Dear Readers,

The attached précis presents a nascent book project on which I am eager to receive your feedback. I intend for the book to culminate and build upon my other work at the intersection of tangible and intangible property (cited in footnote 5). But I am not sure whether the book will be aimed at the same academic audience or instead at a general or perhaps student audience. As I teach first year property, I currently incorporate intangible property examples to illustrate important themes. In thinking about this book I am simultaneously thinking about how to use these and other examples more systematically in my teaching. I therefore imagine that the book could ultimately serve as a teaching tool for me and for others.

At this stage I welcome feedback on what is here and what is missing. I imagine that even the basic structure and proposed chapters will change as I dig into the project over the coming months. So please do not hesitate to propose new topics worthy of inclusion. Also, you will note that the literature that is currently cited represents at best a smattering of exemplars. Please forgive—but do alert me to—omissions of other relevant scholarship.

Thank you in advance for reading and sharing your thoughts.

Molly Van Houweling
September 25, 2012

PROPERTY'S INTELLECT

Molly Shaffer Van Houweling*

Preliminary Précis
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Introduction

First year law students learn early on that lawyers think of property not "as a relationship between a person (the owner) and a thing (that is owned)" but rather as "relationships among people with respect to things."[1] This corrective appears perhaps to reorient legal thinking away from a layperson's preoccupation with *things* and toward a more sophisticated focus on *people* and their legal relations. But, in fact, what makes property law distinctive—in both its lay and expert formulations—is that the human relationships it governs (unlike the human relationships governed by the law of torts or contracts) are always mediated by things.[2] That these things carry legal implications with them yields the notion that property is "in rem," not "in personam." That these legal implications can affect anyone who encounters the thing means that they are "good against the world."[3]

What is more, the alert law student will note that the specific nature of a thing governed by

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[1] Jesse Dukeminier, et al., Property 51 n. 33 (7th ed. 2010).

[2] See generally, e.g., Henry E. Smith, Property As the Law of Things, 125 Harvard L. Rev. 1691 (2012); Thomas W. Merrill & Henry E. Smith, What Happened to Property in Law and Economics, 111 Yale L.J. 357, 359 (2001); see also Robert P. Merges, Justifying Intellectual Property (2011) ("Kant's understanding of property as a relationship between people and objects will be jarring to those familiar with modern property theory. To those steeped in this field, it will seem an anachronism. The standard account of property these days says that it is an institution that primarily mediates relationships between people. . . . That has changed somewhat in recent years, now that a new generation of scholars . . . has rediscovered the importance of objects to property law."); Michael J. Madison, Law as Design: Objects, Concepts, and Digital Things, 56 Case W. Res. L. Rev. 381 (2005); Emily Sherwin, Two- and Three-Dimensional Property Rights, 29 Ariz. St. L.J. 1075, 1086 (1997).

[3] See e.g., Merrill & Smith, supra, at 360; Thomas W. Merrill & Henry E. Smith, The Property/Contract Interface, 101 Colum. L. Rev. 773 (2001); Henry Hansmann & Reinier Kraakman, Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights, 31 J. Legal Stud. 373 (2002); Albert Kocourek, Rights in Rem, 68 U. Pa. L. Rev. 322 (1920).

property law can have implications for the design of that law. The rules of acquisition by capture might sensibly differ depending on whether the thing at issue is a fox or a whale. The strength of the right to exclude might reasonably differ depending on whether the thing from which outsiders is excluded is a home or a shopping mall.[4]

The information age offers a new challenge and a new opportunity for students, practitioners, theorists, and reformers of property law. The challenge is resisting the temptation to apply longstanding property rules to today's most valuable intangible things without careful regard to the distinctive characteristics of those things. Such inattention could lead to application of old rules that are ineffective or even counterproductive as applied to new things. The opportunity is that in thinking creatively about how best to govern newfangled things, we may reinvigorate our thinking about this ancient and enduring body of law. This book represents my attempt to contribute to that endeavor.[5]

The chapters to come will explore how important aspects of property jurisprudence apply to information age dilemmas. I aim here to illustrate the relevance of persistent property themes to the most contemporary of things—focusing primarily on works of authorship and invention that are the subject matter of copyright and patent law. I hope that careful attention to the particular features of these things will suggest the perhaps distinctive ways in which enduring property themes apply (or sometimes don't) in these contexts—yielding new insights that may help us think about both emerging and age-old property law dilemmas.

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[4] But cf. Smith, Things, supra, at 1717 (critiquing "the promiscuous employment of contextual information in property").

[5] It will culminate and build upon my other work at the intersection of tangible and intangible property. Molly Shaffer Van Houweling, Technology and Tracing Costs: Lessons from Real Property, in Intellectual Property and the Common Law (Shyam Balganesh, ed., forthcoming 2012); Molly Shaffer Van Houweling, Touching and Concerning Copyright, 51 Santa Clara L. Rev.. 1063 (2011); Molly Shaffer Van Houweling, Author Autonomy and Atomism in Copyright Law, 96 Virginia L. Rev. 549 (2010); Molly Shaffer Van Houweling, The New Servitudes, 96 Georgetown L. J. 885 (2008); Molly Shaffer Van Houweling, Cultural Environmentalism and the Constructed Commons, 70 Law & Contemp. Probs. 23 (2007); Molly Shaffer Van Houweling, Cultivating Open Information Platforms: A Land Trust Model, 1 J. Telecomm. & High Tech. L. 309 (2002).

I will also of course build on the work of other scholars who have explored this intersection, including Abraham Drassinower, Lee Anne Fenell, Henry Smith, Stewart Sterk, Richard Epstein, Frank Easterbrook, Oren Bracha, James Boyle, Peter Menell, Robert Merges, Michael Carrier, Ed Lee, Ben Depoorter, Alfred Yen, Tim Holbrook, Wendy Gordon, Michael Meurer, Clarisa Long, David Fagundes, Jeanne Fromer, Robert Bone, Christopher Newman, Michael Madison, John Golden, Mark McKenna, Kevin Collins, Adam Mosoff, Eric Claeys, Mark Lemley, Peggy Radin, Jennifer Rothman, Carol Rose, Hanoch Dagan, Jake Linford, Michael Heller, Robin Feldman, Pamela Samuelson, Jason Schultz, Aaron Perzanowski, Stef van Gompel, Shyam Balganesh, Lydia Loren, Daniel Kelly, Lior Strahilevitz, and others cited below.

Part I: Property's Promise and Peril

Chapter One will explore leading rationales for private property rights in land and tangible objects, including justifications that emphasize promoting productive and coordinated use of scarce resources, rewarding and incentivizing labor, cultivating personhood and autonomy, and protecting privacy. Turning to intellectual property, some of the same justifications resonate[6]—and are indeed embodied in the U.S. Constitution's authorization for Congress to grant exclusive rights in writings and discoveries in order to "promote progress." But other rationales—particularly those related to preventing overuse of rivalrous resources—are less apt in the realm of non-rivalrous intangibles, as frequently noted by critics of expansive intellectual property protection. Those critics often draw on the doctrine and scholarship I will cite in Chapter Two, which will turn to rationales for denying or limiting property rights, for taking property for public use, for imposing obligations on property owners (including obligations to grant access to non-owners), and for deploying alternative mechanisms for achieving the goals typically associated with private property.[7] Cases considering novel property claims—to celebrity personas, excised body parts, gene fragments, or seemingly public sidewalks, for example—are among those that illustrate these ideas. But the concerns that trigger skepticism about property rights in these cases—concerns about the complexity imposed by non-standard property rights, about the fragmented and overlapping rights of the "anticommons,"[8] about commodification eroding human dignity, and about over-privatization as a threat to free expression and distributive justice—can also inform the development of existing bodies of tangible and intangible property law. These concerns should prompt open-minded consideration of cases in which the benefits of private property, compared to alternative mechanisms, may be outweighed by the costs.[9]

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[6] See generally, e.g. Merges, supra; Adam Mossoff, Is Copyright Property?, 42 San Diego L. Rev. 29 (2005).

[7] Key sources here will include works by Alexander, Radin, Dagan, Rose, Peñalver, Singer, Sax, et al.

[8] See generally Lee Anne Fennell, Commons, Anticommons, Semicommons, in in Research Handbook on the Economics of Property Law 35 (Kenneth Ayotte & Henry E. Smith, eds., 2011); Michael A. Heller, The Anticommons Lexicon, in Research Handbook on the Economics of Property Law 57 (Kenneth Ayotte & Henry E. Smith, eds., 2011); Michael Heller, The Gridlock Economy (2008); Lee Anne Fennell, Common Interest Tragedies, 98 Nw. L. Rev. 907 (2004); Michael A. Heller, The Tragedy of the Anticommons: Property in the Transition from Marx to Markets, 111 Harv. L. Rev. 621 (1998).

[9] On alternatives to private property in tangible objects, see, e.g., Carol Rose, The Comedy of the Commons: Custom, Commerce, and Inherently Public Property, 53 U. Chi. L. Rev. 53 (1986). On alternatives to intellectual property, see, e.g., Amy Kapczynski, The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism, 59 UCLA L. Rev. 970 (2010); Amy Kapcynski & Talha Syed, Nonexcludability and the Limits of Patents (2012 draft).

These first two chapters will set the stage for a more concrete examination of particular doctrines and themes within the law of property in the parts that follow.

Part II: Property and Possession

Chapter Three will explore the significance (and potential ambiguity) of possession as a source of property rights in land and physical objects and examine the analogs of first possession for purposes of acquiring rights in intellectual creations (i.e. fixation of original copyrightable works and timely filing of novel and otherwise patentable inventions).[10] The importance of possession has been traced back at least to Roman law and across legal traditions around the world;[11] it has been explained as psychologically embedded[12] and even the product of evolution.[13] Ambiguity about the meaning of possession is likely as old and widespread.[14]

Theorists have cited a number of different rationales in an effort to help explain the importance and meaning of possession as applied in particular controversies.[15] Some of these

[10] On the importance and of possession to property rights (and the potential difficulty of defining what counts as possession), see generally Richard A. Epstein, Possession as the Root of Title, 13 Ga. L. Rev. 1221 (1979); Carol M. Rose, Possession as the Origin of Property, 52 U. Chi. L. Rev. 73 (1985); Henry E. Smith, The Language of Property: Form, Context, and Audience, 55 Stan. L. Rev. 1105, 1115-25 (2003). On the IP connection, see, e.g., Alfred C. Yen, Restoring the Natural Law: Copyright as Labor and Possession, 51 Ohio St. L.J. 517 (1990); Abraham Drassinower, Capturing Ideas: Copyright and the Law of First Possession, 54 Clev. St. L. Rev. 191, 196 (2006); Timothy R. Holbrook, Possession in Patent Law, 58 SMU L. Rev. 123 (2006); Timothy R. Holbrook, Equivalency and Patent Law's Possession Paradox, 23 Harv. J.L. & Tech. 1 (2009). Henry Smith argues that accession, rather than first possession, is a better model for thinking about acquisition of intellectual property rights. See Henry E. Smith, Intellectual Property as Property: Delineating Entitlements in Information, 116 Yale L.J. 1742, 1767-68 (2007).

[11] See generally Jill M. Fraley, Finding Possession: Labor, Waste, and the Evolution of Property, 39 Cap. U. L. Rev. 51, 52 (2011); Dean Lueck, The Rule of First Possession and the Design of the Law, 38 J.L. & Econ. 393, 393-94 (1995).

[12] See generally D. Benjamin Barros, The Biology of Possession, 20 Widener L.J. 291 (2011); Ori Friedman & Karen R. Neary, First Possession Beyond the Law: Adults' and Young Children's Intuitions About Ownership, 83 Tul. L. Rev. 679 (2009); Thomas W. Merrill & Henry E. Smith, The Morality of Property, 48 Wm. & Mary L. Rev. 1849, 1858 (2007). Cf. Christopher Buccafusco & Christopher Jon Sprigman, The Creativity Effect, 78 U. Chi. L. Rev. 31 (2011) (exploring the implications of the endowment effect and the related "creativity effect" for the valuation of intellectual works by their creators).

[13] Jeffrey Evans Stake, The Property "Instinct," 359 Phil. Transactions Royal Soc'y B. 1763 (2004); but see Barros, supra (challenging Stake's conclusions).

[14] On the ambiguity of the concept, see, e.g. Rose, supra, at 82-85; Drassinower, supra, at 196.

[15] The classic case of Pierson v. Post is the most typical case study. The competing views offered by the majority, dissent, and innumerable commentators deploy arguments emphasizing labor, investment, notice, custom, and more, in an effort to explain what constitutes possession adequate to establish initial property rights in a wild fox. See, e.g., Rose, supra; Epstein, supra; Henry E. Smith, Modularity and Morality in the Law of Torts, 4 J. Tort L. 1, 14 (2011) (observing with regard to Pierson that "[e]stablishing a claim over a resource may involve earning the claim or doing something to make clear to others that a claim is being made. Indeed, the two aspects are related: the Lockean

rationales are more applicable and helpful than others for understanding and perhaps improving the mechanisms by which authors and inventors seize "possession" of the intangible subject matter of intellectual property. For example, the notion that possession is important to the origin of tangible property rights because of the signal it sends to the rest of the word is central to Carol Rose's persuasive explanation in *Possession as the Origin of Property*, in which she links this signaling function to the labor theory of property, concluding that "the common law of first possession, in rewarding the one who communicates a claim, *does* reward useful labor; the useful labor is the very act of speaking clearly and distinctly about one's claims to property."[16] The intangibility of the subject matter of patent and copyright complicates the analogous acts involved in claiming these rights, although the notice function would seem to be similarly important in these contexts for preventing disputes and facilitating voluntary transactions—as I will discuss more fully in subsequent chapters.[17] First, there is a bit more to say about the concept of possession.

Chapter Four will introduce additional complications into the possession/property relationship by examining the challenges posed for both tangible and intangible property regimes when property rights are held by non-possessors. These challenges arise in the tangible property context when, for example, the claims of current possessors are challenged by prior possessors—with the results often reflecting the enduring notion of "first in time, first in right,"[18] but sometimes prioritizing recent claims over stale ones (as with adverse possession, marketable title acts, and protection for bona fide purchasers). More striking, perhaps, are controversies over property rights held by people who may never have been in possession, but who nonetheless claim the right to control some aspect of a resource. Land servitudes are a classic example, and the anxiety and doctrinal complexity that has marked the body of law governing them merely serves to

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labor-mixing theory ensures that the mixed labor communicates to potential duty bearers through the worked-upon thing").

[16] Rose, supra, at 82.

[17] See Rose, supra, at 83 ("Some objects of property claims do seem inherently incapable of clear demarcation—ideas, for example. In order to establish ownership of such disembodied items we find it necessary to translate the property claims into sets of secondary symbols that our culture understands. In patent and copyright law, for example, one establishes an entitlement to the expression of an idea by translating it into a written document and going through a registration process—though the unending litigation over ownership of these expressions, and over which expressions can even be subject to patent or copyright, might lead us to conclude that these particular secondary symbolic systems do not always yield widely understood "markings."); see generally Jeanne C. Fromer, Claiming Intellectual Property, 76 U.Chi. L. Rev. 719 (2009).

[18] See generally Barros, supra, at 295.

reinforce the importance of possession as a touchstone of property reasoning.[19]

Turning to intellectual property, the basic anxiety and confusion associated with non-possessory property rights is perhaps unavoidable (unless we abandon IP for some alternative regime), because the structure of modern intellectual property divorces ownership of physical objects embodying works of authorship and novel inventions from ownership of the corresponding copyrights and patents.[20] The degree of tension between the rights of the owners of these physical (or, increasingly, digital) objects and intellectual property owners depends, however, on the precise contours of the exclusive rights granted by copyright and patent: do they give a copyright owner, for example, the right to constrain the resale of a lawfully acquired book? The lending of a book by a library? The reproduction of its crumbling paper pages?[21] These and related questions are addressed but seldom satisfactorily resolved by the doctrine of intellectual property "exhaustion," which the Supreme Court has now promised to address for the third time in recent years.[22] A careful examination and comparison of the long history of possession as a touchstone of tangible property may help to illuminate this under-theorized intellectual property doctrine.

Part III: Property and Information

Over the course of Chapter Five and Chapter Six, I will consolidate ideas already alluded to in previous chapters about the relevance of notice provision and information cost management to systems of property rights, highlight the contrasts between the formal information infrastructures available in the tangible and intangible property contexts, and explore how adjustments to property rights and remedies can respond to shortcomings in those infrastructures.

Intellectual property scholars often contrast tangible and intangible property schemes on the basis of how much information is readily available about the identity of property owners and the nature of their rights. Typically, the comparison holds up tangible property—real property in

[19] See generally Carol M. Rose, Servitudes, in Research Handbook on the Economics of Property Law (Kenneth Ayotte & Henry E. Smith, eds., 2011); Van Houweling, The New Servitudes, supra.

[20] See generally Van Houweling, Touching and Concerning Copyright, supra, at 1064-65.

[21] Important recent scholarship on these questions includes Aaron Perzanowski & Jason Schultz, Digital Exhaustion, 58 U.C.L.A. L. Rev. 889 (2011); Aaron Perzanowski & Jason Schultz, Copyright Exhaustion and the Personal Use Dilemma, 96 Minn. L. Rev. (forthcoming 2012).

[22] John Wiley & Sons, Inc. v. Kirtsaeng, 654 F.3d 210 (9th Cir. 2010) (cert. granted, Apr. 16, 2012); see also Quanta Computer, Inc. v. LG Electronics, Inc., 553 U.S. 617 (2008); Omega S.A. v. Costco Wholesale Corp., 541 F.3d 982 (9th Cir. 2008), aff'd by an evenly divided Court, Costco Wholesale Corp. v. Omega S.A., 131 S.Ct. 565 (2010).

particular—as the model of successful information provision. Physical signs can provide clues that a piece of land is owned by someone (often the person in possession). Customs in the relevant neighborhood can shape how those signs are understood.[23] Public records indicate exactly who that someone is and reveal details about the physical dimensions of the parcel, how its ownership has changed over time, and whether express encumbrances (liens, servitudes, etc.) complicate ownership.[24] These sources of information help to prevent inadvertent trespass by those who wish to avoid invading private land; they facilitate consensual transactions for those who seek permission to use or buy it. Intellectual property rights, by contrast, do not so neatly correspond either to physical things in the world or to public records signifying ownership and identifying owners.

Anxiety about the inadequacy of information regarding intellectual property rights has increased in recent years due to statutory changes that have made the situation worse (e.g. the elimination of registration and notice as prerequisites for copyright protection), and to technological changes that have raised the stakes and thickened thickets of (often hidden) rights. In copyright, this anxiety is manifest in policy debates about the status of "orphan works" whose owners cannot be identified and located, and the (related) fate of the Google Book Search project.[25] In patent, critics are alarmed when innovators' investments are jeopardized by allegations that they have infringed unclear and thus difficult-to-avoid patent claims—especially in the new-fangled realms of software and Internet business methods.[26] In both the copyright and

[23] On custom in property and IP, see, e.g., Henry E. Smith, Community and Custom in Property, 10 Theoretical Inquiries in Law 5 (2009); Jennifer Rothman, Custom, the Common Law and Intellectual Property, in Intellectual Property and the Common Law (Shyam Balganesh, ed.) (forthcoming); Jennifer Rothman, The Questionable Use of Custom in Intellectual Property, 93 Va. L. Rev. 1899 (2007).

[24] For a helpful summary of formal information infrastructures in tangible property (with comparison to copyright), see Stef von Gompel, Formalities in Copyright Law 244-46 (2011).

[25] See, e.g., Pamela Samuelson, The Google Book Settlement as Copyright Reform, 2011 Wis. L. Rev. 479; Pamela Samuelson, Legislative Alternatives to the Google Book Settlement, 34 Colum. J.L. & Arts 697 (2011); Pamela Samuelson, Google Book Search and the Future of Books in Cyberspace, 94 Minn. L. Rev. 1308 (2010); Oren Bracha, Standing Copyright on its Head? The Googlization of Everything and the Many Faces of Property, 85 Tex. L. Rev. 1799 (2007).

[26] See, e.g., Bilski v. Kappos, 130 S.Ct. 3218, 3256 (2010) (Stevens, J., concurring in the judgment); eBay Inc. v. MercExchange, L.L.C., 547 U.S. 392, 397 (2006) (Kennedy, J., concurring); James Bessen & Michael J. Meurer, Patent Failure: How Judges, Bureaucrats, and Lawyers Put Innovators at Risk (2008); Clarisa Long, Information Costs in Patent and Copyright, 90 Va. L. Rev. 465, 487-88, 543-44 (2004); Peter S. Menell & Michael Meurer, Notice Failure and Notice Externalities 5-6 (Feb. 15, 2012) (Boston Univ. School of Law Law and Economics Research Paper No. 11-58; Boston Univ. School of Law Public Law Research Paper No. 11-58; Stanford Law and Economics

patent contexts, informational inadequacies can contribute to inadvertent infringement and then to surprising and costly disputes. Or fear of potential infringement—combined with the inability to identify, locate, and negotiate with relevant rights-holders—can chill productive endeavors.[27]

Critics of this current state of affairs lament what they see as unnecessarily faulty information provision and suggest that intellectual property should aspire to replicate the superior informativeness of real property. For example, copyright reformers have called for statutory changes modeled on the centralized ownership information provided by land recording systems and the title-clearing function performed by marketable title acts.[28] Ironically, while intellectual property scholars and activists have been coveting the information-providing mechanisms of real property, developments in the land context have triggered skepticism about the functioning of those mechanisms. The mortgage foreclosure crisis has revealed to the public weaknesses in land recording that have long been lamented by real property scholars[29]—who have issued renewed calls to bring antiquated local recording systems into the digital age.[30] At the same time, private entities (most notably the Mortgage Electronic Recording System) have arisen that interact with the public recording system in controversial ways.[31]

The formal, centralized, and sometimes error-prone information mechanisms associated with land titles are not the only models offered by the law of tangible property, however. As recent scholarship has observed, these structures co-exist with other legal mechanisms—including

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Olin Working Paper No. 418; UC Berkeley Public Law Research Paper No. 1973171), available at http://ssrn.com/abstract=1973171.

[27] See generally Federal Trade Commission, The Evolving Ip Marketplace: Aligning Patent Notice And Remedies With Competition 3 (2011) (observing that where patent notice is poor, "collaborators or licensees may not find relevant patents, or they may hesitate to invest in technology when the scope of patent protection is unclear"); U.S. Copyright Office, Report on Orphan Works 15 (2006) ("In the situation where the owner cannot be identified and located . . . the user faces uncertainty—she cannot determine whether or under what conditions the owner would permit use. . . . Concerns have been raised that in such situation, a productive and beneficial use of the work is forestalled—not because the copyright owner has asserted his exclusive rights in the work, or because the user and owner cannot agree on the terms of a license—but merely because the user cannot locate the owner.").

[28] See, e.g., Lawrence Lessig, For the Love of Culture: Google, Copyright, and Our Future, New Republic, Feb. 4, 2010, at 24.

[29] See, e.g., Dale A. Whitman, Digital Recording of Real Estate Conveyances, 32 J. Marshall L. Rev. 227, 227 (1999).

[30] See, e.g., Gerald Korngold, Legal and Policy Choices in the Aftermath of the Subprime and Mortgage Financing Crisis, 60 S.C. L. Rev. 727, 739-46 (2009); Tanya Marsh, Foreclosures and the Failure of the American Land Title Recording System, 111 Colum. L. Rev. Sidebar 19 (2011); Christopher L. Peterson, Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System, 78 U. Cin. L. Rev. 1359, 1366 (2010).

[31] See generally Peterson, supra.

rules about the form of property rights and the remedies triggered by their infringement—that are attentive to information costs concerns.[32] This common law tradition features a wide variety of doctrinal tools. Even (or perhaps especially) if the formal, centralized informational structures of the land law are never fully replicated for intangible property, this rich common law tradition may prove a valuable source of ideas for addressing contemporary intellectual property challenges.[33]

Part IV: Property and Time

Chapter Seven will show how important doctrinal tools within property law tackle the problems caused by property claims that reach far into the future—or, viewed ex post, originate in the distant past. Such claims trigger fears about "dead hand control," a label that reflects underlying anxiety about special types of information and transaction costs that arise as owners move and proliferate and their claims become entangled over time, about threats to the autonomy of the living imposed by enforcing the preferences of prior generations, and about unfair distribution of resources caused by dynastic wealth accumulation. A variety of property doctrines are attentive to these fears. Indeed, the infamous Rule Against Perpetuities is arguably important as a topic of study for property students more for the powerful way that it illustrates the force of the concern with dead hand control than for its contemporary doctrinal significance. The law of adverse possession is similarly important in part for the way in which it illustrates problems caused by the assertion of stale claims.[34]

The topic of time and the fear of dead hand control have special resonance for intellectual

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[32] Stewart Sterk has documented this phenomenon, with particular attention to judicial adjustment of remedies in both the real property and intellectual property contexts. Stewart E. Sterk, Property Rules, Liability Rules, and Uncertainty About Property Rights, 106 Mich. L. Rev. 1285 (2008). In a similar spirit, Henry Smith explains equitable analysis of patent remedies as a response to notice problems in patent law. Henry E. Smith, Institutions and Indirectness in Intellectual Property, 157 U. Pa. L. Rev. 2083, 2125-32 (2009); see also Mark P. Gergen, John M. Golden & Henry E. Smith, The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions, 112 Colum. L. Rev. 203, 239-40 (2012) (describing the special role that notice plays in property and in equity); John M. Golden, Principles for Patent Remedies, 88 Tex. L. Rev. 505, 554 (2010) (suggesting that under some circumstances "reduced remedies for inadvertent infringement might optimally spur patentees to improve patent notice").

[33] Cf. Smith, Institutions, supra at 2121 (observing that "[a]lthough systematic and centralized property records often do provide effective notice (most notably in the case of land), it is an empirical question as to how they stack up against other methods in any given situation. Other methods include standardization, equitable doctrines of notice . . . and doctrines absolving from liability those who encounter rights.").

[34] For one exploration of an IP/adverse possession connection, see Jake Linford, Trademark Owner as Adverse Possessor, Case Western Res. L. Rev. (forthcoming 2013).

property, as Chapter Eight will explore. In this property context, time is addressed quite directly—with express limits on the duration of copyrights and patents. And yet the problems posed by stale, obsolete, and hopelessly entangled rights nonetheless loom large where technology is advancing so rapidly, where there is no natural limit on the proliferation of property claims, and where the public interest in access to the relevant resources often lasts far longer than the property owners' interest in making available the rights-related information necessary to facilitate voluntary transactions. The problem of "orphaned" copyrighted works, mentioned above, illustrates how the information cost challenges explored in Part III can be compounded over time, resulting in frustrating underuse of presumably owned but unspoken-for resources. This part's exploration of the tools that tangible property law deploys to limit dead hand control should provide additional insight into this problem and potential solutions.

Part VI: Property's Periphery

This part will explore the doctrinal intersections between property and the neighboring common law regimes of contract and tort, noting both the distinctive features of property and the often blurry intersections with these nominally distinct bodies of law. Chapter Nine will focus on the tangible property/contract interface. Chapter Ten will focus on the tangible property/tort interface. Chapter Eleven will explain the ways in which patent and copyright demonstrate but also diverge from the paradigmatic characteristics of property.[35] This chapter will also take up cases in which courts purport to be enforcing something other than intellectual property—contract, for example, in the important case *ProCD v. Zeidenberg*—but in ways that have effects potentially equivalent too and/or troublingly inconsistent with established IP regimes (with implications for the doctrinal concepts of preemption and misuse).[36] Unlike most of the rest of the book, this chapter will also take up additional bodies of law governing intangibles—including trademark,[37]

[35] See generally, e.g., Smith, Intellectual Property as Property, supra. Shyam Balganesh's work will be especially important for thinking through the various common law/IP connections (tort, in particular).

[36] See generally Van Houweling, The New Servitudes, supra; Christopher M. Newman, A License is Not a "Contract Not to Sue': Disentangling Property and Contract in the Law of Copyright Licenses," Iowa L. Rev. (forthcoming 2012).

[37] Mark McKenna's work will be useful here for illuminating trademark law's historical and doctrinal connections to property law, the tort of unfair competition, etc. On the trademark/contract connection, see Jeremy Sheff, Marks, Morals, and Markets, 65 Stan. L. Rev. (forthcoming 2013). On the role of tort-like notions of harm in trademark, see

misappropriation, and trade secret—which serve as helpful demonstrations of how "intellectual property" can be relatively tort- and contract-like.[38]

Conclusion: Property's Past and Future

Property law is often cast in evolutionary terms—typically emphasizing the emergence of new private property rights as populations expand, resources become scarce and valuable, and societies recognize the importance of optimizing resource use while avoiding the inefficiencies caused by externalities.[39] With regard to land and most tangible objects, we often cast our minds far into the past to recreate the key developments in this evolutionary story. With intellectual property, we are in the middle of the story right now—making this a critical time to explore and apply the lessons offered by the evolution of tangible property. These lessons may prompt us to wonder whether property—with its emphasis on possession, its reliance on information infrastructures, and its capacity to create terrible tangles with the passage of time—might be an evolutionary dead end.

Whether or not property is the right model for tackling the resource management dilemmas of the information age, the theory and doctrine of property law—*property's intellect*—should not be neglected as a source of insight about the promise, peril, and alternatives to this age-old mechanism for achieving some of society's most pressing goals.

Robert G. Bone, Taking the Confusion Out of "Likelihood of Confusion": Toward a More Sensible Approach to Trademark Infringement, N.W. U. L. Rev. (forthcoming 2012).

[38] See generally Eric R. Claeys, Intellectual Usufructs: Trade Secrets, Hot News, and the Usufructuary Paradigm at Common Law, in Intellectual Property and the Common Law (Shyamkrishna Balganesh, ed., 2012); Eric R. Claeys, Private Law Theory and Corrective Justice in Trade Secrecy, 4 J. Tort L. 1 (2011).

[39] E.g. Harold Demsetz, Toward a Theory of Property Rights, 57 Am. Econ. Rev. 347 (1967); Terry L. Anderson & P.J. Hill, The Evolution of Property Rights: A Study of the American West, 18 J.L. & Econ. 163 (1975).