

# Property Rhetoric and the Public Domain

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## ABSTRACT

Enthusiasts of a high protection vision of intellectual property often deploy the rhetoric of physical property in defending their preference for broader patent and copyright protection. By contrast, advocates of a lower protection vision of intellectual property resist the use of physical property language in expressing their solicitude for users' rights and the public domain. In this Essay, I use this dichotomy as a starting point for an investigation of the rhetorical power of property talk as a tool in public debate over the proper scope of intellectual property protection. I first observe that this dichotomy is premised on the assumption that invoking the idea of property necessarily entails a libertarian vision of possession that can be used only in defense of an expansive vision of owners' rights. I then critique this prevailing assumption, showing that it fails to account for an alternative, social discourse of property that emphasizes the legal limitations and communal aspects of ownership. Finally, I suggest a novel approach to the use of property rhetoric in debates about the appropriate scope of intellectual property. I argue that rather than resisting the invocation of property rhetoric, enthusiasts of the public domain should embrace it. Specifically, the public domain should be explicitly portrayed as a form of property, one in which the public enjoys a broad entitlement. This approach would encourage public respect for and stewardship of the public domain and would also provide needed pushback against content industries' rhetorical claims that all takings of information are wrongful.