

Copyright, Culture, and the Intellectual Property Servitude

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I. *The Roots of the Intellectual Property Servitude*

Now that it has become time to think about the next great copyright act, the time is propitious to think about the consequences of the extension of intellectual property protection and the nature of the theory that has, in part, led to those consequences. Having examined the myth and mythology of common law copyright in the past, both as it operated in the seventeenth and eighteenth centuries in England, and in the extension of copyright to sound recordings in the twentieth century in the United States, I am turning my attention to the operation of the common law theory in the present and to the influence of the Ghost of *Millar v. Taylor*. What follows is the rather preliminary result.

One of the most important consequences of this theory of copyright law is that it tends to favor the holders of particular means of technological transmission of information and to disfavor the developers of subsequent technological means, the effect of which is to place a servitude both on these developers and on the public at large. The Supreme Court's *Aereo* decision may come as a surprise to some, particularly given the direction that oral argument seemed to take, but it really only reaffirms that the imposition of such a servitude is a consequence of current copyright thoughtways. The Court's decision does not appear to be based on a careful application of the Copyright Act to Aereo's novel means of enabling viewers in effect to rent antennas and dvrs from a central service. Rather it seems that the Court reasons backward from the assumption that the Copyright Act is a promise of *effective* protection of copyrighted wares, to the necessary conclusion that Aereo is engaged in public performances. Necessary, that is, if the plaintiff's copyrights are to remain immune to the opportunities offered by a changing technological landscape.

The intellectual property servitude is neither incidental nor novel; it descends from the theory of

common law copyright first propounded by London's booksellers and their counsel in the eighteenth century, and it is a logical consequence of the application of its elements. The burden derives from the view that there has always been copyright, even in advance either of any statute to codify it or of the ability to infringe it. The implications of such a seemingly innocent proposition are not immediately obvious, but they include endowing the creator, as well as the intermediaries who distribute her work and those to whom her property is assigned, with formidable rights against copying and distribution, and they include the tendency mentioned above toward the retrospective creation of property on the theory that it is already there.

The Supreme Court has not explicitly endorsed the common law view, although there seem to be members of the Court who are quite at home with it. Nonetheless, the theory is imbued with certain tendencies that are subtle and perhaps not obviously related to the common law view, and the law seems to be acting on these to an increasing degree. This essay will assess several of these tendencies and some of the effects that they have had on culture and law. First, the theory of common law copyright has led to a distension of culture that results from placing copyright before culture. Next, legal doctrine has also suffered distortion in the effort to secure effective protection of a species of property that is inherently unstable and is becoming more unstable. Finally, there is an attempt on the part of the copyright industries to recast moral sensibilities to include a thoroughgoing aversion to copying and distribution--to intrude into everyday life by transferring the burden of protecting their intellectual property, which they justify largely on the basis of private entitlement, to the public at large. This effort appears to run the gamut from educating the young in the virtues of the copyright regime to the creation of something like an intellectual property police force.

I began to move toward this view in the course of studying the extension of copyright to sound recordings, and after reading this remarkable (at least to me) passage from the District Court opinion in

RCA v. Whiteman, an early sound recording case (1939) involving the transmission over radio station WNEW of recorded performances by Paul Whiteman without either his or RCA's permission. According to Judge Leibell, performers had rights in their performances even before there was a means of recording them, and thus even before there was a means of invading that right:

"Prior to the advent of the phonograph, a musical selection once rendered by an artist was lost for ever, as far as that particular rendition was concerned. It could not be captured and played back again by any mechanical contrivance then known. Thus the property right of the artist, pertaining as it did to an intangible musical interpretation, was in no danger of being violated. *During all this time the right was always present, yet because of the impossibility of violating it, it was not necessary to assert it.*"¹

Judge Leibell's statement turned out to be a concise summary of the common law theory as it was about to be applied to sound recordings, and it provides a framework for understanding the arguments that were soon to be made in support of copyright for records. The image is one of a timeless performer who holds rights to control reproduction and distribution of her works via not only contemporary but all future means of copying and transmission as well. The arguments sound modern, but all seek to place a restraint on emerging technology that facilitates the transmission of cultural exchange.

In the van of the arguments for copyright for records was the famous article by Zechariah Chafee, "Reflections on the Law of Copyright," which begins with an exuberant passage likening copyright in the new technological age to Cinderella. The quotation seems to suggest that copyright is somehow the friend of inventions capable of copying and transmitting--the ally of technological progress:

"Copyright is the Cinderella of the law. Her rich old sisters, Franchises and Patents, long crowded her into the chimney corner. Suddenly the Fairy Godmother, Invention, endowed her with mechanical and electrical devices as magical as the pumpkin coach and the mice footmen. Now she whirls through the mad mazes of a glamorous ball."²

¹ 28 F.Supp. 787, 791 (S.D.N.Y. 1939)(rev'd on other grounds)(emphasis added).

² Zechariah Chafee, Reflections on the Law of Copyright, in Copyright and Related Topics 1, 2 (Los Angeles Copyright Society & UCLA School of Law, eds., 1964).

The passage sounds like a celebration of advances in means to reproduce and transmit performances, but in fact it is rather something different. As the Chafee article makes clear, Cinderella's great fear is essentially that succumbing to technological progress will cast her into the public domain, a nebulous world into which works sometimes "fall" despite the best efforts of copyright-holders and courts alike.

Chafee outlines the six principal purposes of copyright law as he understands them, the sources of which will be discussed later. They are balanced in the sense that three of them favor stronger copyright and three weaker. The overall thrust of them, however, is to accord greater protection not only as against media already in existence, but with regard to media yet to be invented. Taken together they provide a plan to prevent Cinderella from ever again losing her power, which the sound recording and the radio station were apparently taking away, over emerging means of transmitting cultural wares. In pursuing statutory reform in order to keep pace with modernity, he writes, "Recall that our primary purpose is to benefit the author."³

Chafee's piece features the most important of the general precepts of the common law theory. The first is that copyright law is "philosophical" or "metaphysical," and what this means is that the essence of copyright is not to be found in positive legal enactments, whether in the form of legislation or judicial pronouncements. This is important because it serves as the formal statement of a rather widespread tendency to believe that if copyright law does not speak to an issue, the silence is the result of a failure in drafting or some similar accident, and can be filled in accord with the true purpose of copyright. It is difficult to put this point precisely except to say that at least as early as the 1950s, even (especially?) the Copyright Office appeared to hold the view that copyright law had an essence that was only poorly expressed in legislation and judicial decisions, and that was much better understood by the copyright bar. A different way to put the point is that robust copyright protection is a matter of natural right, and that such a right exists even in the absence of any positive legal enactments or decisions.

³ Chafee at 28.

The second premise is that the growth of intellectual property represents a growing recognition of the claims of intangible property. There are two striking features to this argument, which was expressed as long ago as 1890 in the famous Brandeis and Warren article on privacy. The first is that recognition of intangible property represents an increasing sophistication in the law, and the second that it signifies a corresponding increase in social sophistication.⁴ To put this more baldly, when people were unsophisticated their vision of property was impoverished by being limited to what they could touch and see; over time their social and spiritual growth led them to recognize “the wide realm of intangible property, in the products and processes of the mind, as works of literature and art, good will, trade secrets, and trademarks.” This process, according to the authors, was inevitable.

Two observations should be made. The first is that the view is historically naïve, reflecting a Whiggish view of the inevitability of historical progress long since rejected by historians. Of course, Brandeis and Warren wrote before that approach had been discredited, but the philosophical version of Whiggery appears to live on in the realm of intellectual property theory, which remains very much attached to the mysteries of intangible property. Ancient societies were not all that dumb or lacking in feeling, and modern societies are not so smart or sensitive as we might think. Second, the argument draws too sharp a distinction between intangible and tangible property, forgetting that all property is in some measure intangible. Property rights express social relations, and although we can picture a yard as a whole bunch of dirt with some grass on top of it, the picture is not one of property until it includes someone who owns it and someone who does not.

The third element of the common law theory, and this is the one that must give pause, is an attachment to anachronism. The image that justifies the regime of protection is a timeless philosophical principle dressed in historical garb. Judge Leibell's and Professor Chafee's performer,

⁴ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, in *Copyright and Related Topics* 48, 48-51 (Los Angeles Copyright Society & UCLA School of Law, eds., 1964).

possessed of rights against future hypothetical invasions, is a figure immune to the passage of time and a rather hypothetical one at that. The argument is essentially the same as the one devised by the London booksellers after 1695 when the end of censorship threatened to deprive them of their property; they could not brook such a deprivation, and once censorship ceased to be an attractive justification they earmarked the author's entitlement as the origin of their title. As David Hume observed ruefully in 1774, in a letter assuring London bookseller William Strahan that the *Donaldson* decision would not prove the booksellers' ruin, they had done very well for a long time before the passage of the Statute of Anne without obtaining the assent of authors; the philosopher assumed that the booksellers' prodigious capacity for self-help would see them through any difficulties imposed by the House of Lords.

Hume recognized, as did other eighteenth-century authors, that the booksellers' recently-found solicitude for authorial right was rather a hypothetical prop to their property interests than a sign of their tender regard for living authors. In a similar fashion supporters of copyright for records resorted to the attractive-sounding theory of common law copyright in justifying their title to property on the ground of the creator's labor. Of course many were actually championing the rights of performers. The point I am making is that insofar as the record companies are concerned, their belief in the rights of authors derived from their belief in their right to control reproduction of records. As recording industry spokesman Averill Pasarow remarked in 1963, "I think it is the general, if not unanimous, view of the record industry that protection against unauthorized duplication should be embodied in the new copyright law; *provided, of course, that the record manufacturer is designated as the copyright proprietor.*"⁵

As I have suggested, although the common law theory in its starker form does not command much explicit respect in judicial circles, its premises are increasingly influential and are leading to

5 Averill C. Pasarow, "Viewpoint of the Phonograph Record and Music Industries," 2 Bull. of the Copyright Society 25, 26 (1963)(emphasis added).

distension in both culture and law. The Ghost of *Millar v. Taylor* is a very durable and active apparition, and if he does not appear prominently in the letter of the law, his spirit is nonetheless at work in the interstices where many would find the purposes of the law.

II. *The Aereo and Bowman Decisions*

In looking for a distension of the law in the copyright realm the Supreme Court is not a bad place to start. The *Golan* decision seems rather obviously to assent to the common law theory that Shostakovich, for instance, was endowed by nature with a right against unauthorized reproduction. But that opinion was written by Justice Ginsburg, with Justices Breyer and Alito in dissent. It is surprising to see Justice Breyer writing the majority opinion in *Aereo*, and although the opinion shows no very obvious traces of a natural or common law view of the origins of copyright, it nonetheless contains two features of the common law approach: a tendency to burden innovation, accompanied by reasoning that appears to be dictated less by the statute than by the necessary result in the case. (I am not necessarily disagreeing with the judgment in the case, but I do believe that the reasoning falls short either of justifying the result or of furnishing a meaningful precedent.)

Chafee, writing back in the 1940s, wrote that “any person who invades this wide single monopoly of the author is an infringer, even though the statute does not specifically mention some novel device which the infringer has chosen to employ.”⁶ He might well have written the *Aereo* opinion. *Aereo* argued in part that because content is delivered to individuals individually and as a consequence of their own actions, rather than to a large number of people at once as a consequence of programming decisions made by a provider, that it was not engaging in public performances under the Copyright Act. The Court’s response, admitting that the text of the Act did not settle the issue, resorted to its purpose in rejecting the claim. “In terms of the Act’s purposes,” writes Justice Breyer, “these

⁶ Chafee at 3.

differences do not distinguish Aero's system from cable systems, which do perform 'publicly.' Viewed in terms of Congress' regulatory objectives, why should any of these technological differences matter?" This, I believe, is a remarkable statement. The differences do not change the viewer's experience, and it is interesting that in the opinion the arbiter of the controversy is the viewer: "Why would a subscriber who wishes to watch a television show care much whether images and sounds are delivered to his screen via a large multisubscriber antenna or one small dedicated antenna, whether they arrive instantaneously or after a few seconds' delay, or whether they are transmitted directly or after a personal copy is made?"

Two observations should be made regarding this analysis. First, if the viewer were asked about the cost of the Aero service by comparison with cable and satellite providers, she might well care, and indeed the cost-conscious "cord-cutter" blogosphere reacted quickly and vocally to the decision. More importantly for purposes of assessing the reasoning, it seems odd that in applying a statute that often veers far away from common sense, the viewer's imagined lack of interest in details of the means of transmission would play an important role in the decision. On this issue the Court endorses a rough-and-ready, morally intuitive approach that departs from the rather careful attention it otherwise pays to the meaning of public performances under the statute. It seems unlikely that many viewers would be able to guess what constitutes a performance under the law. Our hypothetical viewer might be surprised to learn that in order to fit transmission by cable companies into the contours of the Copyright Act, they are deemed to be "performing" when they transmit. And she would be much more surprised to learn that when she views a program she is likewise performing according to the Act, when as a matter of common sense she is doing nothing of the sort. This is not to criticize the manner in which the Act deals with the issue, but to suggest that it is not quite intuitive, and to turn to the viewer's ordinary sensibilities in deciding what I take as the dispositive issue seems inconsistent.

The decision thus displays a certain disregard for the effect that it may have on emerging technologies. Both at oral argument and in the majority opinion the Justices exhibited a tender solicitude for the effect that the decision might have on the rather vague notion of the cloud, but this solicitude does not translate into any sympathy for the innovation actually before it.

As a footnote, there was considerable discussion at oral argument over whether Aereo was behaving like a cable company, and the Court decided that it was behaving enough like one to qualify as a public performer. Aereo thereafter looked to the Copyright Office in order to take advantage of the compulsory license available to cable companies, but in a letter of July 16, 2014 General Counsel and Associate Register Jacqueline Charlesworth indicated that while the Office would honor the filing provisionally, in the opinion of the Office Aereo did not qualify as a cable company. So for the moment Aereo faces a real prospect of being put out of business by the decision that it looks and acts like a cable company.

As Justice Scalia argued in dissent, disapproval of Aereo's service did not justify the Court in "distort[ing] the Copyright Act to forbid it." He went on to suggest that the effect of the decision was to overrule the *Sony* decision, or at least that it ran counter to *Sony*, noting that the plaintiffs had in that case shown the same eventually unfounded fear that the VCR would prove their ruin that the plaintiffs showed in this case with regard to internet transmission of programs.

This tendency is also evident in *Bowman v. Monsanto*, in which both the Federal Circuit and the Supreme Court held that Vernon Bowman, an Indiana farmer who planted soybeans which he had lawfully purchased from a grain elevator, which sold the seeds without placing any restriction on the manner in which they might be used, could not avail himself of the patent exhaustion doctrine. Without much (if any) discussion of how the exhaustion doctrine might apply in a new technological setting, Justice Kagan noted several lawful uses that Bowman might make of the resold soybeans:

Bowman could resell the patented soybeans he purchased from the grain elevator; so too he could consume the beans himself or feed them to his animals. Monsanto, although the patent holder, would have no business interfering in those uses of Roundup Ready beans. *But the exhaustion doctrine does not enable Bowman to make additional patented soybeans without Monsanto's permission (either express or implied).* (italics added)

According to the Court, Bowman used the seeds in perhaps the only way that was not allowed: he planted them.

In the course of doing this, the Court held, he *made* the patented invention and thus infringed it. Now, there may be good reasons to deny that exhaustion relieves farmers who replant seeds as Bowman did of liability for infringement, but the Court did not supply them. The reasoning instead fits the pattern described above of identifying products of potential value and securing that value by reference to an original creator and its needs. How do we know that in planting the seeds Bowman himself “reproduced Monsanto's patented invention?” By reasoning backward from the result. Apparently because patent law is no longer simply an incentive that promises rewards to the intelligent inventor, but an insurance policy as well: “Were the matter otherwise, Monsanto's patent would provide scant benefit.” The question should be whether Monsanto's asserted rights actually arise under the principles of patent law, and it is here that the Court strains to view Monsanto as the only relevant inventor, while ignoring the self-replicating nature of the seed, apparently justified in doing so by focusing on the farmer who reaped where he had not sown—by sowing lawfully purchased seeds in his own fields.

There is another way to view the appropriate outcome in the case, which is that Monsanto invested unwisely in patenting an invention whose instability was bound to render it useless in short order if patent exhaustion were to apply. The instability here derives from the self-replicating nature of the technology, a feature which makes the Court's characterization of the reseeder as one who “makes” the invention most dubious. Two important points follow from this characterization: First, while it seems that Bowman, in making a very natural use of the seeds by planting them, has become an

infringer simply by operation of law; the Court's opinion is suffused with the notion that what Bowman did was morally wrong, and that his proclamations of innocence are belied by his bad behavior. In this respect the pattern that I describe above has an interesting addition, which is the retrospective insertion of a self-conscious infringer, whose own sense of wrongdoing helps establish the violation of a property right. To clarify this point, it seems reasonable to think that because the issue of patent exhaustion in relation to self-replicating technologies was unsettled until the Supreme Court's decision, the Court might well have accepted that Bowman was acting in good faith on the basis of time-honored understandings regarding reseeding and the disposition of lawfully purchased goods.

This is not the course that the Court chose. In rejecting Bowman's argument that the seeds replicate themselves and that he was thus not making the invention, the Court responded sardonically, "But we think that blame-the-bean defense tough to credit. Bowman was not a passive observer of his soybeans' multiplication; or put another way, the seeds he purchased (miraculous though they might be in other respects) did not spontaneously create eight successive soybean crops." Not content to decide an issue of first impression on statutory grounds, the Court found it necessary to resort to sarcasm and innuendo in the opinion, presumably to make clear that Bowman himself knew that by replanting he was also making and thus infringing. If the Court's characterization of the facts is correct, it is a fair inference that Bowman was actually making use of the patented dimension of the seed, in that he was spraying it with glyphosate. (This distinguishes his case from that of Percy Schmeiser in the Canadian *Monsanto v. Schmeiser* case, who maintained that because he did not take advantage of the plant's resistance he was not using the patented invention, a contention that the Canadian Supreme Court rejected.)

But that behavior is consistent with his defense of patent exhaustion, and the Court's desire to make Bowman into a knowing infringer would seem an attempt to suggest that the question was unsettled only in a technical legal sense, and that ordinary moral sensibilities dictated the outcome conclusively. Such a heady moralism may seem out of place in deciding a novel and important issue,

but it is not an uncommon substitute for sound reasoning.

The Court's efforts in *Bowman* to mold the right to fit the needs of Monsanto, coupled with its subtle insistence that Bowman himself knew that he was infringing the patent, represents an assertion that the contours of patent law make sense from a cultural point of view—that the sensibilities that promote intellectual property are innately moral-- and do not represent sovereign intervention on behalf of social utility; this is consistent with the homely metaphors that insists that those who reap what others have sown are just as wrong in the absence of a legal prohibition as they are when they operate in defiance of an explicit legal prohibition.

Even after being dressed down Bowman does not seem to have shared the Court's understanding: "All my life myself and other farmers have been able to go to grain elevators, and buy grain, and plant it."⁷ In the wake of the Supreme Court's decision against him he still maintained that he had not infringed on Monsanto's patent rights by planting seeds that he had purchased lawfully from a grain elevator. He also observed that the vindication of these rights by the Court would interfere with a traditionally acceptable use of the seeds by farmers. Indeed, he had become a victim of the intellectual property servitude, this time in the patent arena.

Like the *Aereo* case, *Bowman* represents a trend toward an expansion of intellectual property rights coupled with a perplexing dearth of reasoning on a complicated matter. The reasoning may best be understood as patent law's analogue to the mythology of common law copyright, presenting another species of a more general tendency toward the tendency to create property rights retrospectively in whatever is perceived to be of potential value, and to justify this conversion into property by reference to a creator from whose sole labor and ingenuity springs the original title. The subsequent effect of this process is the imposition of some sort of servitude on customers, citizens, and producers of alternative means of technology. Or perhaps more properly, given the elements of the theory, the servitude is the

⁷ Statement by Vernon Bowman in an interview with RT America, available at <http://www.youtube.com/watch?v=Q8hoyO72NOg>.

unspoken goal.

This is one of the overall tendencies to which I point—forcing culture to adapt itself to contours yet to be mapped out by the law, on the theory that the law has already mapped them out. If this seems an anachronistic statement, it is meant to describe an anachronistic philosophy that has been applied not only in the service of securing Monsanto's gene patents, but in extending copyright beyond its original borders and into, for example, the “subject matter” of the sound recording. Another way to put the point is to observe that what was actually at issue in the debate over copyright for records was whether a property right in recordings was to be created. And it eventually was. However, the basis on which copyright was extended to records was that the property right already existed, albeit in some imperfect form, and the business of the law was to “secure” a right already in existence.

III. *The New Contours of Copyright*

Supreme Court jurisprudence is just one manifestation of a trend that has been afoot for some time, a result of the effort to secure effective protection of a species of property that is inherently unstable and becoming moreso. As it becomes more difficult to protect intellectual property, the law has shown an increasing determination to do so. As I have argued elsewhere, the conception of property has itself come under stress. People are finding that products which they have purchased are accompanied by servitudes. Customers are paying not only for the products but also for the digital fences that are intended to prevent them from making full use of what they thought was their property. Likewise, contract law has been pressed into the service of this desperate attempt at preservation, and as the famous *ProCD v. Zeidenberg* case suggests, a federal common law of contract appears to be undermining a belief in the importance of assent to the process of contracting.

“*I Have a Dream*©.” The theory of common law copyright has also led to a distension of culture that results from placing copyright before culture. The legal career of the Rev. Martin Luther

King Jr.'s "I Have a Dream" speech is a perfect example of what comes of forcing culture to take the shape of its copyrighted bottle. It was a speech of vast cultural significance, "performed" on public property in the presence of 200,000 people, with security provided by federal Marshals. It is also copyrighted.

Just three years ago the entire speech was available on Youtube at this URL:

<http://www.youtube.com/watch?v=iEMXaTktUfA>. Now the same URL brings up only a message, accompanied by a cartoon picture of a face:

"'Martin Luther King,...'

This video is no longer available due to a copyright claim by EMI Music Publishing.

Sorry about that."

This is the result of placing copyright ahead of culture.

Still more ominously, the content industries have for a long time been proposing a program of educating young people in copyright thoughtways. They may now be enjoying success. Cory Doctorow reports that the "MPAA, RIAA, and America's major ISPs have teamed up to produce a stilted, propagandistic copyright curriculum for California's public schools."⁸ The program takes aim at students as early as the first grade, with the ostensible goal, as stated in the first-grade plan, entitled "It's great to create," of helping "students understand that when they create something, they own it."

Part of this exercise in learning to respect the property of others involves a game called "He's Copying Me!" In this game two student artists draw on the board and then are deceived into leaving the classroom for a few minutes, during which time the other students are told to copy their drawings. Upon their return the original artists are apparently supposed to feel terrible that their "ideas" were copied. The sequence of events in the game as laid out by these educators is not completely clear, but

⁸ Cory Doctorow, Big Content and Big Telcos make copyright propaganda for California public schools, available at <http://boingboing.net/2013/09/25/big-content-and-big-telcos-mak.html>. Educational programs for the first, second, fifth, and sixth grades are available at this site, as well.

the goal seems clear: Reordering moral sensibilities so they align with the interests of copyright holders, even if teachers must deceive their students in order to teach them honesty.

Perhaps most tellingly, we may be seeing the emergence of something like a private intellectual property police force, serving as part of a grander effort by the content industries to recast moral and legal sensibilities so as to turn the norms of intellectual property into fundamental moral norms. To give one example, in 2007 Omar A. Omar was stopped by a state trooper for speeding in Pennsylvania.⁹ The trooper noticed a number of boxes of what appeared to be “counterfeit” Nike sneakers and arrested Omar for violating the state's Trademark Counterfeiting Statute. He prevailed on First Amendment grounds, but what is interesting is the inference that Pennsylvania's state troopers are policing the highways for intellectual property violations. There are other examples that suggest, although the number with which I am acquainted far from proves, that widespread public-private networks are coming into being with the goal of policing the rights of intellectual property holders—rights that are increasingly justified on the basis of private entitlement, and increasingly enforced by the imposition of a burden on the public.

The consequence of all this is that intellectual property now threatens to become boundless. In his dissent in *Millar v. Taylor* Justice Yates insisted, in 1769, that literature could never truly be the subject matter of property because it knows no bounds. Sophisticates from that time until the present have dismissed this argument as displaying a lack of sophistication on the part of those who can imagine property only where they can see it or touch it. Yates now appears prescient; the problem is not that intellectual property cannot be demarcated initially, but that it cannot be contained within its initial bounds for very long. That is to say that the law has endorsed a species of property that knows no boundaries, without regard for consequences and placing us squarely in the age of the intellectual property servitude.

⁹ Commonwealth of Pennsylvania v. Omar, 602 Pa. 595 (2009).

As I note above, an emphasis on the philosophical, even metaphysical, character of intellectual property is one of the precepts with the supporters of copyright for sound recordings brought to the table. The association of intangible property with increased social and legal sophistication is one element of this metaphysical argument. And as attractive as it may sound, it comes with serious implications. It seems to me that all of what we call tangible property also has an intangible element. It is easy to forget that property rights represent social arrangements, and it is especially easy when we like those arrangements, or when they have been with us so long that we cease to notice them.

My yard is just a load of dirt with some grass on top of it. As long as I don't have to remove someone from it by asserting my legal rights. The proponents of expansive intellectual property rights like to invoke Lockean sensibilities in defense of the right that creators have to their creations. As Locke wrote, I own the acorns and apples that I gather: "He that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself." Who can quibble with that sentiment? Why, on the other hand, do we ignore an equally important quotation: "Thus the grass my horse has bit, the turfs my servant has cut, become my *property*. . . The *labour* that was mine, removing them out of that common state they were in, hath *fixed* my *property* in them." This assertion is not followed closely by an explanation of why the servant does not own that turf, if he was the one mixing his labor with it, or how he came to be Locke's servant to begin with. Locke's argument about ownership was aimed at overreaching monarchs who thought they were entitled to dispose of their subjects's property without consent. It was not intended to explain other dimensions of the relationship between the social order and property rights, or to justify the social inequality that did not trouble very many propertied Englishmen at the time.

Even though Locke was describing individual entitlement to what we would ordinarily consider tangible property, there appears to have been a very closely-connected intangible element that made the

servant Locke's social inferior. To celebrate the intangible character of intellectual property as signaling an advance in social and legal sophistication is to risk forgetting that tangible property has for a very long time carried with it an element of social relations. As intellectual property threatens to become boundless, perhaps the boundaries are now to be found in new social relations and new relationships of inequality.

I believe that the intellectual property servitude is one expression of these novel relationships, but it need not be if we understand its elements and its origin. In discussions of the next Copyright Act, as in the debates preceding the last major revision, it seems very likely that we will hear much about the importance of keeping pace with modernity. The arguments are likely to sound very forward-looking and friendly to progress, but if they take the form that they have taken in common law copyright theory from the eighteenth century to the present, the suspicion must be strong that they will be rather different, and that the new contours of copyright will be derived from a deliberately anachronistic philosophy.