recap on behalf of both of us, hopefully—you have to trust I get this right. Let me just recap. This has been great and I've learned places where we agree and disagree.

Let's start with the mini-agreements. You and I are both—and we're somewhat alone in academia in this regard—friends of property. So I'm shoulder-to-shoulder with you on that front.

Also, we both believe in natural property rights. There are plenty of people who teach property, but they think it's only for utilitarian purposes. I think you and I agree there are natural rights out there, and property rights are among them.

And I think we agree, and this came out in the debate, that different property rights deserve different treatment. So it's a nuanced approach. It's not a situation where you can simply slap the label "property" on it and assume you're good to go.

I think we also agree that labor theory is good for justifying property, but it's not the only arrow in our quivers. There are many reasons to defend natural property rights, labor theory among them.

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

187. *Id.* at 211 n.18 ("Rewarding authors for their creative labor and 'promoting . . . Progress' are thus complementary").

188. *See* Mossoff, *supra* note 123.

I guess where we differ is in maybe a couple of places. First, I'm not convinced that labor theory justifies copyrights and patents, at least not as natural property rights. I'm more willing to accept a utilitarian argument.[189] But I think we need to invoke multiple justifications, on the labor theory front and on some other fronts, because there is a conflict between copyrights and patents and the other natural rights of tangible property for which I have so much respect.

Also, and perhaps more generally, I'm wary of the rhetorical effect of over-extending the property model. I have to agree there are many aspects of copyrights and patents that look like property, and it's useful and proper sometimes to describe copyrights and patents as "intellectual property." But I think we need to be cognizant of people who don't exercise the care that you and I exercise, Adam, in addressing these issues—people who, like Jack Valenti, will over-extend the property metaphor and start saying things like, "Unauthorized copying equals theft."[190] That would be true if it were tangible property. I can't buy that with regard to copyrights and patents. I worry that people will over-extend the many good ideas you've set forth to achieve results that I think both of us would regard as unfortunate.

PROFESSOR SCHULTZ: With that we thank you. We'd like to thank the Federalist Society and thank our participants today.

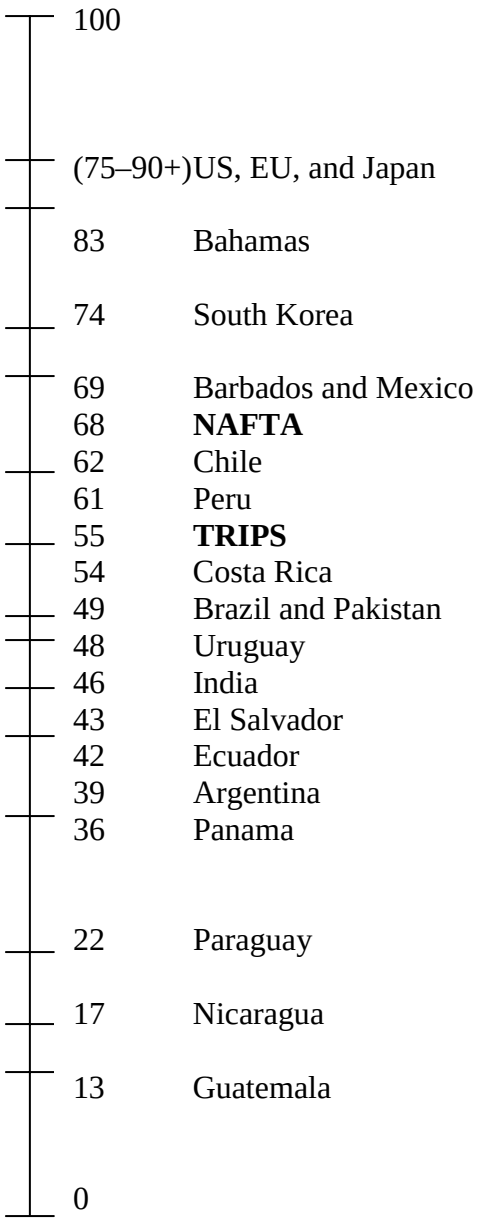
If you're interested in looking at Tom Bell's work and Adam Mossoff's work, you can go to tomwbell.com, and Adam Mossoff has posted his papers on the site ssrn.com, as have many other academics. So you can read further on their views on this subject. The Federalist Society will be publishing this transcript in the *University of Illinois Journal of Law, Technology & Policy*.

So thank you and good afternoon.

189. *See* Bell, *supra* note 102, at 763.

190. *See, e.g.*, Declan McCullagh, *Congress Mulls Revisions to DMCA*, NEWS.COM, May 12, 2004, *available at* http://news.com.com/Congress+mulls+revisions+to+DMCA/2100-1025_3-5211674.html (quoting Jack Valenti).

Table 1. IP Protection Rating System[191]



[191] This table is adapted from Robert M. Sherwood, *Intellectual Property Systems and Investment Stimulation: The Rating of Systems in Eighteen Developing Countries*, 37 IDEA 261, 355 (1997), and is reprinted with permission of the author. The scale increments are not evenly distributed. For more information on how the author developed this rating system, see *id.* at 263–68.