Book Review

Romantic Authorship and the Rhetoric of Property

SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF
THE INFORMATION SOCIETY. By James Boyle.¹
Cambridge: Harvard University Press, 1996.
Pp. xvi, 270. \$35.00.²

REVIEWED BY MARK A. LEMLEY³

JAMES BOYLE BILLS HIS NEW BOOK AS BEING "ENTIRELY FREE
FROM REFERENCES TO MADONNA."⁴ PERHAPS IN THIS DAY AND AGE,
A MORE IMPRESSIVE DISCLAIMER FOR A BOOK ABOUT THE "INFORMATION
SOCIETY" WOULD HAVE BEEN THAT THE BOOK IS LARGELY FREE FROM
REFERENCES TO THAT UBIQUITOUS THING CALLED (IN ROUGHLY

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⁴P. xvi.

INCREASING ORDER OF TRENDINESS) THE INFORMATION SUPERHIGHWAY,⁵
THE NATIONAL INFORMATION INFRASTRUCTURE,⁶ CYBERSPACE,⁷ THE

⁵This term is decidedly uncool on the Net itself. The term has political overtones suggestive of a government-sponsored public works project and is, in any event, a grossly misleading description of how the Net actually works. See Mark A. Lemley, *Shrinkwraps in Cyberspace*, 35 JURIMETRICS J. 311, 312 n.7 (1995). What is perhaps even worse is the host of disastrous metaphors the term has spawned—"roadkill on the Information Superhighway," "toll booths on the Information Superhighway," "exit ramps on the Information Superhighway," "road construction on the Information Superhighway," "speed bumps on the Information Superhighway," and the like. In all fairness, the trendy way to describe the Net seems to change on a regular basis, so those who used the S-word before about 1994 may reasonably be forgiven.

⁶This is the federal government's term. See, e.g., THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 2 n.5 (1995) [hereinafter NII WHITE PAPER]. Some might consider that fact reason enough not to use it.

⁷As anyone who has ever read the first page of a law review article about the Net knows, this term was coined by cyberpunk writer William Gibson. See, e.g., WILLIAM GIBSON, COUNT ZERO 36 (1986); WILLIAM GIBSON, NEUROMANCER 51 (1984). A recent Lexis search for "gibson w/25 cyberspace" retrieved 36 entries. Search of LEXIS, Lawrev Library, Allrev File (Sept. 17, 1996).

INTERNET,⁸ THE INFOBAHN,⁹ THE NET,¹⁰ OR THE METAVERSE.¹¹ WHILE BOYLE DOES SPEND SOME TIME DISCUSSING THE NET,¹² THE BOOK ITSELF RANGES FROM EIGHTEENTH-CENTURY AUTHORSHIP TO INSIDER TRADING TO TRANSGENIC SLAVERY. WHAT TIES THESE DISPARATE THREADS TOGETHER IS INFORMATION, AND WHAT HE ATTEMPTS IN THESE PAGES IS NOTHING LESS THAN AN EXPLORATION OF THE LAW OF INFORMATION.¹³ ONE CAN FIND MANY DIFFERENT THINGS IN THIS BOOK; I WILL FOCUS THIS REVIEW ON A SUBJECT WHICH EXISTS AS A SUBTEXT THROUGHOUT BOYLE'S BOOK: WHO ENDS UP OWNING INFORMATION, AND WHY?

BOYLE'S BOOK ADVANCES A CONCEPTION OF "ROMANTIC AUTHORSHIP," WHICH HE FINDS UNDERLYING MUCH OF THE CURRENT DOCTRINE NOT ONLY IN INTELLECTUAL PROPERTY, BUT IN SUCH DIVERSE FIELDS AS BLACKMAIL AND BIOETHICS AS WELL. IN PART I OF THIS REVIEW, I BRIEFLY CONSIDER THE SALIENT FEATURES OF

⁸Strictly speaking, this is in fact what most of the fuss is about, though popular conception of "the Internet" sometimes ranges to things like freestanding electronic bulletin boards, which are not technically part of it. For an interesting history of the early development of the Internet, see KATIE HAFNER & MATTHEW LYON, *WHERE WIZARDS STAY UP LATE: THE ORIGINS OF THE INTERNET* (1996) and Barry M. Leiner et al., *A Brief History of the Internet* (last modified Feb. 20, 1997) <<http://www.isoc.org/internet-history/>>.

⁹This term was popularized by *Wired* magazine in 1994 as an alternative to the then-ubiquitous "Information Superhighway." See John Perry Barlow, *Jackboots on the Infobahn*, *WIRED*, Apr. 1994, at 40.

¹⁰Cf. *THE NET* (Columbia TriStar Pictures 1995) (using the term to refer to a fictionalized set of network connections between computers).

¹¹See NEAL STEPHENSON, *SNOW CRASH* 22 (1992). Stephenson's book imagines a virtual world (the "Metaverse") which is perhaps more easily realizable than Gibson's more abstracted virtual architecture.

¹²See, e.g., pp. 135-39.

¹³Boyle would perhaps deny that he has attempted anything so grandiose as a normative *theory* of information. See p. 110 ("At most, I am trying to lay out the structure within which issues are framed, possibilities foreclosed, and so on.").

BOYLE'S ARGUMENT. IN PART II, I SUGGEST THAT THE ROMANTIC AUTHORSHIP IDEA DOES NOT IN FACT SUCCEED IN EXPLAINING VERY MUCH ABOUT INTELLECTUAL PROPERTY LAW. FINALLY, IN PART III, I OFFER AN ALTERNATIVE VIEW OF SOME OF THE RULES AND RESULTS BOYLE DESCRIBES: THAT CURRENT TRENDS IN INTELLECTUAL PROPERTY (AND PERHAPS OUTSIDE IT AS WELL) CAN BEST BE DESCRIBED AS THE ONGOING "PROPERTIZATION" OF THE INTELLECTUAL SPHERE ALONG THE LINES SUGGESTED IN ONE BRANCH OF ECONOMIC SCHOLARSHIP.

LET ME BEGIN WITH TWO CAVEATS. FIRST, I WOULD LIKE TO MAKE IT CLEAR AT THE OUTSET THAT I AGREE WITH MUCH OF WHAT BOYLE SAYS IN HIS EXCELLENT BOOK, AND I THINK THAT AT THE END OF THE DAY WE ARE LIKELY TO BE ON THE SAME SIDE IN MANY OF THE CURRENT DISPUTES HE DESCRIBES. IN PARTICULAR, I AGREE BOTH WITH BOYLE'S GENERAL POINT THAT AUTHORS GET TOO MUCH PROTECTION FROM MODERN INTELLECTUAL PROPERTY LAW AND WITH MANY OF HIS SPECIFIC CONCERNS ABOUT THE CONTOURS OF THAT LAW. OUR DISAGREEMENT IS MORE THEORETICAL THAN PRACTICAL. BOYLE POINTS TO "ROMANTIC AUTHORSHIP" AS THE DRIVING FORCE BEHIND THE EXPANSION OF INTELLECTUAL PROPERTY; I OFFER A DIFFERENT EXPLANATION.¹⁴ SECOND, BOYLE'S RANGE OF EXPERTISE FAR EXCEEDS MINE. I SPEND MY TIME STUDYING INTELLECTUAL PROPERTY, AND INTELLECTUAL PROPERTY WILL ACCORDINGLY BE THE FOCUS OF THIS REVIEW. WHILE I MAY OFFER A FEW TENTATIVE THOUGHTS HERE AND THERE ABOUT BLACKMAIL AND INSIDER TRADING, I DO NOT PRETEND TO HAVE ANY SPECIALIZED KNOWLEDGE IN EITHER FIELD.¹⁵

I. THE BOOK

BOYLE'S BOOK IS POSITIVELY BREATHTAKING IN ITS SCOPE. INTELLECTUAL PROPERTY ALONE IS AN ENORMOUS FIELD, PROBABLY BEYOND THE CAPABILITY OF ANY INDIVIDUAL TO MASTER TODAY. AND YET BOYLE'S BOOK EXAMINES NOTHING NARROWER THAN THE LAW'S TREATMENT OF INFORMATION. THIS IS A PROJECT WHICH HAS BEEN ONGOING FOR SOME TIME. BOYLE PUBLISHED AN EARLY VERSION OF

¹⁴For an argument that links romantic authorship and property rhetoric, see Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1333-38 (1996).

¹⁵In fact, this may be less of a limitation than it would at first appear. While Boyle's book ranges broadly over a variety of topics in the law of information, it is intellectual property that seems to be his focus, and it is intellectual property from which his theory of romantic authorship grows.

HIS THEORY AS A LAW REVIEW ARTICLE IN 1992.¹⁶ SINCE THAT TIME, THE THEORY HAS EXPANDED SIGNIFICANTLY, AND BOYLE HAS THOUGHT THROUGH A NUMBER OF POSSIBLE OBJECTIONS, ALL OF WHICH THE BOOK DISCUSSES.

FIRST, BOYLE ATTEMPTS TO CONVINCE THE READER THAT INFORMATION IS A SOMEWHAT UNITARY PHENOMENON AND THAT LAW'S TREATMENT OF INFORMATION MERITS CONSIDERATION AS MORE THAN AN AGGREGATION OF DIFFERENT LEGAL RULES. BOYLE ARGUES THAT INFORMATION IS INCREASINGLY DECONTEXTUALIZED—THAT, TO USE HIS WORDS, "IN INFORMATION THEORY RIGHT NOW, ONE CAN WATCH THE DISCIPLINARY BOUNDARIES EVAPORATE IN REAL TIME."¹⁷ THE BOOK CONTAINS SOME PERSUASIVE EXAMPLES, SUCH AS THE INFORMATIONAL CONNECTIONS BETWEEN DNA SEQUENCES AND COMPUTER PROGRAMMING.¹⁸ BUT PERHAPS THE MOST CRITICAL REASON FOR LAW TO TREAT INFORMATION AS A UNIFIED ENTITY IS THAT INFORMATION, AND NOT THE SHELL IN WHICH IT HAS ORDINARILY PRESENTED ITSELF, IS INCREASINGLY BECOMING THE CENTRAL VALUE IN ECONOMIC TRANSACTIONS.¹⁹ IN LARGE PART, THIS RESULTS FROM THE DECLINING COST OF REPRODUCING AND TRANSMITTING INFORMATION. IT COSTS ESSENTIALLY NOTHING TO MAKE AND DISTRIBUTE A COPY OF A DOCUMENT ON THE INTERNET TODAY; IT COSTS A LOT MORE TO CONVEY THE SAME INFORMATION BY TYPESETTING, PRINTING, AND BINDING A BOOK, AND THEN DELIVERING IT TO A WAREHOUSE, WHICH WILL DELIVER THE BOOK TO A STORE, WHICH WILL SELL THE BOOK TO A CUSTOMER. BECAUSE COUNTERFEITERS HAVE TO PAY PRODUCTION COSTS TOO, COUNTERFEITING BECOMES MORE LIKELY AS PRODUCTION COSTS DECLINE RELATIVE TO THE VALUE OF THE IDEA CONTAINED IN THE WORK. COUNTERFEITING OFFERS SOME RETURN IF THE "INTELLECTUAL VALUE" COMPONENT OF A BOOK IS TWENTY PERCENT OF THE PURCHASE PRICE; IT IS MUCH MORE LUCRATIVE IF THE INTELLECTUAL VALUE IS NINETY-FIVE PERCENT OF THE PRICE. HENCE THE "PUBLIC GOODS" PROBLEM IN ECONOMICS IS EXACERBATED AS INFORMATION ITSELF INCREASINGLY BECOMES WHAT IS BEING

¹⁶See James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413 (1992).

¹⁷P. 2.

¹⁸See pp. 7-8.

¹⁹See pp. 2-3. Similar ideas have been expressed by others. See, e.g., John Perry Barlow, *The Economy of Ideas*, WIRED, Mar. 1994, at 85 (suggesting that traditional legal rules focus on the "bottle"—how information is packaged—rather than the "wine"—the information itself).

SOLD.²⁰

BOYLE SEEMS TO ACKNOWLEDGE THE CENTRAL ROLE ECONOMICS PLAYS IN DRIVING THE DECONTEXTUALIZATION OF INFORMATION.²¹ BOYLE IS LESS CONVINCED, HOWEVER, THAT ECONOMIC THEORY HAS ANYTHING USEFUL TO SAY CONCERNING WHAT TO DO ABOUT IT. IN CHAPTER IV, TITLED "INFORMATION ECONOMICS," BOYLE CRITIQUES THE ECONOMIC ANALYSIS OF INFORMATION.²² HIS BASIC ARGUMENT IS TWOFOLD. FIRST, ECONOMIC THEORY TREATS INFORMATION IN TWO DIFFERENT WAYS—AS THE ESSENTIAL BACKGROUND TO AN EFFICIENT MARKET TRANSACTION (IN OTHER WORDS, THE IDEA THAT BUYERS AND SELLERS BOTH HAVE "PERFECT INFORMATION") AND ALSO AS A COMMODITY THAT MUST BE PROPERTIZED IN ORDER TO AVOID THE PUBLIC GOODS PROBLEM AND TO ENCOURAGE FURTHER INNOVATION AND CREATION.²³ BOYLE SUGGESTS THAT IF INFORMATION IS REALLY A UNITARY PHENOMENON, THESE TWO APPROACHES ARE FATALLY CONTRADICTORY: INFORMATION THAT IS PROPERTY IS NOT FREELY AVAILABLE, AND THUS A FALLACY UNDERLIES THE ASSUMPTION OF EFFICIENT MARKETS. BOYLE SUGGESTS THAT THE LAW TREATS DIFFERENT TYPES OF INFORMATION INCONSISTENTLY, SOMETIMES TREATING INFORMATION AS FREE TO THE WORLD AND SOMETIMES AS PROPERTY THAT CAN BE OWNED.²⁴

BOYLE'S SECOND OBJECTION TO THE ECONOMIC TREATMENT OF INFORMATION IS THAT ECONOMIC ANALYSIS IS INDETERMINATE.²⁵ HE CITES SOME WONDERFUL EXAMPLES OF FAMOUS ECONOMISTS DISAGREEING

²⁰For a general discussion of the public goods problem in intellectual property, see Peter S. Menell, *An Analysis of the Scope of Copyright Protection for Application Programs*, 41 STAN. L. REV. 1045, 1059-66 (1989). On intellectual value in cyberspace, see Esther Dyson, *Intellectual Value*, WIRED, July 1995, at 136, 137 (arguing that support services will replace content and intellectual property as the focus of value on the Net).

²¹See pp. 2-3 (describing the decrease in the cost of hardware and the increase in the value of information).

²²See pp. 35-45.

²³See pp. 35-45.

²⁴See pp. 36-38.

²⁵See pp. 36-38 (describing the inconclusive debate between scholars regarding whether the commodification of information will cause an efficient or inefficient production of information).

OVER WHETHER THE FREE MARKET PRODUCES TOO MUCH OR TOO LITTLE INFORMATION AND OF ONE ECONOMIST SUGGESTING THAT IT MIGHT DO BOTH.²⁶ AND BOYLE OFFERS SOME TRENCHANT CRITICISMS OF MUCH OF THE EMPIRICAL WORK THAT HAS BEEN DONE TO DATE IN THE FIELD.²⁷ HIS CONCLUSION SEEMS TO BE THAT ECONOMICS CANNOT TELL US VERY MUCH ABOUT HOW TO TREAT INFORMATION BECAUSE ITS ASSUMPTIONS FAR OUTWEIGH HARD FACTS IN ITS EVALUATION OF THE EFFECTS OF VARIOUS LEGAL RULES ON THE EFFICIENT PRODUCTION OF INFORMATION.²⁸

BOYLE'S CENTRAL THESIS IS THAT AN OFTEN UNSTATED VISION OF INTELLECTUAL PROPERTY LAW DRIVES THESE ECONOMIC ASSUMPTIONS AND GENERATES THE LEGAL RULES. THIS VISION IS THAT INTELLECTUAL PROPERTY LAW (AND TO A LESSER EXTENT OTHER TYPES OF INFORMATION LAW) EXISTS TO REWARD THE "ROMANTIC AUTHOR" (OR POSSIBLY THE "ROMANTIC INVENTOR").²⁹ INDEED, THIS BASIC

²⁶See pp. 41-42. There is plenty of evidence in the intellectual property field to support the indeterminacy criticism. One might point to Fritz Machlup's famous study of the patent system, commissioned by Congress in the 1950s, which concluded that if we did not have a patent system, it would be irresponsible to create one, but because we already have one, it would be irresponsible to abolish it. See SENATE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS, SENATE COMM. ON THE JUDICIARY, 85TH CONG., AN ECONOMIC REVIEW OF THE PATENT SYSTEM 55 (Comm. Print 1958) (prepared by Fritz Machlup). Indeed, George Priest called economic analysis of the patent system "one of the least productive lines of inquiry in all of economic thought." George L. Priest, *What Economists Can Tell Lawyers About Intellectual Property: Comment on Cheung*, 8 RES. L. & ECON. 19, 19 (1986).

²⁷See pp. 42-45 (criticizing the paucity of the empirical evidence, the certainty with which such studies draw conclusions, and the methodological bias inherent in studies supporting intellectual property protection).

²⁸For more discussion of this issue, see *infra* notes -16 and accompanying text.

²⁹Boyle raises the specter of the romantic inventor, who presumably would play a role in patent law akin to the role of the romantic author in copyright law. He does not pursue this idea, however: "I leave open the question of whether one could perform a similar analysis using the idea of the 'inventor.'" P. 206 n.13. But see pp. 92-96 (alluding to entrepreneurship as well as authorship as a romantic construct); p. 107 (referring to the "transformative, Faustian artistry" of genetic scientists). His failure to expand further on this idea is unfortunate, the more so

ARGUMENT UNDERLIES MUCH OF THE BOOK.³⁰ THE ROMANTIC AUTHOR IN BOYLE'S VIEW IS A PHILOSOPHICAL CONSTRUCT OF THE EIGHTEENTH CENTURY, A MYTHICAL, IDEALIZED FIGURE WHO CREATES "ORIGINAL" WORKS FROM WHOLE CLOTH.³¹

VIEWING CREATION IN COPYRIGHT LAW THROUGH THE LENS OF ROMANTIC AUTHORSHIP HAS THREE EFFECTS, ACCORDING TO BOYLE. FIRST, IT CAUSES COURTS TO "PLAY DOWN THE IMPORTANCE OF EXTERNAL SOURCES BY EMPHASIZING THE UNIQUE GENIUS OF THE AUTHOR AND THE ORIGINALITY OF THE WORK."³² THUS, NEW AUTHORS SHOULD BE EXPECTED TO "OWN" THINGS THAT CAME FROM PRIOR WORKS, BECAUSE WE TREAT THEM AS IF THEY HAD CREATED THE WORK ANEW. SECOND, THE ROMANTIC VISION OF AUTHORSHIP SKEWS THE DEBATE IN COPYRIGHT CASES IN FAVOR OF THE AUTHOR, WHO IS AFTER ALL A SYMPATHETIC FIGURE, ONE WHOM WE WANT TO REWARD. IN BOYLE'S

because many of the examples he cites of "romantic authorship" do not involve authorship at all, but rather invention. See pp. 98-106 (discussing ownership rights in genetic property); pp. 128-30 (analyzing ownership rights in pharmaceutical inventions); cf. Keith Aoki, *Foreword: Innovation and the Information Environment: Interrogating the Entrepreneur*, 75 OR. L. REV. 1, 7 (1996) (ascribing to Boyle "a particular vision of entrepreneurship"). Keith Aoki himself treats the "romantic inventor" in more detail in Keith Aoki, *Authors, Inventors, and Trademark Owners: Private Intellectual Property and the Public Domain* (pts. 1 & 2), 18 COLUM.-VLA J.L. & ARTS 1, 191 (1993-1994).

³⁰See pp. 108-42.

³¹See p. 114. In attributing legal rules to the lingering effects of romantic authorship, Boyle has ironically enough stepped outside the romantic vision of authorship himself by relying on an edifice built in part by others. There is a rich literature explicating the romantic author, ranging from the historical work of Martha Woodmansee to the work of a number of legal scholars, including Boyle himself. See, e.g., James D.A. Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625 (1988); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455; Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author,'* 17 EIGHTEENTH-CENTURY STUD. 425 (1984). Boyle is, of course, fully aware of this background, and indeed his book is best read in the context of a number of these works, particularly Jaszi's.

³²p. 114.

WORDS, "AUTHORS TEND TO WIN."³³ WHETHER REWARDING THE AUTHOR IS "JUDGMENTAL MORALISM"³⁴ OR INSTEAD SATISFIES "A REAL CONCERN"³⁵ IN ANY GIVEN CASE IS NOT ENTIRELY CLEAR. THIRD, BOYLE SUGGESTS THAT THE IDEA OF ROMANTIC AUTHORSHIP "MEDIATES" OUR DIFFERENT VIEWS OF INFORMATION AND THEREFORE PROVIDES A THEORETICAL GROUNDING FOR THE OTHERWISE TROUBLING IDEA-EXPRESSION DICHOTOMY IN COPYRIGHT LAW.³⁶ IN THE LAST FEW CHAPTERS, BOYLE OFFERS EXAMPLES OF HOW ONE MIGHT TREAT PROBLEMS IN INFORMATION WITHOUT FALLING VICTIM TO THE PROBLEMS OF ROMANTIC AUTHORSHIP.³⁷

ROMANTIC AUTHORSHIP CAN BE VIEWED IN TWO WAYS—AS AN ARGUMENT THAT IS USED IN INTELLECTUAL PROPERTY CASES, OR AS A BROADER EXPLANATION FOR THE LAW OF INFORMATION. BOYLE AT TIMES APPEARS TO HAVE MADE BOTH ARGUMENTS; IT IS THE LATTER WITH WHICH I AM PRIMARILY CONCERNED. RENDERED INTO LINEAR TERMS, THE STRONG FORM OF THE ROMANTIC AUTHORSHIP THEORY SEEMS TO ME TO HAVE FOUR PARTS, AS FOLLOWS: FIRST, THERE IS SOMETHING ABOUT INFORMATION THAT WARRANTS TREATING IT AS A UNITARY THING; SECOND, THE LAW OF INFORMATION CANNOT CONSISTENTLY BE EXPLAINED BY ECONOMICS; THIRD, THE LAW OF INFORMATION CAN BE EXPLAINED AS A FUNCTION OF THE IDEA OF ROMANTIC AUTHORSHIP; AND FOURTH, ACKNOWLEDGING THIS FACT OFFERS US USEFUL INFORMATION ABOUT WHAT THE LAW SHOULD BE, OR AT LEAST WHY IT IS WHAT IT IS. I HAVE NO QUARREL WITH THE FIRST STEP OF THIS SYLLOGISM, BUT I THINK THERE ARE SERIOUS PROBLEMS WITH EACH OF THE FOLLOWING THREE STEPS.³⁸

III. PROBLEMS WITH THE IDEA OF ROMANTIC AUTHORSHIP

³³P. 116; *accord* p. 118.

³⁴P. 117.

³⁵P. 117.

³⁶See pp. 56-57. How or why it does this is not at all clear, and indeed that is one of the central shortcomings of Boyle's theory. See *infra* text accompanying notes -.

³⁷See pp. 155-73.

³⁸Treating Boyle's book as an exercise in linear logic is perhaps unfair, given its postmodern character. My critique of the romantic authorship theory necessarily attempts to reduce it to base principles. Thus, the reader should not assume that Boyle has not thought through these problems. In many cases, we simply approach the theory in fundamentally different ways.

MY PURPOSE IN THIS PART IS TO QUESTION THE EXPLANATORY POWER OF THE ROMANTIC AUTHORSHIP IDEA. WHILE I DO NOT DOUBT THAT THERE IS SOMETHING TO THIS IDEA,³⁹ I THINK IT SUFFERS FROM THREE DEFICIENCIES. FIRST, THE IDEA OF ROMANTIC AUTHORSHIP DOES NOT IN FACT TELL US VERY MUCH ABOUT THE LEGAL RULES BOYLE DESCRIBES. SECOND, THERE ARE NUMEROUS AREAS OF INTELLECTUAL PROPERTY LAW THAT ARE FUNDAMENTALLY AT ODDS WITH THE IDEA OF ROMANTIC AUTHORSHIP, CALLING THE IDEA'S GENERAL POWER AS A THEORY OF INFORMATION—OR EVEN AS A THEORY OF INTELLECTUAL PROPERTY—INTO SERIOUS QUESTION. FINALLY, ROMANTIC AUTHORSHIP CANNOT EXPLAIN THE CHANGES THAT ARE TAKING PLACE IN INTELLECTUAL PROPERTY LAW IN THE MODERN WORLD.

A. EXPLAINING BOYLE'S EXAMPLES

LET US BEGIN WHERE BOYLE DOES—WITH THE IDEA THAT ROMANTIC AUTHORSHIP JUSTIFIES THE OTHERWISE PERPLEXING IDEA-EXPRESSION DICHOTOMY IN COPYRIGHT LAW. IT DOES THIS, HE SUGGESTS, THROUGH THE CONCEPT OF ORIGINALITY; ONLY AN AUTHOR'S "ORIGINAL" CONTRIBUTIONS ARE RECOGNIZED AND REWARDED IN THE LAW.⁴⁰ BECAUSE THE LAW TREATS AN AUTHOR'S WORK AS ORIGINAL, RATHER THAN DERIVATIVE OF WHAT CAME BEFORE HER, THE LAW IS WILLING TO REWARD HER WITH A LIMITED PROPERTY RIGHT.⁴¹ BOYLE HERE SEEMS TO CONFLATE THE REQUIREMENT OF ORIGINALITY, AS ELABORATED IN SECTION 102(A) OF THE COPYRIGHT ACT AND CASES LIKE *FEIST PUBLICATIONS, INC. V. RURAL TELEPHONE SERVICE*

³⁹Indeed, as Pamela Samuelson notes, the argument is sometimes made expressly, even in the most unlikely of contexts. See Pamela Samuelson, *The Quest for Enabling Metaphors for Law and Lawyering in the Information Age*, 94 MICH. L. REV. 2029, 2038-40 (1996) (discussing, as an example of the effects of romantic authorship, Anthony L. Clapes et al., *Silicon Epics and Binary Bards: Determining the Proper Scope of Copyright Protection for Computer Programs*, 34 UCLA L. REV. 1493 (1987), which equates computer programs with poetry).

⁴⁰See pp. 54-55.

⁴¹See p. 57 (observing that "if a work of authorship is original" then "intellectual property no longer looks like a zero-sum game" because "there is always 'enough and as good' left over—by definition").

Co.,⁴² WITH THE VERY DIFFERENT IDEA-EXPRESSION DICHOTOMY.⁴³ IF ONE CONCEDES THAT THE ROMANTIC AUTHORSHIP VISION INCLINES COURTS TO THINK THAT WRITINGS ARE MORE ORIGINAL THAN THEY ARE, THE RESULT SHOULD BE THAT BOTH "NEW" IDEAS AND "NEW" EXPRESSION SHOULD BE PROTECTED. CERTAINLY THERE IS A ROMANTIC VISION OF SCIENTISTS AND THEIR IDEAS TO MATCH THAT OF AUTHORS. THINK OF EINSTEIN THE PATENT CLERK, WORKING LATE INTO THE NIGHT ON THE THEORY OF RELATIVITY,⁴⁴ OR DARWIN THE SCIENTIST-EXPLORER, RECORDING IN HIS JOURNAL IDEAS THAT WOULD SHAKE THE WORLD.⁴⁵ INDEED, MUCH OF BOYLE'S ARGUMENT DEPENDS ON THE ASSUMPTION OF SUCH A ROMANTIC VISION OF SCIENCE,⁴⁶ SINCE HE ARGUES THAT PATENT AS WELL AS COPYRIGHT LAW DEVALUES

⁴²499 U.S. 340 (1991).

⁴³See pp. 54-58 (connecting the two concepts). In fact, the rules are quite distinct, at least as a formal matter. Compare 17 U.S.C. § 102(a) (1994) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . ."), and *Feist Publications*, 499 U.S. at 358 ("Originality requires only that the author make the selection or arrangement independently (i.e., without copying that selection or arrangement from another work), and that it display some minimal level of creativity."), with 17 U.S.C. § 102(b) (1994) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."), and *Baker v. Selden*, 101 U.S. 99, 101-04 (1879) (distinguishing copyright protection from patent rights by explaining that an author of a copyrighted treatise on bookkeeping does not secure the exclusive rights to the form he provides for such bookkeeping).

⁴⁴For a romanticization of Einstein's discovery, see ALAN LIGHTMAN, *EINSTEIN'S DREAMS* (1994).

⁴⁵See CHARLES DARWIN, *CHARLES DARWIN'S BEAGLE DIARY* (Richard Darwin Keynes ed., 1988).

⁴⁶For one example of the romantic vision of scientists discovering flowers with medicinal purposes in the rain forest, see the example of Dr. Robert Campbell, played by Sean Connery in *MEDICINE MAN* (Hollywood Pictures 1992).

SOURCES.⁴⁷

WHY THEN THE CRITICAL DIFFERENCE IN TREATMENT BETWEEN THOSE WHO LABOR OVER WORKS OF FICTION AND GET THE FULL PROTECTION OF COPYRIGHT LAW AND THOSE WHO LABOR EQUALLY OVER WORKS OF HISTORICAL FACT BUT MUST BE CONTENT WITH "THIN" COPYRIGHT PROTECTION?⁴⁸ BOYLE REJECTS THE FACIAL EXPLANATION THE LAW GIVES FOR THIS DIFFERENCE—THAT THE RIGHTS GIVEN TO THE SECOND AUTHOR ARE CIRCUMSCRIBED BY WHAT HAS COME BEFORE. BUT HE OFFERS NOTHING MORE PLAUSIBLE TO TAKE ITS PLACE. THE ROMANTIC VISION MIGHT PERHAPS EXPLAIN STRONG, UNLIMITED PROPERTY RIGHTS IN BOTH IDEAS AND EXPRESSION; IT HAS REAL TROUBLE EXPLAINING THE LIMITED, QUALIFIED PROTECTION THAT COPYRIGHT HAS IN FACT HISTORICALLY PROVIDED.

A SIMILAR PROBLEM DOGS MANY OF BOYLE'S OTHER EXAMPLES. TAKE INSIDER TRADING. THE PUZZLE HERE SEEMS TO BE WHY INSIDER TRADING IS ILLEGAL, WHEN OTHER SALES OF INFORMATION THAT MIGHT BE THOUGHT ANALOGOUS ARE UNQUESTIONED. SINCE BOYLE'S THESIS IS THAT THE ROMANTIC AUTHORSHIP IDEAL HELPS US TO UNDERSTAND THE LAW'S TREATMENT OF INFORMATION, IT IS REASONABLE TO EXPECT THAT HE WOULD ARGUE THAT ROMANTIC AUTHORSHIP EXPLAINS THE PROHIBITION AGAINST INSIDER TRADING. BUT INSTEAD HE DOES PRECISELY THE OPPOSITE. RELYING HEAVILY ON A SINGLE (ALBEIT IMPORTANT) ACADEMIC CRITICISM OF THE INSIDER TRADING LAWS,⁴⁹ BOYLE ARGUES THAT *THE ACADEMIC CRITICISM* OF THE INSIDER TRADING RULE EXHIBITS A CONCERN WITH ROMANTIC AUTHORSHIP OF A NOVEL SORT—HERE, THE ENTREPRENEURIAL SPIRIT OF THOSE WHO GATHER THE INFORMATION.⁵⁰

THERE ARE SOME FUNDAMENTAL PROBLEMS WITH THIS APPROACH. MOST OBVIOUSLY, THE LAW OF INSIDER TRADING NOW LOOKS NOT LIKE AN EXAMPLE OF THE ROLE OF ROMANTIC AUTHORSHIP, BUT RATHER LIKE A COUNTEREXAMPLE. INSIDER TRADING IS STILL ILLEGAL, AFTER ALL, DESPITE THE PRESUMED APPEAL OF THE "ROMANTIC" FINANCIAL ENTREPRENEUR. AT A DIFFERENT LEVEL, THE WHOLE ISSUE OF ROMANTIC AUTHORSHIP HERE JUST SEEMS TO BE A BIT OF A STRETCH.

⁴⁷Pp. 128-30.

⁴⁸See *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980) (noting that copyright protection for historical accounts "embrac[es] no more than the author's original expression of particular facts and theories already in the public domain").

⁴⁹See pp. 92-96 (citing HENRY G. MANNE, *INSIDER TRADING AND THE STOCK MARKET* (1966)).

⁵⁰See pp. 92-96.

YES, IT IS POSSIBLE TO FIND AN ARGUMENT FOR LEGALIZING INSIDER TRADING THAT FOCUSES ON THE ENTREPRENEURIAL NATURE OF MUCH INFORMATION-GATHERING ACTIVITY. BUT THE ARGUMENT NORMALLY MADE FOR INSIDER TRADING (INDEED, THE ARGUMENT TO WHICH HENRY MANNE HIMSELF DEVOTES MOST OF HIS BOOK⁵¹) IS A MUCH MORE STRAIGHTFORWARD ECONOMIC ONE: DIFFERENCES IN INFORMATION AND BELIEFS ABOUT INFORMATION ARE THE SINE QUA NON OF THE STOCK MARKET.⁵² AS WITH THE IDEA-EXPRESSION DICHOTOMY, THE ROMANTIC AUTHORSHIP EXPLANATION JUSTIFYING INSIDER TRADING SEEMS MUCH MORE CONVOLUTED THAN THE ECONOMIC ARGUMENT THAT BOYLE REJECTS.

FINALLY, CONSIDER BOYLE'S THEORY OF BLACKMAIL. BLACKMAIL IS INDEED A PUZZLE. WHY DO WE PERMIT AND EVEN ENCOURAGE SOME PARTIES TO ACCEPT VALUABLE COMPENSATION IN RETURN FOR NOT DISCLOSING INFORMATION TO THE WORLD (THINK OF TRADE SECRETS LAW,⁵³ FOR INSTANCE, OR THE ENFORCEABLE AGREEMENT BY A NEWSPAPER NOT TO DISCLOSE ITS SOURCES⁵⁴), BUT CRIMINALIZE OTHER INSTANCES OF WHAT MIGHT APPEAR TO BE THE SAME SORT OF CONDUCT?⁵⁵ BLACKMAIL IS ALSO A CENTRAL—INDEED, IN SOME RESPECTS THE ONLY—EXAMPLE OF THE OTHER SIDE OF BOYLE'S ANALYSIS OF INFORMATION LAW. FOR BOYLE, THE LAW'S TREATMENT OF BLACKMAIL IS EVIDENCE THAT SOCIETY'S VISION OF INFORMATION TYPES IT INTO BOTH THE PUBLIC AND PRIVATE SPHERES AND THEREFORE CONTAINS A STRONG PRIVACY COMPONENT. IN BOYLE'S VIEW, THE PROHIBITION ON THE SALE TO ANOTHER OF LEGALLY OBTAINED INFORMATION ABOUT LEGAL BUT EMBARRASSING ACTIVITIES

⁵¹See HENRY G. MANNE, *INSIDER TRADING AND THE STOCK MARKET*, 1-110 (1966).

⁵²See, e.g., Dennis W. Carlton & Daniel R. Fishel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857, 862 (1983) (discussing Manne's argument that "private negotiations between a firm and its employees can most efficiently determine whether insiders should be allowed to profit by trading on inside information"); Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 629-34 (1984) (acknowledging the argument that a wider distribution of derivative insider information resulting from deregulation will enhance market efficiency).

⁵³See, e.g., UNIF. TRADE SECRETS ACT, 14 U.L.A. 438 (1990).

⁵⁴See *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

⁵⁵See, e.g., TEX. PENAL CODE ANN. §§ 31.02-.03 (Vernon 1996) (listing extortion as a theft offense).

REFLECTS

A STRONG SOCIAL BELIEF . . . THAT NOT EVERYTHING SHOULD BE REDUCED TO "THE UNIVERSALIZING LOGIC OF THE MONEY RELATION." IN PARTICULAR, THE PRIVATE REALM OF HOME AND HEARTH SHOULD BE PROTECTED FROM THE RELENTLESS INSTRUMENTALISM OF MARKET TRANSACTIONS. . . . INTUITIVELY, BLACKMAIL SEEMS LIKE THE INTRUSION OF MARKET LOGIC INTO THE REALM THAT SHOULD BE MOST "PRIVATE."⁵⁶

NOW, I DO NOT DENY THAT THIS MAY BE AN APPEALING VISION. BUT IT IS FUNDAMENTALLY AT ODDS WITH THE WAY IN WHICH BLACKMAIL IS IN FACT TREATED. AS BOYLE HIMSELF POINTS OUT, THE LAW ONLY PROHIBITS THE "SALE" OF THE RIGHT TO PUBLISH BY THE BLACKMAILER TO THE BLACKMAIL VICTIM.⁵⁷ THE BLACKMAILER REMAINS FREE TO PUBLISH THE INFORMATION AND EVEN TO SELL THE INFORMATION TO A NEWSPAPER.⁵⁸ FURTHERMORE, THE VICTIM HIMSELF IS FREE TO SELL HIS STORY TO OTHERS,⁵⁹ A POINT BOYLE DOES NOT DISCUSS. BECAUSE OF THIS FACT, IT IS HARD TO SEE BLACKMAIL AS ANALOGOUS TO PROSTITUTION OR BABY-SELLING, ACTIVITIES THAT FOR SOCIAL REASONS WE REFUSE TO PERMIT TO BE COMMODIFIED AT ALL.⁶⁰ THIS INFORMATION IS A COMMODITY—IN BOTH THE HANDS OF THE BLACKMAILER AND THE HANDS OF THE VICTIM. ALL THAT THE BLACKMAIL LAWS DO IS PLACE CERTAIN LIMITS ON WHO MAY SELL THAT INFORMATION TO WHOM. BOYLE'S EXPLANATION FOR THIS DISTINCTION—THAT PUBLIC DISCLOSURE IS CONSISTENT WITH OUR PUBLIC VISION OF INFORMATION, BUT THAT A "WILLINGNESS TO KEEP QUIET FOR MONEY" IS NOT⁶¹—WOULD SEEM TO SUGGEST CRIMINALIZING TRADE SECRETS AND EMPLOYEE CONFIDENTIALITY AGREEMENTS AS WELL AS BLACKMAIL. THERE MAY BE SOMETHING TO BOYLE'S IDEA, BUT IT CAN HARDLY BE THOUGHT OF AS A CANONICAL EXAMPLE OF THE

⁵⁶P. 77. But see Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381 (1996) (suggesting that markets may provide an effective means of protecting privacy).

⁵⁷See pp. 61-62.

⁵⁸See p. 78.

⁵⁹See James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 684-85 (1984).

⁶⁰See pp. 109-10. On the limits to commodification in the social context, see Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1870-77 (1987).

⁶¹P. 78.

APPLICATION OF ROMANTIC AUTHORSHIP.

B. EXPLAINING INTELLECTUAL PROPERTY DOCTRINE

IF THE THEORY OF ROMANTIC AUTHORSHIP FARES POORLY ON BOYLE'S HOME TURF, IT DOES EVEN WORSE AS A COHERENT DOCTRINE EXPLAINING THE BODY OF INTELLECTUAL PROPERTY LAW. THERE ARE NUMEROUS ASPECTS OF INTELLECTUAL PROPERTY LAW THAT NOT ONLY CANNOT BE EXPLAINED BY THE ROMANTIC AUTHORSHIP THEORY, BUT WHICH SEEM AFFIRMATIVELY INIMICAL TO IT. THESE RULES FALL INTO TWO BROAD CATEGORIES.

FIRST, THE RULES REGARDING THE OWNERSHIP OF INTELLECTUAL PROPERTY RIGHTS ARE HEAVILY SKEWED TO PROTECT THE INTERESTS OF CORPORATIONS, NOT INDIVIDUAL AUTHORS AND INVENTORS.⁶² THE MOST OBVIOUS EXAMPLE IN COPYRIGHT IS THE WORK-FOR-HIRE DOCTRINE, WHICH PROVIDES THAT FOR ALL EMPLOYEES AND SOME CLASSES OF INDEPENDENT CONSULTANTS, THE AUTHOR OF THE WORK IS DEEMED TO BE THE CORPORATION THAT COMMISSIONED IT, RATHER THAN THE INDIVIDUAL OR INDIVIDUALS WHO ACTUALLY CREATED IT.⁶³ THE SUPREME COURT IN *COMMUNITY FOR CREATIVE NON-VIOLENCE v. REID*⁶⁴ NOTED THAT IN 1955, FORTY PERCENT OF ALL COPYRIGHT REGISTRATIONS WERE FOR WORKS MADE FOR HIRE;⁶⁵ WITH THE GROWTH IN CORPORATE AUTHORSHIP AND THE SOFTWARE INDUSTRY SINCE THAT TIME, IT IS LIKELY THAT THE PERCENTAGE HAS INCREASED.⁶⁶ FROM A ROMANTIC AUTHORSHIP PERSPECTIVE, THIS DOCTRINE IS STRIKING, FOR SURELY THE CORPORATION DOES NOT FIT WELL WITH THE VIEW OF

⁶²See Marci A. Hamilton, *Appropriation Art and the Imminent Decline in Authorial Control over Copyrighted Works*, 42 J. COPYRIGHT Soc'y 93, 102, 105-07 (1994). Boyle acknowledges this. See p. 178.

⁶³See 17 U.S.C. § 201(b) (1994); Committee for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989) [hereinafter CCNV].

⁶⁴490 U.S. 730 (1989).

⁶⁵*Id.* at 737 n.4.

⁶⁶See, e.g., Robert G. Sugarman & Joseph P. Salvo, *Whose Rights? Sampling Gives Law a New Mix*, NAT'L L.J., Nov. 11, 1991, at 22 ("Most recording [and publishing] contracts provide that rights in a sound recording inure to the record label").

ROMANTIC AUTHORSHIP.⁶⁷

EVEN APART FROM THE WORK-FOR-HIRE RULE, THE DOCTRINES OF ASSIGNMENT AND TRANSFER HAVE ENSURED THAT THE VAST MAJORITY OF INTELLECTUAL PROPERTY RIGHTS END UP NOT IN THE HANDS OF AUTHORS OR INVENTORS, BUT IN THE HANDS OF CORPORATE ECONOMIC INTERESTS. THOSE AUTHORS WHO INITIALLY RETAIN THEIR OWN COPYRIGHT, FOR EXAMPLE, CAN ASSIGN VIRTUALLY ALL INTEREST IN THEIR WORK TO A CORPORATION.⁶⁸ FOR MANY CLASSES OF WORKS, INCLUDING BOOKS, MOVIES, AND MUSIC, IT IS DE RIGUEUR FOR THE ARTIST TO ASSIGN THE COPYRIGHT TO THE PUBLISHER, PRODUCER, OR STUDIO.⁶⁹ ASSIGNMENT IS EVEN MORE COMMON IN PATENT LAW.⁷⁰ DESPITE A FORMAL PRESUMPTION THAT THE PATENTEE IS ALWAYS AN INDIVIDUAL, THERE ARE NUMEROUS PROVISIONS IN THE PATENT CODE

⁶⁷The disparity between corporate reality and romantic theory is particularly striking given Boyle's statement elsewhere that "in the romantic vision art (and authorship in particular) is inimical to commercial concerns. The writer does not write for money, nor is she interested in anything other than the perfection of her work." Boyle, *supra* note , at 628-29. Peter Jaszi has tried to square the work-for-hire doctrine with romantic authorship, in part by focusing on *CCNV* as a decision limiting the scope of that doctrine, but in the end he must admit that in this case, authorship theory "serves merely to rationalize possession." Jaszi, *supra* note , at 491, 485-91.

⁶⁸See 17 U.S.C. § 201(d)(1) (1994). The sole exception to this rule is that transfers may be terminated after 35 years at the option of the original copyright owner. See *id.* § 203(a)(3).

⁶⁹See, e.g., Don E. Tomlinson, *Everything That Glitters Is Not Gold: Songwriter-Music Publisher Agreements and Disagreements*, 18 HASTINGS COMM. & ENT. L.J. 85, 88 (1995) (explaining that many artists assign copyrights to corporate backers in order to receive advances against royalties and to take advantage of a corporation's marketing expertise); Stephen Pritchard, *Landlords of Intellectual Property*, INDEPENDENT, May 4, 1995, at 29 (noting that universities are increasingly requiring students to assign them the copyright on the students' unpublished works); Sugarman & Salvo, *supra* note , at 21-22.

⁷⁰See, e.g., Paul C. Van Slyke & Mark M. Friedman, *Employer's Rights to Inventions and Patents of Its Officers, Directors, and Employees*, 18 AIPLA Q.J. 127, 128 (1990) (explaining that employees, partners, managers, shareholders, officers, and directors of corporations may have a common-law obligation to assign their patents to the corporation).

THAT NOT ONLY PERMIT ASSIGNMENT OF THE INVENTION,⁷¹ BUT ALLOW THE ASSIGNEE (OR FOR THAT MATTER, ANYONE "WHO OTHERWISE SHOWS SUFFICIENT PROPRIETARY INTEREST IN THE MATTER") TO APPLY FOR A PATENT IN THE INVENTOR'S NAME, WITHOUT HER KNOWLEDGE OR CONSENT.⁷² FURTHER, COURTS ROUTINELY UPHOLD AS REASONABLE NOT ONLY EMPLOYMENT AGREEMENTS THAT REQUIRE EMPLOYEES TO ASSIGN THEIR OWN IDEAS, WRITINGS, AND INVENTIONS MADE WITHIN THE SCOPE OF EMPLOYMENT,⁷³ BUT EVEN AGREEMENTS COMPELLING THE ASSIGNMENT OF INVENTIONS MADE AFTER THE EMPLOYEE HAS LEFT THE COMPANY.⁷⁴ THE CUMULATIVE RESULT OF THIS RULE IS THAT THE CORPORATE EMPLOYER (OR PUBLISHER OR PRODUCER), NOT THE ROMANTIC AUTHOR, IS THE PRIMARY BENEFICIARY OF COPYRIGHT AND PATENT LAW IN MOST INSTANCES. INDEED, EVEN RULES LIMITING INTELLECTUAL PROPERTY RIGHTS ARE OFTEN DESIGNED TO FAVOR CORPORATIONS AT THE EXPENSE OF INDIVIDUALS. FOR EXAMPLE, THE LAW OF IDEA SUBMISSION IS HEAVILY SKEWED TOWARD PROTECTING CORPORATE RECIPIENTS OF INFORMATION AT THE EXPENSE OF THOSE WHO SUBMIT UNSOLICITED IDEAS.⁷⁵

⁷¹See 35 U.S.C. § 261 (1994).

⁷²*Id.* § 118.

⁷³See, e.g., *Shamrock Tech., Inc. v. Medical Sterilization, Inc.*, 808 F. Supp. 932 (E.D.N.Y. 1992), *aff'd*, 6 F.3d 788 (Fed. Cir. 1993); *Healthcare Affiliated Servs., Inc. v. Lippany*, 701 F. Supp. 1142, 1155 (W.D. Pa. 1988).

⁷⁴See, e.g., *Dorr-Oliver, Inc. v. United States*, 432 F.2d 447, 452 (Ct. Cl. 1970); *General Signal Corp. v. Primary Flow Signal, Inc.*, No. 85-0471B, 1987 U.S. Dist. LEXIS 6929, at *3, *10 (D.R.I. July 27, 1987).

⁷⁵See, e.g., *Smith v. Snap-On Tools Corp.*, 833 F.2d 578 (5th Cir. 1987) (concluding that the unilateral disclosure of an idea does not create a confidential relationship or require compensation for misappropriation of a trade secret); *Desny v. Wilder*, 299 P.2d 257 (Cal. 1956) (holding that if the disclosure of an idea occurs before it is known by the recipient that compensation is a condition of use, no contract for compensation will be implied). Idea-submission cases skew the ownership of intellectual property in favor of corporations because the unsolicited ideas are almost always submitted by individuals to corporations, rather than vice versa, and because corporations regularly use standard-form contracts in which they refuse to compensate those who submit ideas.

THE SECOND CLASS OF PROBLEMS FOR ROMANTIC AUTHORSHIP THEORY LIES IN THE WAY INTELLECTUAL PROPERTY TREATS IMPROVEMENTS. BOYLE'S THEORY IMPLIES THAT COPYRIGHT OVERVALUES THE CONTRIBUTION OF THE CURRENT AUTHOR, DISCOUNTING THE RELATIVE VALUE OF PRIOR WORKS ON WHICH THIS AUTHOR HAS BUILT.⁷⁶ SIMILARLY, HE SUGGESTS THAT THE ROMANTIC VIEW OF COPYRIGHT OVERVALUES WORKS WHICH IN ESSENCE MERELY "RECOMBIN[E] THE RESOURCES OF THE COMMONS."⁷⁷ IN FACT, HOWEVER, THE CURRENT COPYRIGHT RULES REGARDING IMPROVEMENTS ON EXISTING WORKS ARE SUSCEPTIBLE TO EXACTLY THE OPPOSITE INTERPRETATION—THAT THEY GIVE INITIAL CREATORS FAR TOO MUCH CONTROL OVER THE WORK OF TRANSFORMATIVE IMPROVERS.⁷⁸

THE FUNDAMENTAL PROBLEM THAT COPYRIGHT LAW MUST ADDRESS IS THAT VIRTUALLY EVERY AUTHOR IS ALSO A USER OF PRIOR WORKS. INTELLECTUAL PROPERTY PROTECTION ENCOURAGES AUTHORS TO INVEST TIME AND EFFORT IN THE CREATION OF NEW WORKS OF AUTHORSHIP, BUT TAKEN TO AN EXTREME, SUCH PROTECTION CAN MAKE THE CREATION OF NEW WORKS VIRTUALLY IMPOSSIBLE BY LOCKING UP ALL OF THE POSSIBLE SOURCES FROM WHICH A NEW AUTHOR CAN WORK.⁷⁹ BOYLE ACKNOWLEDGES THIS PROBLEM, EVEN GOING SO FAR AS TO QUOTE KENNETH VANDEVELDE'S WARNING AGAINST PROPERTIZING EVERYTHING IN SIGHT: "[I]F EVERY VALUABLE INTEREST CONSTITUTED PROPERTY, THEN PRACTICALLY ANY ACT WOULD RESULT IN EITHER A TRESPASS ON,

⁷⁶See p. 130 ("An author-focused regime that makes the contributions of sources 'invisible' is unlikely to reward those contributions—even when an economic analysis might show this to be desirable.").

⁷⁷P. 57. As an initial matter, it is not at all clear that works like compilations of commercial data fit comfortably within the "romantic authorship" typology.

⁷⁸For a detailed exposition of this argument, see Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEXAS L. REV. (forthcoming Apr. 1997) (manuscript on file with the *Texas Law Review*).

⁷⁹See, e.g., Lemley, *supra* note ; Robert P. Merges & Richard R. Nelson, *On the Complex Economics of Patent Scope*, 90 COLUM. L. REV. 839 (1990); Suzanne Scotchmer, *Standing on the Shoulders of Giants: Cumulative Research and the Patent Law*, 5 J. ECON. PERSP. 29 (1991).

OR A TAKING OF, SOMEONE'S PROPERTY"80

BOYLE'S TREATMENT OF THIS DIFFICULT PROBLEM IS INCONSISTENT. ON ONE HAND, HE SEEMS TO HAVE HEEDED THE WARNING AGAINST OVER-PROPERTIZATION. HE DEVOTES LARGE SECTIONS OF CHAPTER 11 TO ENCOURAGING THE EXPANSION OF THE FAIR USE DOCTRINE,⁸¹ TO OPPOSING THE PATENTING OF SOFTWARE,⁸² AND TO CRITIQUING THE NII WHITE PAPER'S PROPOSALS TO EXPAND COPYRIGHT PROTECTION ON THE NET.⁸³ IN EACH CASE, BOYLE SUGGESTS THAT INTELLECTUAL PROPERTY HAS GONE TOO FAR IN PROTECTING CREATORS, AND THAT THE PUBLIC SUFFERS AS A RESULT. BUT ELSEWHERE BOYLE TAKES A REMARKABLY DIFFERENT TACK, ARGUING IN THE INTERNATIONAL CONTEXT THAT THE PROBLEM WITH INTELLECTUAL PROPERTY IS THAT IT DOES NOT PROTECT *ENOUGH* INFORMATION. BOYLE POINTS TO NUMEROUS NATIVE PLANTS, MEDICINES, STORIES, AND CULTURAL ARTIFACTS THAT FORM THE BASIS OF MORE MODERN WESTERN GOODS, SUGGESTING THAT THE DEVELOPING-WORLD COUNTRIES IN WHICH THESE THINGS ORIGINATED SHOULD BE ENTITLED TO A PROPERTY RIGHT IN THEIR NATURAL AND CULTURAL HERITAGE.⁸⁴

THE PROBLEM IS THAT THE IDEA OF ROMANTIC AUTHORSHIP DOES NOT NECESSARILY LEAD ONE TO FAVOR ONE SIDE OR THE OTHER IN A DISPUTE BETWEEN TWO TYPES OF AUTHORS—THE FIRST AND SECOND GENERATIONS. ONE COULD INVOKE THE LANGUAGE OF ROMANTIC AUTHORSHIP EITHER TO DEMAND STRONG COPYRIGHT PROTECTION FOR A FIRST-GENERATION AUTHOR OR TO DEMAND AN EXPANSIVE INTERPRETATION OF FAIR USE FOR A SECOND-GENERATION AUTHOR WHO HAS "TRANSFORMED" A FIRST-GENERATION WORK. IN PRACTICE, THE RHETORIC OF ROMANTIC AUTHORSHIP SEEMS TO BE LARGELY UNRELATED TO THE LEGAL RULES THAT GOVERN THESE CASES. CORPORATE OWNERS OF TRADEMARKS (HARDLY AUTHORS IN THE ROMANTIC SENSE) AND

80P. 48 (quoting Kenneth Vandeveld, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 329 (1980)); accord Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 966-67 (1990).

81See pp. 130-32 (noting that many decisions are unduly restrictive of the fair use exception in copyright law).

82See pp. 132-35.

83See pp. 135-39 (citing NII WHITE PAPER, *supra* note).

84See pp. 125-30. Boyle's argument for propertizing these public domain items is explicitly the public-goods argument of economics: the unprotected goods will be undervalued, and as a result fewer such goods will flow to laboratories in the developed world, stifling innovation. See p. 130.

INDIVIDUALS CLAIMING TO OWN THEIR OWN PUBLIC IMAGE PREVAIL OVER CREATIVE, "AUTHORIAL" PARODIC USES OF THOSE MARKS OR IMAGES.⁸⁵ AT THE SAME TIME, THE CREATORS OF RICHLY EXPRESSIVE FILMS AND MUSIC CANNOT PREVENT THE LITERAL COPYING OF THOSE ITEMS BY ORDINARY CONSUMERS.⁸⁶ CREATORS OF "DERIVATIVE" WORKS MAY BE HELD HOSTAGE TO THE WHIMS OF ORIGINAL COPYRIGHT OWNERS, EVEN WHERE THE DERIVATIVE WORK IS FAR MORE CREATIVE THAN THE ORIGINAL.⁸⁷ IT IS CERTAINLY POSSIBLE TO FIND EVIDENCE OF THE RHETORIC OF AUTHORSHIP IN COPYRIGHT CASES,⁸⁸ BUT AS AN EXPLANATION FOR THE NUANCES OF COPYRIGHT, TRADEMARK, OR RIGHT-OF-PUBLICITY CASES, THE CONCEPT FALLS WELL SHORT OF THE MARK.

⁸⁵See, e.g., *Anheuser-Busch, Inc. v. Balducci Publications*, 28 F.3d 769, 777 (8th Cir. 1994) (holding that trademark law prevented the use of a "Michelob Oily" parody); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992) (declaring that the common-law right of publicity entitled Vanna White of the game show *Wheel of Fortune* to prevent a parody which used a letter-turning robot that reminded people of her); *Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 403 (8th Cir. 1987) (affirming a permanent injunction that restricted the defendant from violating trademark laws by parodying Mutual of Omaha's logo with a "Mutant of Omaha" design); *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 201 (2d Cir. 1979) (holding that there is no First Amendment right to parody a trademark).

⁸⁶See 17 U.S.C. § 1008 (1994); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

⁸⁷See, e.g., *Stewart v. Abend*, 495 U.S. 207, 238 (1990) (holding that the distribution of a film derived from a copyrighted literary work, occurring during the renewal term of the copyright, infringed upon the rights of the copyright owner); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 409 (1940) (supporting the apportionment of profits as the appropriate remedy when the defendant, in violation of the copyright laws, produced a movie loosely based on a story taken from the plaintiff's play).

⁸⁸The copyright fair use cases that focus on "transformative use" are an example. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 589 (1994) ("In parody, as in news reporting, . . . context is everything, and the question of fairness asks what else the parodist did besides go to the heart of the original."). However, transformative use is far from the determinative factor in fair use analysis. See Lemley, *supra* note (manuscript at 77).

C. EXPLAINING CHANGES IN INTELLECTUAL PROPERTY LAW

A FURTHER PROBLEM WITH ROMANTIC AUTHORSHIP IS THAT THE THEORY CANNOT EXPLAIN CHANGES AND TRENDS IN INTELLECTUAL PROPERTY LAW. THIS PROBLEM EXISTS AT TWO LEVELS. FIRST, THERE IS NOTHING IN THE THEORY OF ROMANTIC AUTHORSHIP THAT SUGGESTS THAT INTELLECTUAL PROPERTY LAW SHOULD CHANGE AT ALL OVER TIME. AND YET CHANGE IT DOES. COPYRIGHT LAW HAS GONE THROUGH NUMEROUS STATUTORY ITERATIONS OVER THE PAST 210 YEARS, ALMOST ALWAYS CHANGING IN THE DIRECTION OF EXPANDED PROTECTION FOR COPYRIGHT OWNERS⁸⁹—INCREASING THE NUMBER OF THINGS THAT ARE COPYRIGHTABLE,⁹⁰ INCREASING THE DURATION OF COPYRIGHT PROTECTION,⁹¹ MAKING IT EASIER TO QUALIFY FOR COPYRIGHT PROTECTION,⁹² AND INCREASING THE RIGHTS COPYRIGHT OWNERS HAVE TO CONTROL USES OF THEIR WORKS.⁹³ ROMANTIC

⁸⁹This is not necessarily the same as enhancing protection for *authors*. See Hamilton, *supra* note , at 125-26 (arguing that publishers are gaining protection at the expense of authors).

⁹⁰Compare Copyright Act of 1776, Pub. L. No. 94-553, § 102, 90 Stat. 2541, 2544 (codified as amended at 17 U.S.C. § 102(a) (1994)) (listing the categories of protected works), with Act for the Encouragement of Learning, 1709, 8 Anne, ch. 21 (Eng.) (protecting only books).

⁹¹Compare Copyright Act of 1776, Pub. L. No. 94-553, § 302, 90 Stat. 2541, 2572 (codified at 17 U.S.C. § 302 (1994)) (allowing copyright protection for the life of the author plus 50 years), with Act for the Encouragement of Learning, 1709, 8 Anne, ch. 21 (Eng.) (allowing copyright protection for a renewable term of 14 years). See also *infra* notes - and accompanying text (discussing the proposed further expansion of the copyright term).

⁹²See ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 345-51 (1997) (discussing the abolition or weakening of various formal requirements for copyright protection, such as notice, publication, and registration).

⁹³See, e.g., Copyright Act of 1776, Pub. L. No. 94-553, § 106, 90 Stat. 2541, 2546 (codified at 17 U.S.C. § 106(2) (1994)) (giving a new right to control the preparation of derivative works); Digital Performance Right in Sound Recordings Act of 1995, Pub. L. 104-39, § 2, 109 Stat. 336 (to be codified at 17 U.S.C. § 106(6) (1994))

AUTHORSHIP SEEMS TO ME TO BE AT A LOSS TO EXPLAIN THIS DYNAMIC. HAS AUTHORSHIP GOTTEN MORE ROMANTIC OVER TIME? SURELY NOT SINCE THE INVENTION OF THE ROMANTIC AUTHORSHIP CONCEPT, WHICH BOYLE TRACES TO THE EIGHTEENTH CENTURY.⁹⁴ DOES THE CREATION OF WORKS LIKE MUSICAL COMPOSITIONS SUDDENLY ACQUIRE THE TRAPPINGS OF AUTHORSHIP (THUS TRIGGERING COPYRIGHT PROTECTION) COINCIDENTALLY AT AROUND THE TIME THE COPYING OF SUCH WORKS BECOMES EASY? IF IT IS TO HAVE THE EXPLANATORY POWER BOYLE ATTRIBUTES TO IT, ROMANTIC AUTHORSHIP NEEDS TO ACCOUNT FOR THESE CHANGES. BUT THERE IS NOTHING IN THE THEORY THAT WOULD EXPLAIN WHY PROTECTION FOR WORKS SHOULD CHANGE OVER TIME.

MORE SPECIFICALLY, THE IDEA OF ROMANTIC AUTHORSHIP DOES NOT SEEM TO BE ABLE TO EXPLAIN THE PARTICULAR WAYS IN WHICH INTELLECTUAL PROPERTY RIGHTS EXPAND. THE DURATION OF COPYRIGHT PROTECTION PROVIDES ONLY ONE STRIKING EXAMPLE. COPYRIGHT PROTECTION HAS GROWN FROM A FOURTEEN-YEAR TERM (RENEWABLE FOR AN ADDITIONAL FOURTEEN YEARS) TO A TERM THAT EXTENDS FOR THE LIFE OF THE AUTHOR PLUS FIFTY YEARS AFTER HER DEATH.⁹⁵ FURTHER, A PROPOSAL CURRENTLY BEFORE CONGRESS WOULD ADD ANOTHER TWENTY YEARS TO EXISTING COPYRIGHT TERMS, GIVING PROTECTION FOR SEVENTY YEARS AFTER AN AUTHOR'S DEATH.⁹⁶ ONE MIGHT CONCOCT A ROMANTIC AUTHORSHIP RATIONALE FOR THIS—THE GRANDCHILDREN OF AUTHORS WHO HAVE BEEN DEAD FOR FORTY-NINE YEARS WILL NOT BE SUFFICIENTLY REWARDED FOR THE GENIUS OF THE DEAR DEPARTED WITHOUT THE ADDITIONAL TERM, WHILE THOSE WHOSE GRANDPARENTS HAVE BEEN DEAD FIFTY-ONE YEARS HAVE BEEN REWARDED ENOUGH—BUT IT HARDLY PASSES THE LAUGH TEST.⁹⁷ INDEED, IF ONE

(establishing a new right to control the public performance of sound recordings by digital means). See generally Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275 (1989).

⁹⁴See pp. 53-54; Boyle, *supra* note , at 628-33; see also Jaszi, *supra* note ; Woodmansee, *supra* note .

⁹⁵See *supra* note .

⁹⁶See, e.g., Copyright Term Extension Act of 1997, H.R. 604, 105th Cong. § 2 (1997).

⁹⁷See *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989, H.R. 1248, and H.R. 1734 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong. 290-91 (1995) (statement of

ACCEPTS THE IDEA OF ROMANTIC AUTHORSHIP, THE REAL PUZZLE SEEMS TO BE WHY THE DURATION OF COPYRIGHT PROTECTION IS LIMITED AT ALL.

D. THE EFFECTIVENESS OF THE ROMANTIC AUTHORSHIP EXPLANATION

MY ARGUMENT IS NOT THAT ROMANTIC AUTHORSHIP FAILS AS A THEORY BECAUSE IT CANNOT PICK THE "RIGHT" DURATION OF COPYRIGHT PROTECTION; ECONOMIC THEORY IS PROPERLY SUBJECT TO THE SAME CRITICISM.⁹⁸ RATHER, MY POINT IS THAT THE ISSUES AND DEBATES RELEVANT TO INTELLECTUAL PROPERTY LAW BY AND LARGE CANNOT BE RESOLVED BY REFERENCE TO THE IDEAL OF ROMANTIC AUTHORSHIP BECAUSE, MORE OFTEN THAN NOT, ROMANTIC AUTHORSHIP SIMPLY HAS NOTHING TO SAY ON THE SUBJECT. I DO NOT DENY THAT THERE IS SOMETHING TO THE IDEA THAT A ROMANTIC VISION OF AUTHORSHIP MAKES INTELLECTUAL PROPERTY PROTECTION SEEM MORE APPEALING. BUT EVEN IF THAT VISION ANIMATES INTELLECTUAL PROPERTY PROTECTION AT A BROAD LEVEL, IT TELLS US NEXT TO NOTHING ABOUT THE DETAILED CONTOURS OF THAT PROTECTION. AND IT IS THE DETAILS THAT TURN OUT TO BE IMPORTANT IN INTELLECTUAL PROPERTY, AS BOYLE SEEMS TO ACKNOWLEDGE. IT IS FOR THIS REASON THAT HIS EFFORTS TO TIE THE ROMANTIC AUTHORSHIP VISION TO SPECIFIC POLICY PROPOSALS FALL SO FLAT. THERE MAY BE A LINK BETWEEN THE IDEA OF INTELLECTUAL PROPERTY AND THE ROMANTIC VISION OF AUTHORSHIP; THERE IS NO OBVIOUS LINK BETWEEN THAT VISION AND, SAY, THE PATENTABILITY OF SOFTWARE.⁹⁹

THE PROBLEM WITH ROMANTIC AUTHORSHIP IS HIGHLIGHTED WHEN ONE COMPARES IT TO ALTERNATIVE EXPLANATIONS FOR THE RULES OF INTELLECTUAL PROPERTY. IN PARTICULAR, I THINK BOYLE WRONGLY DISCOUNTS THE POSSIBILITY THAT WHAT HAS IN FACT BEEN GOING ON HISTORICALLY IN INTELLECTUAL PROPERTY LAW IS PRECISELY WHAT THE COURTS HAVE SAID IS GOING ON: COURTS AND COMMENTATORS ARE TRYING TO BALANCE THE COMPLEX, INTERTWINED INTERESTS OF

Dennis S. Karjala); Joseph A. Lavigne, Comment, *For Limited Times? Making Rich Kids Richer via the Copyright Term Extension Act of 1996*, 73 U. DET. MERCY L. REV. 311, 347-52 (1996).

⁹⁸See Louis Kaplow, *The Patent-Antitrust Intersection: A Reappraisal*, 97 HARV. L. REV. 1814, 1842-45 (1984) (arguing that the optimal term of patent protection is indeterminate).

⁹⁹*Cf.* pp. 132-35 (arguing against software patent protection).

CREATORS, IMPROVERS, COMPETITORS, AND THE PUBLIC¹⁰⁰ BY GRANTING CERTAIN PARTIES LIMITED CONTROL OVER CERTAIN TYPES OF INFORMATION. EVIDENCE OF THIS SORT OF CLASSICAL APPROACH, WHICH FOCUSES ON THE PUBLIC INTEREST AS THE ULTIMATE GUIDE TO INTELLECTUAL PROPERTY LAW, IS UBIQUITOUS IN AMERICAN LAW. THE RATHER UNUSUAL CONSTITUTIONAL GRANT OF POWER TO ENACT THE PATENT AND COPYRIGHT LAWS IS DECIDEDLY INSTRUMENTAL IN NATURE, CONFERRING ONLY THE RIGHT TO GRANT OWNERSHIP OF INTELLECTUAL PROPERTY FOR "LIMITED TIMES," AND THEN ONLY IN ORDER "[T]O PROMOTE THE PROGRESS OF SCIENCE AND USEFUL ARTS."¹⁰¹ ENGLISH DECISIONS PREDATING THE CONSTITUTION MAKE THE BALANCING PROCESS EXPLICIT,¹⁰² AND THOMAS JEFFERSON SUGGESTED THAT IT LIES AT THE CORE OF THE PATENT SYSTEM.¹⁰³ THE SUPREME COURT

¹⁰⁰On some of the contours of this difficult balancing act, see Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1275-78 (1995).

¹⁰¹U.S. CONST. art. I, § 8, cl. 8. This is one of the few clauses in the Constitution which explicitly conditions a grant of power on the achievement of a goal.

¹⁰²This approach was used in the case of *Sayre v. Moore*:

[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.

Sayre v. Moore (1785), quoted in *Cary v. Longman*, 102 Eng. Rep. 138, 140 n.b (1801).

¹⁰³Jefferson's suggestion was invoked by the Supreme Court in the case of *Graham v. John Deere Co.*, 383 U.S. 1 (1966):

Inventions . . . cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from any body.

Id. at 9 n.2 (quoting THOMAS JEFFERSON, Letter to Isaac McPherson (Aug. 13, 1813), in 6 THE WRITINGS

HAS REPEATEDLY INVOKED THE INSTRUMENTAL NATURE OF INTELLECTUAL
PROPERTY RIGHTS, NOT HESITATING TO LIMIT THOSE RIGHTS WHEN THE
PUBLIC INTEREST HAS SO REQUIRED.¹⁰⁴ VARIOUS STATUTORY

OF THOMAS JEFFERSON 175, 181 (H.A. Washington ed.,
Washington, D.C., Taylor & Maury 1854)
(quotation marks omitted)).

¹⁰⁴See, e.g., *id.* at 9 ("The patent monopoly was not designed to secure to the inventor his natural right in his discoveries. Rather, it was a reward, an inducement, to bring forth new knowledge."); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare"); see also *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994) ("The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public."); *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) (stating that the "primary objective of copyright" is to promote public welfare); *Stewart v. Abend*, 495 U.S. 207, 224, 224-25 (1990) (noting the Copyright Act's "balance between the artist's right to control the work . . . and the public's need for access"); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 167 (1989) (noting the "careful balance between public right and private monopoly to promote certain creative activity"); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (stating that the limited monopoly conferred by the Copyright Act "is intended to motivate creative activity of authors and inventors . . . and to allow the public access to the products of their genius after the limited period of exclusive control has expired"); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (noting that "private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts"); *Goldstein v. California*, 412 U.S. 546, 559 (1973) (discussing Congress's ability to provide for the "free and unrestricted distribution of a writing" if required by the national interest); *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of the authors.").

PROVISIONS REFLECT THIS BALANCING,¹⁰⁵ AND NUMEROUS COMMENTATORS HAVE ALLUDED TO IT.¹⁰⁶

TO BE SURE, NOT ALL ASPECTS OF INTELLECTUAL PROPERTY LAW CAN BE EXPLAINED AS A UTILITARIAN BALANCING OF INCENTIVES DESIGNED TO PROMOTE THE PUBLIC BENEFIT.¹⁰⁷ IN SOME CASES, FOR EXAMPLE, INTELLECTUAL PROPERTY LAW WILL PROTECT THE MORAL RIGHTS OF AUTHORS EVEN WHEN DOING SO IMPOSES A COST ON SOCIETY, PERHAPS REFLECTING AN EXCESSIVE PREOCCUPATION WITH

¹⁰⁵See, e.g., 15 U.S.C. § 1125(a) (1994) (protections for news reporting and noncommercial use in federal dilution statute); 17 U.S.C. § 102(b) (idea-expression dichotomy); *id.* § 107 (fair use doctrine); *id.* § 108 (right to make library copies); *id.* § 110 (right to make certain miscellaneous copies and performances); *id.* § 117 (right to copy computer software); 35 U.S.C. § 112 (requirement of public disclosure of patents).

¹⁰⁶See, e.g., 1 PAUL GOLDSTEIN, COPYRIGHT § 1.14, at 1:40 (2d ed. 1995); L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT 120-22 (1991); Julie E. Cohen, *Reverse Engineering and the Rise of Electronic Vigilantism: Intellectual Property Implications of "Lock-Out" Programs*, 68 S. CAL. L. REV. 1091, 1198 (1995); Dennis S. Karjala, *Federal Preemption of Shrinkwrap and On-Line Licenses*, 22 U. DAYTON L. REV. (forthcoming 1997) (manuscript on file with the Texas Law Review); Lemley, *supra* note , at 1275-78; Pierre N. Leval & Lewis Liman, *Are Copyrights for Authors or Their Children?*, 39 J. COPYRIGHT Soc'y 1, 11 (1991); Litman, *supra* note , at 967-68; Menell, *supra* note , at 1082; Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J.L. & COM. 509, 515 (1996). These are only a few of the innumerable citations on this point.

¹⁰⁷For discussions of nonutilitarian approaches to intellectual property, see Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540-44 (1993) (applying Locke's natural law theory to intellectual property issues); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 517-22 (1990) (arguing for a return to natural law in copyright jurisprudence); and Steven Chermansky, Comment, *A Penny for Their Thoughts: Employee-Inventors, Preinvention Assignment Agreements, Property, and Personhood*, 81 CAL. L. REV. 595, 641 (1993) (suggesting a "personhood theory" as an alternative to utilitarian or natural law theories).

ROMANTIC AUTHORSHIP.¹⁰⁸ HOWEVER, MANY OF THE FUNDAMENTAL ISSUES IN INTELLECTUAL PROPERTY LAW ARE SHAPED NOT BY ROMANTIC AUTHORSHIP, BUT BY THE DESIRE TO PROTECT INTELLECTUAL PROPERTY ADEQUATELY WITHOUT OVERPROTECTING IT.¹⁰⁹ THE IDEA-EXPRESSION DICHOTOMY AND THE FAIR USE DOCTRINE IN COPYRIGHT, THE ENABLEMENT REQUIREMENT AND THE RULE OF PUBLIC DISCLOSURE IN PATENT, AND THE LIMITED DURATION OF BOTH COPYRIGHTS AND PATENTS ALL CLAIM TO (AND APPEAR TO) REFLECT THIS BALANCING.

BOYLE'S RESPONSE TO THIS VIEW OF INTELLECTUAL PROPERTY IS AN ATTACK ON ITS ECONOMIC FOUNDATIONS, QUITE CORRECTLY POINTING OUT THAT THEY ARE INDETERMINATE.¹¹⁰ THERE ARE A COUPLE OF PROBLEMS WITH THIS APPROACH. FIRST, IT IS NOT AT ALL CLEAR THAT BOYLE'S CRITIQUE OF THE ECONOMIC ANALYSIS OF INFORMATION IS AS DEVASTATING AS HE MAKES IT OUT TO BE. HIS PRIMARY FOCUS IN THAT CRITIQUE IS ON THE TWO DIFFERENT WAYS IN WHICH ECONOMICS TREATS INFORMATION—AS A PREDICATE TO AN EFFICIENT MARKET TRANSACTION AND AS A COMMODITY. BOYLE VIEWS THIS AS A

¹⁰⁸It is interesting to note that Boyle does not dwell on moral rights, which provide perhaps the strongest example in support of the idea of romantic authorship. This may be because such rights play only a very limited role in the U.S. (as opposed to the Continental) copyright tradition and virtually no role in other areas of intellectual property, such as patents or trade secrets. On moral rights and romantic authorship, see Jaszi, *supra* note , at 496-500. Cf. A. Samuel Oddi, *Un-Unified Economic Theories of Patents—The Not-Quite-Holy Grail*, 71 NOTRE DAME L. REV. 267, 274-77 (1996) (discussing nonutilitarian yet strictly economic, rather than morality-based, theories of intellectual property jurisprudence).

¹⁰⁹See Samuelson, *supra* note , at 2041 (discussing the embodiment of policy considerations other than those encompassed in romantic entitlement theory in U.S. copyright law).

¹¹⁰See pp. 41-42. Boyle also points to certain examples, suggesting that they indicate that the balancing approach does not work. Most notably, he points to numerous examples of software patents granted for obvious or previously existing programming techniques. See pp. 132-35. The problem here is that Boyle has confused a *misapplication* of the rules of intellectual property with a fundamental objection to those rules. The problem is not that software is patentable; the problem is that the Patent Office has made some serious errors in allowing some of the applications before it. On this problem, see Cohen, *supra* note , at 1175-81; Mark A. Lemley & David W. O'Brien, *Encouraging Software Reuse*, 49 STAN. L. REV. (forthcoming 1997) (manuscript on file with the *Texas Law Review*).

FUNDAMENTAL CONTRADICTION WHICH BRINGS DOWN THE WHOLE ENTERPRISE.¹¹¹ IT IS NOT. IN THE FIRST PLACE, "PERFECT INFORMATION" DOES NOT HAVE THE PRIDE OF PLACE IN ECONOMICS THAT BOYLE THINKS IT DOES.¹¹² AT LEAST OUTSIDE OF INTRODUCTORY ECONOMICS CLASSES, ECONOMIC ANALYSIS HAS DONE AWAY WITH THE FORMAL ASSUMPTION OF PERFECT INFORMATION, AND MUCH OF THE MODELING THAT DOES OCCUR TAKES ACCOUNT OF UNCERTAINTY,

¹¹¹See pp. 35-37.

¹¹²Boyle suggests that economics might solve some of its indeterminacy problems by focusing more attention on empirical facts and on market imperfections:

One could imagine a type of information economics that was sensitive to baseline errors, offer-asking problems, and wealth effects, that questioned the reality of exogenous preferences, and that openly acknowledged the tension between the efficiency and incentive views of information problems. . . .

If all of these things were done, what epistemological *status* and practical *effect* would information economics have? It would be a little less imperial, a lot more modest, and much more empirical. Its conclusions would be more carefully hedged than they are now, and it would openly declare its partiality

. . . Seen this way, economics would be a spur to concentrate on incentives and information flow, to worry about perverse motivations and unintended consequences. It would, in short, be more a rough-and-ready set of analytical techniques and check-lists than a Newtonian science.

Whether or not this is the economics we should have, it is not the economics we have at the moment.

Pp. 45-46 (emphasis in original). My impression of economics is radically different than Boyle's. While economics tends to oversimplify problems at times, and it is certainly capable of abuse, most modern economic work seems to me to be light-years beyond the stereotypes that have come to dog it.

"RATIONAL IGNORANCE," AND INFORMATION DISPARITY.¹¹³ INDEED, EVEN THE SUPREME COURT HAS ACKNOWLEDGED THAT LEGAL RESULTS CAN TURN ON THE EFFECT OF IMPERFECT INFORMATION.¹¹⁴

MORE IMPORTANTLY, THOUGH, THE PERFECT INFORMATION AND THE INFORMATION-AS-COMMODITY RULES GENERALLY APPLY TO *DIFFERENT TYPES OF INFORMATION*. THE PERFECT INFORMATION REQUIREMENT APPLIES, IF AT ALL, TO WHAT ONE MIGHT CALL "META-INFORMATION"—INFORMATION ABOUT A TRANSACTION FOR SOME OTHER GOOD OR SERVICE, SUCH AS THE PRICE OF A COMMODITY OR THE QUALITY OF THE GOODS BEING SOLD. BY CONTRAST, INFORMATION IS TREATED AS A COMMODITY WHEN IT IS THE *SUBJECT* OF A TRANSACTION—A VERY DIFFERENT THING. BOYLE SUGGESTS THAT ECONOMISTS HAVE NO MASTER PRINCIPLE FOR DECIDING WHICH

¹¹³See, e.g., WILLIAM POUNDSTONE, *PRISONER'S DILEMMA* 212-13 (1992) (discussing the advantages of perceived irrationality in game-theoretic models of "chicken"); Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1048-50 (1995) (modeling bargaining under imperfect information); Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1, 13 (1982) (acknowledging the distortion of imperfect information in various possible remedies for externalities, when such remedies themselves contain incentives for the provision of distorted information to decisionmakers); Robert Cooter & Stephen Marks, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 226 (1982) (incorporating litigants' uncertainty into a model of pretrial bargaining); Wendy J. Gordon, *Asymmetric Market Failure and Prisoner's Dilemma in Intellectual Property*, 17 U. DAYTON L. REV. 853, 866-68 (1992) (discussing the implications of asymmetrical imperfections in information for intellectual property law); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 724-28 (1996) (discussing parties' responses to information imperfections); Steven N. Wiggins & Gary D. Libecap, *Oil Field Unitization: Contractual Failure in the Presence of Imperfect Information*, 75 AM. ECON. REV. 368, 372-75 (1985) (outlining a theory of contracting for the unitization of oil fields that takes into account imperfect information).

¹¹⁴See *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 473-76 (1992) (holding that when life-cycle pricing information is costly or unavailable to potential customers, the existence of a seller's economic power may be inferred in an antitrust case).

INFORMATION IS WHICH,¹¹⁵ BUT THAT SIMPLY ISN'T SO. IN MOST CASES, THE DIFFERENCE IS OBVIOUS—THE INFORMATION I AM BUYING IS IN A BOX LABELLED "SOFTWARE," AND THE PRICE IS ON A STICKER ON THE OUTSIDE. CERTAINLY IT IS TRUE THAT SOMETIMES INFORMATION ABOUT A PRODUCT IS ITSELF A COMMODITY. BUT EVEN IN SUCH CASES, THE SALE OF SUCH META-INFORMATION NORMALLY OCCURS IN A DIFFERENT MARKET FROM THE SALE OF THE UNDERLYING INFORMATION PRODUCT ITSELF. FOR EXAMPLE, I MAY BUY *THE WALL STREET JOURNAL* BECAUSE IT CONTAINS INFORMATION ABOUT STOCK PRICES, BUT THE *JOURNAL* IS NOT COMPETING WITH THE STOCKS THEMSELVES IN ANY MEANINGFUL ECONOMIC SENSE.

THERE ARE SOME CASES IN WHICH COMPANIES THAT SELL INFORMATION ALSO HAVE CONTROL OVER SOME OF THE META-INFORMATION ASSOCIATED WITH THAT PRODUCT, PARTICULARLY ITS QUALITY CHARACTERISTICS. EVEN THEN, THERE IS NOT NECESSARILY AN ECONOMIC PROBLEM. FIRST, SOME OF THIS META-INFORMATION WILL BE APPARENT FROM A CASUAL INSPECTION OF THE PRODUCT ITSELF, OR WILL BE REVEALED UPON REQUEST. PRICE GENERALLY FALLS INTO THIS CATEGORY. SECOND, INFORMATION THAT IS NOT REVEALED BY THE SELLER MAY BE OFFERED BY INDEPENDENT THIRD PARTIES LIKE *CONSUMER REPORTS*. HERE ONCE AGAIN, THE META-INFORMATION IS A "COMMODITY," BUT THERE IS NO DANGER THAT IT WILL BE CONFUSED WITH THE UNDERLYING PRODUCT BEING SOLD. THIRD, WHERE META-INFORMATION ABOUT AN INFORMATION PRODUCT IS UNIQUELY WITHIN THE HANDS OF THE SELLER—A SITUATION KNOWN AS ARROW'S INFORMATION PARADOX¹¹⁶—INTELLECTUAL PROPERTY ACTUALLY OFFERS A WAY OUT OF THE PARADOX. AS ROBERT MERGES PUTS IT, "ONE OF THE ROLES ATTRIBUTED TO PROPERTY RIGHTS IN INFORMATION OVER THE YEARS IS TO FACILITATE EXACTLY THIS SORT OF EXCHANGE. SELLERS WILL BE WILLING TO DISCLOSE SOME OR EVEN ALL OF THE INFORMATION IN THEIR POSSESSION WHEN THAT INFORMATION IS PROTECTED BY A PROPERTY RIGHT."¹¹⁷ FURTHER, TRADEMARK LAW ITSELF FUNCTIONS AS A FACILITATING MECHANISM IN THE MARKET FOR META-INFORMATION BECAUSE IT ALLOWS CONSUMERS TO GATHER META-INFORMATION ABOUT A PRODUCT'S EXPERIENCE

¹¹⁵See pp. 44-45.

¹¹⁶Arrow's information paradox concerns secret information that is the putative subject of a market transaction. This information cannot be valued by the buyer unless it is known, but once known, its exclusivity value to the seller is lost. See Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS* 609, 614-16 (1962).

¹¹⁷Robert P. Merges, *Intellectual Property and Digital Content: Notes on a Scorecard*, *CYBERSPACE LAW.*, June 1996, at 15, 16.

CHARACTERISTICS.¹¹⁸

FINALLY, WHILE IT MAY BE THE CASE THAT CERTAIN TYPES OF SELLERS WILL WITHHOLD SOCIALLY VALUABLE META-INFORMATION BECAUSE THEY CAN, ECONOMICS IS PERFECTLY CAPABLE OF DEALING WITH THIS PROBLEM. SUCH SITUATIONS ARE CLASSIC EXAMPLES OF MARKET FAILURE. IN CASES OF INFORMATIONAL MARKET FAILURE, GOVERNMENT COULD STEP IN AND PROVIDE META-INFORMATION DIRECTLY TO CONSUMERS (WITNESS ANTI-SMOKING CAMPAIGNS), REQUIRE THE SELLER TO PROVIDE THE INFORMATION TO CONSUMERS (AS WE DO WITH FOOD, DRUGS, AND PESTICIDES), OR EVEN PREJUDGE THE PURCHASE DECISION ENTIRELY (FOR EXAMPLE, BY REQUIRING ALL CARS TO HAVE AIR BAGS). THE MARKET MAY HAVE FAILED IN SUCH CASES, BUT THAT DOES NOT MEAN THAT ECONOMICS HAS FAILED. ALL IT MEANS IS THAT ECONOMICS MUST DIRECT US TOWARD MECHANISMS THAT WILL SOLVE THE MARKET FAILURE.

BUT THERE IS ANOTHER PROBLEM WITH BOYLE'S TREATMENT OF INFORMATION ECONOMICS. BOYLE'S ARGUMENT IN THE FINAL ANALYSIS COMES DOWN TO THIS: ECONOMIC ANALYSIS IS INDETERMINATE, SO IT CANNOT TELL US WHAT IS REALLY GOING ON IN INTELLECTUAL PROPERTY CASES. I SIMPLY DO NOT THINK THIS FOLLOWS. EVEN IF WE ACCEPT BOYLE'S ARGUMENT THAT ECONOMICS IS FATALLY FLAWED AS A TOOL FOR PRODUCING THE RIGHT ANSWER, IT COULD EASILY BE THE CASE THAT COURTS AND COMMENTATORS ARE SIMPLY TRYING TO APPLY THE LOGIC OF THAT FLAWED SYSTEM. THEY MAY NOT DO IT PARTICULARLY WELL IN ANY GIVEN CASE, BECAUSE THEY ARE HUMAN AND THEREFORE FALLIBLE, BECAUSE THEY DO NOT HAVE ALL THE INFORMATION THEY NEED, OR EVEN BECAUSE (AS BOYLE SUGGESTS) THE ENTIRE ENTERPRISE IS DOOMED TO INDETERMINACY. BUT BOTH THE LAW AND THE RHETORIC OF INTELLECTUAL PROPERTY HAVE REFLECTED A PREOCCUPATION NOT SO MUCH WITH ROMANTIC AUTHORSHIP AS WITH THE BALANCING OF COMPETING INTERESTS. IT SEEMS REASONABLE, THEREFORE, TO ASSUME THAT WHATEVER INDETERMINACY EXISTS IN ECONOMIC ANALYSIS IS SIMPLY REFLECTED IN THE UNQUESTIONABLE INDETERMINACY OF INTELLECTUAL PROPERTY LAW.¹¹⁹

¹¹⁸See MERGES ET AL., *supra* note , at 527-30.

¹¹⁹The intractability of legal issues in intellectual property has been well discussed. See, e.g., *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (Hand, J.) (noting the difficulty of the substantial similarity analysis); *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661 (2d Cir. 1939) (per curiam) (noting that the fair use doctrine is "the most troublesome in the whole law of copyright"); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (Hand, J.) (noting the difficulty of the idea-expression dichotomy); p. 19 ("[I]n copyright law—to a greater extent than in most other fields of legal doctrine—there is a routine and acknowledged breakdown of the simplifying assumptions of the discourse, so that mundane issues force

IT IS A MUCH GREATER STRETCH TO ERECT A PHILOSOPHICAL SUPERSTRUCTURE (ROMANTIC AUTHORSHIP) ON TOP OF THIS ECONOMIC ANALYSIS AND TO PRESUME THAT COURTS APPLY THIS SUPERSTRUCTURE WITHOUT ACKNOWLEDGING IT, IN ORDER TO RESOLVE THE CONTRADICTIONS LEFT BY ECONOMIC ANALYSIS. AND THERE IS NO REASON TO MAKE THE STRETCH IN THIS CASE, BECAUSE AS NOTED ABOVE THERE IS NO EVIDENCE THAT THE ROMANTIC AUTHORSHIP CONSTRUCT EXPLAINS LEGAL RULES PARTICULARLY WELL.

PERHAPS ALL OF THIS MISSES THE POINT. BOYLE DOES NOT OFFER ROMANTIC AUTHORSHIP AS AN EXPLANATION FOR EVERYTHING THAT GOES ON IN THE LAW OF INFORMATION. INDEED, HE IS QUITE CONSCIOUS THAT IT IS SOMETIMES ADVANCED ON THE LOSING SIDE, AS IN INSIDER TRADING. BUT HE MIGHT NONETHELESS SAY THAT IT IS A USEFUL PARTIAL THEORY OF INFORMATION, AND THAT THAT IS THE BEST WE CAN HOPE FOR. THERE IS NO QUESTION THAT AUTHORS TRY TO CHARACTERIZE THEIR WORKS AS MORE RATHER THAN LESS CREATIVE AND THEMSELVES AS MORE RATHER THAN LESS DESERVING, WHETHER THEY ARE ARGUING IN COURT OR SEEKING LEGISLATIVE CHANGES IN CONGRESS. ANTHONY CLAPES'S *SILICON EPICS AND BINARY BARDS* IS AN OBVIOUS, IF EXTREME, EXAMPLE OF AN OVERT APPEAL TO AUTHORSHIP AS A GROUNDS FOR ENTITLEMENT.¹²⁰ FURTHER, BOYLE AND OTHERS MAY WELL BE CORRECT IN CHARACTERIZING ROMANTIC AUTHORSHIP AS A THEORY THAT AFFECTS DECISIONMAKING SOMEWHERE BELOW THE CONSCIOUS LEVEL BY INCLINING JUDGES AND MEMBERS OF CONGRESS TO SUPPORT "THE AUTHOR."¹²¹ IF BOYLE'S ARGUMENT IS CONCEIVED IN THIS MORE LIMITED WAY—AN ARGUMENT USED TO SWAY DECISIONMAKERS IN PARTICULAR CASES, RATHER THAN AN OVERARCHING THEORY EXPLAINING INTELLECTUAL PROPERTY OR INFORMATION LAW—I TEND TO AGREE WITH IT.

AT THE SAME TIME, ONE SHOULD NOT OVERSTATE THE EFFECTIVENESS OF THE ROMANTIC AUTHORSHIP ARGUMENT IN INFLUENCING OUTCOMES. AS PAMELA SAMUELSON POINTS OUT, CLAPES'S APPEAL FOR PROGRAMMERS TO BE TREATED AS ROMANTIC AUTHORS WAS ULTIMATELY UNSUCCESSFUL—AN EXAMPLE OF A CASE IN

lawyers, judges, and policy-makers to return to first principles." (emphasis in original)).

¹²⁰See Clapes et al., *supra* note , at 1583 (arguing that computer programs are like traditional literary works and that their authors should enjoy the full protection of existing copyright laws). For a discussion of this article as an example of romantic authorship theory, see Samuelson, *supra* note , at 2038-39.

¹²¹See, e.g., p. 116. Peter Jaszi goes further, asserting that "the full-blown Romantic conception of 'authorship' has a continuing grip on the legal imagination." Jaszi, *supra* note , at 463.

WHICH "THE COURTS HAVE HELD ROMANTIC ENTITLEMENT RHETORIC IN CHECK."¹²² SIMILARLY, WHILE PETER JASZI POINTED IN 1991 TO "THE UPWELLING OF ENTHUSIASM" FOR MORAL RIGHTS AS A CLEAR EFFECT OF THE ROMANTIC AUTHORSHIP TREND,¹²³ THE EXTREMELY LIMITED SUCCESS OF MORAL RIGHTS THEORIES IN THE UNITED STATES SUGGESTS THAT, HERE TOO, ROMANTIC AUTHORSHIP SEEMS TO HAVE FAILED. THE ROMANTIC AUTHORSHIP RATIONALE FOR LEGALIZING INSIDER TRADING IS YET ANOTHER INSTANCE IN WHICH THESE ARGUMENTS HAVE FAILED TO SWAY DECISIONMAKERS. WHILE I DO NOT MEAN TO DENY THE SIGNIFICANCE OF ROMANTIC AUTHORSHIP AS AN ARGUMENT EMPLOYED BY THOSE FAVORING AN EXPANSIVE VISION OF INTELLECTUAL PROPERTY, I DO NOT THINK IT TELLS US VERY MUCH AT EITHER A THEORETICAL OR A PREDICTIVE LEVEL ABOUT INTELLECTUAL PROPERTY LAW OR ABOUT CURRENT EFFORTS TO CHANGE THAT LAW. RATHER, IT SEEMS TO ME THAT SOMETHING DIFFERENT IS AFOOT.

III. PROPERTIZATION

IN THIS PART, I WANT TO SUGGEST IN VERY GENERAL TERMS AN ALTERNATE EXPLANATION FOR CERTAIN TRENDS IN INTELLECTUAL PROPERTY LAW—AND PERHAPS IN INFORMATION LAW MORE GENERALLY. THE EXPLANATION IS THAT THE RHETORIC AND ECONOMIC THEORY OF REAL PROPERTY ARE INCREASINGLY DOMINATING THE DISCOURSE AND CONCLUSIONS OF THE VERY DIFFERENT WORLD OF INTELLECTUAL PROPERTY. I DO NOT SUGGEST THIS AS A GENERAL THEORY OF INFORMATION, OR INDEED EVEN OF INTELLECTUAL PROPERTY. THE "PROPERTIZATION" OF INTELLECTUAL PROPERTY LAW IS OCCURRING AGAINST THE BACKDROP OF THE MORE TRADITIONAL BALANCING OF COSTS AND BENEFITS, AND THERE ARE CERTAINLY ELEMENTS OF THAT BALANCING WOVEN TOGETHER WITH THE IDEAS OF PROPERTY. FURTHER, I DO NOT CLAIM TO BE THE FIRST TO HAVE IDENTIFIED THIS TREND.¹²⁴ PROPERTIZATION IS, I THINK, AT THE HEART OF

¹²²Samuelson, *supra* note , at 2039.

¹²³Jaszi, *supra* note , at 496, 500.

¹²⁴Robert Merges writes of "creeping propertization" in the pure sciences, *see* Robert P. Merges, *Property Rights Theory and the Commons: The Case of Scientific Research*, Soc. PHIL. & POL., Summer 1996, at 145, 146-47, though in the areas I describe propertization might more fairly be said to gallop. Neil Netanel has linked the problem to the economic theories of the Chicago School. *See* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 311-13 (1996). And Pamela Samuelson has identified trends in the law of information that suggest an increased emphasis on property rights both within and outside intellectual property.

MANY OF THE DEVELOPMENTS TO WHICH BOYLE IS REACTING, INCLUDING THE NII WHITE PAPER.¹²⁵ FOCUSING ON THE PROPERTIZATION OF INFORMATION MAY SHED SOME INSIGHT ON AREAS OF THE LAW THAT BOYLE'S ARGUMENT FAILS TO ILLUMINE.

THE IDEA OF PROPERTIZATION BEGINS WITH A FUNDAMENTAL SHIFT IN THE RHETORIC OF INTELLECTUAL PROPERTY LAW. IN PART, ONE MIGHT SEE THIS AS AN ISSUE OF TERMINOLOGY. PATENT AND COPYRIGHT LAW HAVE BEEN AROUND IN THE UNITED STATES SINCE ITS ORIGIN, BUT ONLY RECENTLY HAS THE TERM "INTELLECTUAL PROPERTY" COME INTO VOGUE.¹²⁶ THOSE WHO PAY ATTENTION TO THAT SORT OF THING MAY FIND THIS SHIFT IN TERMINOLOGY IMPORTANT, OR AT LEAST SYMBOLIC; CERTAINLY THE RISE OF THE "PROPERTY RIGHTS"

See Pamela Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. U. L. REV. 365, 397-98 (1989) (listing export restrictions on technical information and patent rules allowing secrecy orders for nonclassified inventions related to national security as examples of a growing emphasis on the idea of information as property).

¹²⁵See pp. 135-39 (discussing the Clinton administration's attempt to expand the rights of copyright owners on the Net, see NII WHITE PAPER, *supra* note); see also *id.* at 144-48 (discussing the granting of property rights in language).

¹²⁶The modern use of the term "intellectual property" as a common descriptor of the field probably traces to the foundation of the World Intellectual Property Organization (WIPO) by the United Nations. See Convention Establishing the World Intellectual Property Organization, done July 14, 1967, art. 2(viii), 21 U.S.T. 1749, 1772, 828 U.N.T.S. 3, 11. Since that time, numerous groups such as the American Patent Law Association and the ABA Section on Patent, Trademark, and Copyright Law have changed their names (to the American Intellectual Property Law Association and the ABA Section on Intellectual Property Law, respectively). There were certainly uses of the term in the literature well before this time, especially on the Continent. See, e.g., *Davoll v. Brown*, 7 F. Cas. 197, 199 (C.C.D. Mass. 1845) (No. 3662) (defining intellectual property as "the labors of the mind, productions and interests as much a man's own, and as much the fruit of his honest industry, as what he cultivates, or the flocks he rears"); A. NION, *DROITS CIVILS DES AUTEURS, ARTISTES ET INVENTEURS* (1846) (referring to "propriete intellectuelle"). These uses do not seem to have reflected a unified property-based approach to the separate doctrines of patent, trademark, and copyright, however.

VIEW OF INTELLECTUAL PROPERTY SEEMS TO COINCIDE WITH THE WIDESPREAD USE OF THE NEW PHRASE.¹²⁷ BUT THE RHETORIC OF PROPERTY IS NOT CONFINED TO THIS ONE EXAMPLE. INTELLECTUAL PROPERTY CASES AND ARGUMENTS ARE REplete WITH REFERENCES TO INFRINGEMENT AS "THEFT,"¹²⁸ WHICH IT ASSUREDLY IS NOT, AT LEAST IN THE TRADITIONAL MEANING OF THAT WORD. THE IMPORTANCE OF THE SHIFT IN RHETORIC IS CLEAR HERE: "INFRINGEMENT" MAY BE A MORALLY NEUTRAL TERM, BUT "THEFT" IS CLEARLY WRONG, AND COURTS ARE MORE LIKELY TO BE INCLINED TO PUNISH THE LATTER.¹²⁹ INDEED, THE RHETORIC OF "PROPERTY" ITSELF MAY CARRY A BROADER VIEW OF RIGHTS THAN OTHER BREACH-OF-DUTY CASES, AS PAMELA SAMUELSON HAS SUGGESTED.¹³⁰ ON THE ACADEMIC FRONT, SOME SCHOLARS HAVE EXPRESSLY ARGUED THAT INFORMATION IS PROPERTY IN THE TRADITIONAL SENSE, AND THAT THE RULES THAT APPLY TO ONE CATEGORY OF PROPERTY OUGHT

¹²⁷To be sure, one can find earlier references to the property analogy. See MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 90 (1993) (noting early comparisons of the author's right in literary property to the rights of first possessors in real property chattels). But property in the sense in which it is used by the Chicago School has only recently been brought to bear with much force on intellectual property law.

¹²⁸Boyle discusses some examples of this in his section on intellectual property and international trade relations. See pp. 121-25.

¹²⁹See Laurie Stearns, Comment, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CAL. L. REV. 513 (1992) (distinguishing copyright infringement, which is morally neutral, from plagiarism, which is morally opprobrious). An example of the use of this rhetoric is *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991), in which the court felt it could resolve a novel problem of copyright liability for the "sampling" of a prior work in a new, transformative work by reference to the maxim, "Thou shalt not steal." *Id.* at 183. The court in that case seemed to feel that this powerful rhetoric substituted for a detailed analysis of what in fact turns out to be a difficult issue: the circumstances in which the copying of quantitatively insignificant "samples" of a copyrighted work will rise to the level of infringement unprotected by the fair use defense.

¹³⁰See Samuelson, *supra* note , at 398.

PRESUMPTIVELY TO APPLY TO THE OTHERS AS WELL.¹³¹ OTHER SCHOLARS HAVE LAMENTED THE RISE OF PROPERTY RHETORIC AND ITS EFFECTS, WHILE ACKNOWLEDGING ITS GROWING SIGNIFICANCE IN THE DEBATE.¹³² AND MOST CRITICALLY, THE SUPREME COURT HAS INCREASINGLY RELIED ON THE RHETORIC OF PROPERTY RIGHTS IN TREATING INTELLECTUAL PROPERTY AND RELATED CASES.¹³³

¹³¹See Stephen L. Carter, *Does It Matter Whether Intellectual Property Is Property?*, 68 CHI.-KENT L. REV. 715 (1993); Kenneth W. Dam, *Some Economic Considerations in the Intellectual Property Protection of Software*, 24 J. LEGAL STUD. 321, 332 & n.44 (1995); Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108 (1990); Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. (forthcoming 1997) (manuscript on file with the Texas Law Review); Edmund W. Kitch, *Patents: Monopolies or Property Rights?*, 8 RES. L. & ECON. 31 (1986); Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265, 275-80 (1977) [hereinafter Kitch, *Nature and Function*]; cf. Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1354-88 (1989) (discussing similarities between copyright law and common-law property law).

¹³²See, e.g., Rochelle Cooper Dreyfuss, *We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity*, 20 COLUM.-VLA J.L. & ARTS 123 (1996) (speaking of the "privatization" of words and symbols); Netanel, *supra* note , at 314-21 (examining the application of neoclassical property theory to copyright); Kenneth L. Port, *The Illegitimacy of Trademark Incontestability*, 26 IND. L. REV. 519, 552-69 (1993) (analyzing common-law property rights in the context of incontestability grants to trademark holders); Samuelson, *supra* note , at 397-98 (discussing the implications of a court's decision to classify information as property); cf. Hamilton, *supra* note , at 109 (arguing that the rhetoric of real property is inapplicable to intellectual property, partly because of intellectual property's long period of development as a separate discipline).

¹³³For example, in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987), the Court stated: "[W]hen a word acquires value as the result of organization and the expenditure of labor, skill, and money by an entity, that entity constitutionally may obtain a limited property right in the

THE RISE OF PROPERTY RHETORIC IN INTELLECTUAL PROPERTY CASES IS CLOSELY IDENTIFIED NOT WITH COMMON-LAW PROPERTY RULES IN GENERAL, BUT WITH A PARTICULAR ECONOMIC VIEW OF PROPERTY RIGHTS. THIS VIEW, WHICH EMERGES FROM THE CHICAGO SCHOOL LAW-AND-ECONOMICS MOVEMENT, EMPHASIZES THE IMPORTANCE OF PRIVATE OWNERSHIP AS THE SOLUTION TO THE ECONOMIC PROBLEM KNOWN AS THE "TRAGEDY OF THE COMMONS." THE CENTRAL IDEA IS THAT JOINT OR PUBLIC OWNERSHIP OF A PIECE OF PROPERTY IS INEFFICIENT BECAUSE NONOWNERS WHO USE THE PROPERTY HAVE NO INCENTIVE TO TAKE CARE OF IT. THUS, COMMON LAND SHARED BY CATTLE OWNERS IS OVERGRAZED BECAUSE IN THE PRIVATE CALCULUS OF EACH CATTLE OWNER THE BENEFIT FROM GRAZING EXCEEDS THE BENEFIT FROM HOLDING OFF. THE CHICAGO ARGUMENT IS THAT DIVIDING THE COMMONS INTO PRIVATE PROPERTY SOLVES THIS PROBLEM BY MAKING EACH PROPERTY OWNER LIABLE FOR THE CONSEQUENCES OF HER OWN ACTIONS. FURTHER, IF ONE ASSUMES THAT EFFICIENT TRANSACTIONS WILL ALWAYS OCCUR, IT DOES NOT PARTICULARLY MATTER WHO GETS THE PROPERTY ENTITLEMENT, AS THE OWNER WILL SIMPLY SELL OR RENT THE PROPERTY TO THE MOST PRODUCTIVE USER.¹³⁴

word." *Id.* at 532. The Court further held that "[t]he USOC's right to prohibit the use of the word Olympic in the promotion of athletic events is at the core of its legitimate property right." *Id.* at 541; see also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001-04 (1984) (holding that trade secrets laws confer certain property rights which cannot be "taken" by government disclosure of the secret unless the government pays just compensation). For an analysis of several cases suggesting that the Court may be moving towards a view of information as property, see Samuelson, *supra* note , at 375-95 (examining in turn *Ruckelshaus*, *Carpenter v. United States*, 484 U.S. 19 (1987), and *International News Service v. Associated Press*, 248 U.S. 215 (1918)).

¹³⁴See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Some of Boyle's examples seem most clearly to be debates over which of two parties is entitled to a property right in a particular piece of information. The debate over spleens is the most obvious example. See pp. 22-24, 98-107 (discussing *Moore v. Regents of the University*, 793 P.2d 479 (Cal. 1990)). The *Moore* court concluded—quite reasonably, from an economic perspective—that the ownership of the information contained in DNA belongs to the person who discovered the information and its use, not the person who happened unknowingly to possess the DNA. See *Moore*, 793 P.2d at 488-93. One can certainly imagine coming to the opposite conclusion; indeed, the proposed Genetic Privacy and Nondiscrimination Act of 1997, H.R.

IF ONE CONCLUDES THAT THIS LOGIC APPLIES TO INTELLECTUAL PROPERTY AS WELL, AS SOME (BUT NOT ALL) CHICAGO ECONOMISTS APPARENTLY HAVE,¹³⁵ THE IMPLICATIONS ARE OBVIOUS. THE WAY TO GET PRIVATE PARTIES TO INVEST EFFICIENTLY IN INNOVATION IS TO GIVE THEM EXCLUSIVE OWNERSHIP RIGHTS IN WHAT THEY PRODUCE. THUS, THE EFFICIENT THING TO DO ON THIS VIEW IS TO CONFER STRONG PROPERTY RIGHTS ON INTELLECTUAL PROPERTY CREATORS, ENCOURAGING THEM TO INVEST ENOUGH (BUT NOT TOO MUCH) IN IDENTIFYING, DEVELOPING, AND COMMERCIALIZING NEW INVENTIONS.

341, 105th Cong., would do so. See Michael M.J. Lin, *Conferring a Federal Property Right in Genetic Material: Stepping into the Future with the Genetic Privacy Act*, 22 AM. J.L. & MED. 109, 111 (1996); Edwin Flores Troy, *The Genetic Privacy Act: An Analysis of Privacy and Research Concerns* (1996) (unpublished manuscript, on file with the *Texas Law Review*). But no one seems to have suggested that *neither* side should own a property interest in the information at stake in cases like *Moore*.

It is possible to recast Boyle's other examples as disputes over property ownership as well. For example, data privacy questions may really be disputes over which of two parties—the individual profiled or the profiling firm—"owns" the interest in that information. See generally PAUL M. SCHWARTZ & JOEL R. REIDENBERG, *DATA PRIVACY LAW* (1996) (discussing the issues arising out of the processing of personal data, and analyzing differences between the United States and Europe in the regulation of information). Finally, cases like *Carpenter v. United States* (holding that a stock broker and an author of a *Wall Street Journal* column defrauded the *Journal* by using confidential information to make investments prior to publication), which Boyle does not discuss, may also be thought of as involving the *allocation* of a property right between competing claimants, rather than the determination of whether a property right should exist in the information at all.

¹³⁵The clearest example is Kitch, *Nature and Function*, *supra* note , at 270-71, 275, who suggests a "prospect" rationale for intellectual property which is expressly based on the mining claims system used for certain types of real property formerly in the public domain. See also Dam, *supra* note , at 332 & n.44. On the other hand, William Landes and Richard Posner explicitly reject such an approach in favor of the classic incentive-balancing approach described in Part II. See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989). But cf. Netanel, *supra* note , at 319, 368 & n.381 (suggesting that some aspects of Landes and Posner's argument reflect a property-based approach).

FURTHER, IF ONE POSTULATES THAT TRANSACTIONS INVOLVING INTELLECTUAL PROPERTY ARE COSTLESS, SOCIETY AS A WHOLE SHOULD BENEFIT, SINCE THE OWNERS OF INTELLECTUAL PROPERTY RIGHTS WILL LICENSE THOSE RIGHTS TO OTHERS WHENEVER IT IS ECONOMICALLY EFFICIENT TO DO SO.

I THINK THE INFLUENCE OF THIS APPROACH CAN BE SEEN IN TWO GENERAL TRENDS IN RECENT INTELLECTUAL PROPERTY CASES. FIRST, THERE IS CURRENTLY A STRONG TENDENCY TO "PROPERTIZE" EVERYTHING IN THE REALM OF INFORMATION. INTELLECTUAL PROPERTY LAW IS EXPANDING ON AN ALMOST DAILY BASIS AS NEW RIGHTS ARE CREATED OR EXISTING RIGHTS ARE APPLIED TO GIVE INTELLECTUAL PROPERTY OWNERS RIGHTS THAT THEY NEVER WOULD HAVE HAD IN AN EARLIER TIME.¹³⁶ THE NATIONAL BASKETBALL ASSOCIATION CLAIMS A PROPERTY RIGHT IN THE SCORES OF ITS GAMES.¹³⁷ THE BUILDERS OF HOUSES SUE THOSE WHO TRY TO MAKE A SIMILAR HOUSE, SUCCESSFULLY ASSERTING THAT NOT ONLY THE FLOOR PLAN, BUT ALSO THE ELEMENTS OF THE HOUSE ITSELF ARE COPYRIGHTABLE.¹³⁸ THOSE WHO FAIL TO GET COPYRIGHT PROTECTION BECAUSE OF INCONVENIENT STATUTORY LIMITATIONS¹³⁹ CAN TURN INSTEAD TO TRADEMARK LAW, CLAIMING THAT A POSTCARD OF A CITY SKYLINE IS TRADEMARK INFRINGEMENT BECAUSE IT INCLUDES THE PLAINTIFF'S RECOGNIZABLE

¹³⁶Boyle acknowledges this trend. See p. 141 ("The process I have been describing is of intellectual property rights expanding worldwide.").

¹³⁷See *NBA v. Sports Team Analysis & Tracking Sys., Inc.*, 939 F. Supp. 1071 (S.D.N.Y. 1996), *aff'd in part, vacated in part sub nom. NBA v. Motorola, Inc.*, No. 96-7975, 1997 WL 34001 (2d Cir. Jan. 30, 1997). While the Second Circuit properly rejected the NBA's expansive misappropriation claim, it did suggest that the NBA might be able to achieve the same result by contract. See *NBA*, 1997 WL 34001, at *9.

¹³⁸See Architectural Works Copyright Protection Act of 1990, 17 U.S.C. § 102(a)(8) (1994); *Value Group, Inc. v. Mendham Lake Estates, L.P.*, 800 F. Supp. 1228, 1232-33 (D.N.J. 1992) (holding that the plaintiff's architectural plans and drawings, including design elements based on those plans and drawings, were protected by the copyright laws). See generally Christopher C. Dremann, *Copyright Protection for Architectural Works*, 23 AIPLA Q.J. 325 (1995).

¹³⁹See, e.g., 17 U.S.C. § 120 (1994) (permitting photography of an existing structure).

BUILDING.¹⁴⁰ ARCHITECTS CAN ALSO GET TRADEMARK CONTROL OVER A GOLF COURSE THEY DESIGNED, EVEN ABSENT ANY EVIDENCE THAT ANY CONSUMER COULD CONCEIVABLY CONFUSE THAT GOLF COURSE WITH ANOTHER GOLF COURSE.¹⁴¹ A CELEBRITY (AND PRESUMABLY EVEN AN ORDINARY MORTAL) CAN USE THE RIGHT OF PUBLICITY TO CONTROL NOT ONLY THE USE OF HER NAME, BUT ALSO HER PICTURE, VOICE, AND OVERALL IMAGE.¹⁴² INDEED, ONE NEED NOT USE AN ACTUAL PERSON'S NAME, LIKENESS, OR VOICE TO RUN AFOUL OF THE RIGHT OF PUBLICITY—VANNA WHITE, BETTE MIDLER, AND TOM WAITS ARE APPARENTLY ENTITLED TO PREVENT ANYONE (OR ANYTHING) FROM LOOKING OR SOUNDING TOO MUCH LIKE THEM.¹⁴³ THESE NEW RIGHTS

¹⁴⁰See *Rock & Roll Hall of Fame & Museum, Inc. v. Gentile Prods.*, 934 F. Supp. 868, 873 (N.D. Ohio 1996) (enjoining preliminarily the sale of posters depicting a museum).

¹⁴¹See *Pebble Beach Co. v. Tour 18, I Ltd.*, 942 F. Supp. 1513, 1541-42 (S.D. Tex. 1996) (reasoning that even if a golfer in Texas could not be confused as to whether or not she was playing a hole on a trademarked course in California, confusion over whether the trademark's owner had endorsed a similarly designed hole constitutes trademark infringement).

¹⁴²See, e.g., *McFarland v. Miller*, 14 F.3d 912, 923 (3d Cir. 1994) (enabling child actor "Spanky" McFarland from *Our Gang* to prevent use of the image of him as a child); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1100 (9th Cir. 1992) (allowing a singer to prevent another from imitating his voice); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1400-01 (9th Cir. 1992) (allowing an actress to prevent the use of a robot that reminds people of her); *Midler v. Ford Motor Co.*, 849 F.2d 460, 462-63 (9th Cir. 1988) (allowing a singer to prevent use of her voice on a commercial even though the copyright owner consented to such use); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (9th Cir. 1974) (holding that an owner of a famous race car could prevent the use of a photograph of the car). Some courts have reached a similar result under trademark law. See, e.g., *PAM Media, Inc. v. American Research Corp.*, 889 F. Supp. 1403, 1406-09 (D. Colo. 1995) (enjoining the broadcast of a liberal radio talk show entitled "After the Rush," to be aired after Rush Limbaugh's show, because consumers might think that Limbaugh sponsored it).

¹⁴³See *Waits*, 978 F.2d at 1100; *White*, 971 F.2d at 1397-99; *Midler*, 849 F.2d at 463-64. The *White* decision is particularly striking. The court held that Vanna White was entitled to prevent Samsung

MAY NOT ALWAYS SERVE THE TRADITIONAL PURPOSE OF ENCOURAGING THE CREATION OF VALUABLE NEW WORKS—FOR INSTANCE, IT IS FAR FROM CLEAR WHAT VALUABLE NEW WORKS THE *WHITE V. SAMSUNG ELECTRONICS AMERICA, INC.*¹⁴⁴ DECISION WILL ENCOURAGE. NOR ARE THESE RIGHTS PARTICULARLY CONSISTENT WITH THE IDEA OF ROMANTIC AUTHORSHIP—THINK OF THE NBA'S CLAIM TO OWN THE SCORE OF A BASKETBALL GAME, FOR EXAMPLE.¹⁴⁵ ON THE OTHER HAND, THEY ARE PERFECTLY CONSISTENT WITH THE VIEW THAT INFORMATION IS PROPERTY AND SOMEBODY SHOULD OWN IT.¹⁴⁶

SECOND, EVEN WITHIN THE REALM OF EXISTING INTELLECTUAL PROPERTY RIGHTS, THE POWER THE INTELLECTUAL PROPERTY OWNER HAS OVER THOSE RIGHTS IS INCREASING. COPYING IS LESS LIKELY TO BE EXCUSED AS A FAIR USE OF THE COPYRIGHT THAN EVER BEFORE, PARTICULARLY IF THE LICENSOR CAN SHOW THAT SOME MONEY COULD

from using a television commercial featuring a robot in a blond wig because in context the robot would remind people of her. See *White*, 971 F.2d at 1401. For a helpful analysis of the *White* case, see Paul J. Heald, *Filling Two Gaps in the Restatement (Third) of Unfair Competition: Mixed-Use Trademarks and the Problem with Vanna*, 47 S.C. L. REV. 783, 804-08 (1996).

144971 F.2d 1395 (9th Cir. 1992).

¹⁴⁵See *NBA v. Sports Team Analysis & Tracking Sys., Inc.*, 931 F. Supp. 1124, 1157-59 (S.D.N.Y. 1996), *aff'd in part, vacated in part sub nom.* *NBA v. Motorola, Inc.*, 1997 WL 34001 (2d Cir. Jan. 30, 1997).

¹⁴⁶Indeed, David Dailey has half-humorously suggested that intellectual property rights could also be established for a variety of other things that humans "create," including "footprints, fingerprints, skidmarks, phone bills, credit histories" Electronic mail from David Dailey to cni-copyright@cni.org (Nov. 26, 1996), available in David Dailey, *Behavioral By-Products* (Nov. 26, 1996) <gopher://gopher.cni.org:70/0R930056-938281-/cniftp/forums/cni-copyright/log9611> (hard copy on file with the *Texas Law Review*). Another author has taken the more serious position that awarding individuals property rights in information about themselves may serve the purposes of protecting privacy. See Murphy, *supra* note , at 2396-402. Murphy's argument is significant for our purposes chiefly because it suggests that the private as well as the public side of Boyle's information theory may be susceptible to the propertization explanation.

HAVE BEEN SQUEEZED OUT OF THE USER.¹⁴⁷ TRADEMARK OWNERS CAN PREVENT USES OF THEIR MARKS AS OBVIOUS PARODIES OR FOR ENTIRELY NONCOMMERCIAL PURPOSES,¹⁴⁸ AND ARE WELL ON THEIR WAY TO OWNING THE EXCLUSIVE RIGHT TO PUN.¹⁴⁹ OWNERS OF COMPUTER SOFTWARE, AND INDEED OF ANY INFORMATION RECORDED IN DIGITAL FORM, NOW GET NOT ONLY THE RIGHTS GRANTED TO EVERY OTHER COPYRIGHT OWNER, BUT ALSO THE EFFECTIVE RIGHT TO CONTROL ANY USE OF THEIR WORK.¹⁵⁰ EVERY INTENTIONAL MISAPPROPRIATION OF

¹⁴⁷See *Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381 (6th Cir. 1996) (en banc) (finding that a print shop's copying of "coursepacks" for sale to students for use in college courses did not meet the fair use exception), *petition for cert. filed*, 65 U.S.L.W. 3539 (U.S. Feb. 11, 1997) (No. 96-1219); *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 931 (2d Cir. 1994) (concluding that Texaco's use of photocopied scientific journal articles for institutional research was not a fair use because the publisher lost licensing and subscription revenue), *cert. dismissed*, 116 S. Ct. 592 (1995).

¹⁴⁸See *Anheuser-Busch, Inc. v. Balducci Publications*, 28 F.3d 769, 776 (8th Cir. 1994); see also *supra* note .

¹⁴⁹See *Ringling Bros.-Barnum & Bailey, Combined Shows v. Utah Div. of Travel Dev.*, 935 F. Supp. 763, 765-66 (E.D. Va. 1996) (concluding that Utah's state slogan, "The Greatest Snow on Earth," dilutes Ringling Brothers's famous mark, "The Greatest Show on Earth," for circuses).

¹⁵⁰See *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993) (construing any use of a computer program as the making of a "copy" within the scope of the Copyright Act). Jessica Litman suggests that the result of these cases is to give the digital copyright owner "the exclusive right to read." Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 29 (1994) [hereinafter Litman, *Exclusive Right*]; Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 21 (1996) ("[A]ny use of a computer to view, read, reread, hear, or otherwise experience a work in digital form requires reproducing that work in a computer's memory, . . . [therefore] everybody needs to have either a statutory privilege or the copyright holder's permission . . . each time she does so."); see also Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. (forthcoming 1997) (manuscript at 3, on file with the Texas Law Review).

TRADE SECRETS IS NOW A FEDERAL FELONY, AND SOME THINGS THAT ARE NOT CIVIL MISAPPROPRIATION MAY NONETHELESS STILL BE FELONIES.¹⁵¹ SHOULD ANY OF THESE RIGHTS THREATEN TO EXPIRE, RELEASING WORKS INTO THE PUBLIC DOMAIN, ONE CAN ALWAYS PETITION CONGRESS TO ADD MORE YEARS TO THE TERM OF PROTECTION.¹⁵² AND IN THOSE RARE CASES IN WHICH THE INTELLECTUAL PROPERTY LAWS DO NOT ALREADY GIVE FULL POWER TO THE INTELLECTUAL PROPERTY OWNER, A NEW CASE, *ProCD, Inc. v. Zeidenberg*,¹⁵³ SUGGESTS THAT THE INTELLECTUAL PROPERTY OWNER IS FREE TO DISREGARD THE LIMITS IMPOSED BY THE LAW, IN EFFECT REWRITING THE LAW BY PRIVATE CONTRACT TO SUIT HIS NEEDS.¹⁵⁴

¹⁵¹See Economic Espionage Act of 1996, Pub. L. No. 104-294, § 101, 110 Stat. 3488, 3488-91 (to be codified at 18 U.S.C. §§ 1831-1839). The Act provides that whoever knowingly "copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys a trade secret" without authorization is a felon. *Id.* at 3488 (to be codified at 18 U.S.C. § 1831(a)(2)). There is no provision to protect reverse engineering that involves one or more of these acts, as it almost certainly will in the software and semiconductor contexts, even though reverse engineering is perfectly legal under state civil trade secret law. See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476 (1974); UNIF. TRADE SECRETS ACT § 1 cmt. (1985), 14 U.L.A. 437, 439 (1990). For more detail on this issue, see James H.A. Pooley et al., *Understanding the Economic Espionage Act of 1996*, 5 TEX. INTELL. PROP. L.J. (forthcoming 1997) (manuscript at 22-25, on file with the *Texas Law Review*).

¹⁵²See, e.g., Copyright Term Extension Act of 1995, H.R. 989, 104th Cong. (proposing to add 20 years to the copyright term, 19 years after Congress added 19 years to the copyright term).

¹⁵³86 F.3d 1447 (7th Cir. 1996).

¹⁵⁴*Id.* at 1455 (Easterbrook, J.) (holding that shrinkwrap licenses are enforceable under the principles of general contract law). The decision in this case is particularly striking because it involved a shrinkwrap license, a form of "contract" which is unilaterally drafted by the intellectual property owner and is first made available to the purchaser only after the transaction is completed. The *ProCD* decision is at odds with the majority view, which rejects shrinkwrap licenses as being unenforceable. See, e.g., *Step-Saver Data Sys. Inc. v. Wyse Tech.*, 939 F.2d 91,

THESE RECENT CHANGES HAVE LITTLE OR NO JUSTIFICATION IN THE CLASSIC BALANCING-OF-RIGHTS SENSE—INDEED, THE *ProCD* CASE SUGGESTS THAT THE ENTIRE CONCEPT OF A BALANCE BETWEEN INTELLECTUAL PROPERTY OWNERS, USERS, COMPETITORS, AND THE PUBLIC MAY BE ANACHRONISTIC. THESE CHANGES CERTAINLY HAVE NO EXPLANATION IN ROMANTIC AUTHORSHIP—IS THE SAME WORK SOMEHOW MORE “ROMANTIC” WHEN RENDERED IN DIGITAL FORM, THUS ENTITLING AUTHORS TO MORE PROTECTION WHEN WORKS ARE RECAST IN THAT FORM? BUT ONCE AGAIN, THE CHANGES ARE COMPLETELY CONSISTENT WITH THE PROPERTIZATION APPROACH. IF THE POINT OF INTELLECTUAL PROPERTY IS TO CENTRALIZE CONTROL OF INFORMATION IN A SINGLE OWNER WHO WILL USE IT EFFICIENTLY, INTELLECTUAL PROPERTY RIGHTS OUGHT TO BE INFINITE IN TERM AND ABSOLUTE IN NATURE. FURTHER, IF LICENSING IS EFFICIENT, THERE IS NO REASON NOT TO ALLOW THE CONTRACTING PARTIES TO ALTER WHAT BECOME MERELY THE “DEFAULT RULES” SET BY FEDERAL LAW.

IN SHORT, WHAT IS GOING ON HERE IS NOT THE PRODUCT OF SOME EIGHTEENTH-CENTURY VISION OF AUTHORSHIP WITH UNFORTUNATE CONSEQUENCES. RATHER, IT IS A WHOLESALE ATTACK ON THE PUBLIC DOMAIN IN INTELLECTUAL PROPERTY LAW. THE ATTACK DOES NOT SIMPLY CONSIST OF MULTIPLE EFFORTS TO WHITTLE AWAY THE SCOPE OF THAT DOMAIN FOR THE BENEFIT OF THOSE WHO GET TO OWN PIECES

104-05 (3d Cir. 1991) (holding that when a “box-top” license materially alters the terms of a contract to sell software, the license will not become a part of the contract and is therefore unenforceable); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 268-70 (5th Cir. 1988) (holding that because federal copyright law pre-empted Louisiana's license statute, the shrinkwrap license agreement was unenforceable under the statute); *Arizona Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 765-66 (D. Ariz. 1993) (ruling that under UCC § 2-207, package disclaimers arriving only after the parties have reached an accord are essentially modification proposals, rather than enforceable agreements); *Foresight Resources Corp. v. Pfortmiller*, 719 F. Supp. 1006, 1010 (D. Kan. 1989) (holding that a shrinkwrap agreement purporting to give the copyright owner sole rights of improvement and enhancement, even if enforceable, does not give the copyright owner exclusive rights); Lemley, *supra* note (arguing that shrinkwrap licenses should be unenforceable). However, the Reporter's Draft of the new Uniform Commercial Code Article 2B, if adopted in present form, would validate such licenses. See U.C.C. § 2B-112 illus. 1 (Tentative Draft, Dec. 12, 1996), available in *Uniform Commercial Code Article 2B Revision Home Page* (visited Feb. 15, 1997) <http://www.law.uh.edu/ucc2b/121296/1212_2b.html>.

OF IT, THOUGH THAT IS CERTAINLY PART OF IT.¹⁵⁵ RATHER, THE ATTACK IS MORE FUNDAMENTAL—A CHALLENGE TO THE VERY IDEA OF THE PUBLIC DOMAIN AS AN INTRINSIC PART OF INTELLECTUAL PROPERTY LAW.

NOW, I HAPPEN TO THINK THAT THE "PROPERTIZATION" OF INTELLECTUAL PROPERTY IS A VERY BAD IDEA.¹⁵⁶ IT IS NOT AT ALL CLEAR TO ME THAT COMMONS ARE ALWAYS A BAD THING, EVEN IN REAL PROPERTY LAW.¹⁵⁷ I AM FURTHER UNCONVINCED THAT THE CHICAGO APPROACH TO REAL PROPERTY, EVEN IF VALID IN THAT CONTEXT, MAPS WELL ONTO INTELLECTUAL PROPERTY. WE DO NOT, AFTER ALL, PROPERTIZE OTHER PUBLIC GOODS (SUCH AS NATIONAL DEFENSE OR LIGHTHOUSES), ATTEMPTING TO GIVE THEIR CREATORS A LEGAL RIGHT TO EXCLUDE OTHERS. IF ANYTHING, THE PUBLIC NATURE OF A GOOD SEEMS TO SUGGEST THAT PROPERTIZATION IS A UNIQUELY BAD IDEA, PRECISELY BECAUSE THE CONSUMPTION OF THAT GOOD IS "NONRIVALROUS"—IT DOES NOT TAKE AWAY FROM THE CREATOR OF THAT GOOD.¹⁵⁸ RATHER, INTELLECTUAL PROPERTY IS IN SOME SENSE A NECESSARY EVIL—A RESTRICTION ON THE FREE FLOW OF INFORMATION TO THE MINIMUM EXTENT NECESSARY TO ENCOURAGE NEEDED INVESTMENT IN INNOVATION.¹⁵⁹ AS SUCH, WE SHOULD BE SENSITIVE TO THE PROBLEM OF GIVING INTELLECTUAL PROPERTY OWNERS TOO MUCH PROTECTION. FINALLY, EVEN IF THE PROPERTY-RIGHTS APPROACH TO INTELLECTUAL PROPERTY IS THEORETICALLY SOUND, IT DEPENDS CRITICALLY ON THE DEMONSTRABLY FALSE ASSUMPTION THAT TRANSACTIONS IN INTELLECTUAL PROPERTY ARE COSTLESS, AND ON THE

¹⁵⁵See Litman, *supra* note , at 275-82 (discussing intellectual property legislation as a product of rent-seeking); Litman, *Exclusive Right*, *supra* note , at 29.

¹⁵⁶For further arguments along these lines, see Samuelson, *supra* note , at 368-75.

¹⁵⁷See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 723 (1986) (suggesting that the private division of land is not always efficient).

¹⁵⁸Certainly, lighthouses are often privately owned. We could determine that a ship that benefits from the light provided by a lighthouse has infringed upon a property right of the lighthouse owner. We might even say that the lighthouse owner could protect its right with a property rule and obtain an injunction requiring the ship to run aground. But would anyone really argue that this was the *efficient* thing to do?

¹⁵⁹See Radin, *supra* note , at 517-18.

PREMISE THAT EFFICIENT LICENSING WILL ALWAYS OCCUR.¹⁶⁰ BUT MY GOAL HERE IS NOT TO CRITIQUE THE PROPERTIZATION OF INTELLECTUAL PROPERTY IN DETAIL. RATHER, IT IS MERELY TO OFFER IT AS AN EXPLANATION OF RECENT TRENDS IN THE LAW, ONE WHICH I THINK IS SIGNIFICANTLY MORE ROBUST THAN THE IDEA OF ROMANTIC AUTHORSHIP.

BOYLE ACKNOWLEDGES SOME FORM OF THIS ARGUMENT, THOUGH NOT IN THE WAY I HAVE JUST STATED IT.¹⁶¹ HIS RESPONSE IS TO SUGGEST THAT THE LARGE CORPORATIONS PUSHING TO EXPAND INTELLECTUAL PROPERTY LAW MAY BE DOING SO BECAUSE THEY ARE THEMSELVES VICTIMS OF THE AUTHOR PARADIGM.¹⁶² IN OTHER WORDS, EVEN THOUGH THEY THINK THEY ARE APPLYING A PROPERTY THEORY, THEY ARE REALLY ONLY FOLLOWING THE DICTATES OF ROMANTIC AUTHORSHIP. I THINK THIS IS UNSATISFACTORY. AS NOTED ABOVE, THE ROMANTIC AUTHORSHIP THEORY DOES NOT OFFER ANY PARTICULAR REASON THAT INTELLECTUAL PROPERTY RIGHTS SHOULD EXPAND OVER TIME, AND IT CERTAINLY OFFERS NO EXPLANATION FOR SOME OF THE PECULIAR FORMS THAT THAT EXPANSION HAS TAKEN. ON THE OTHER HAND, THOSE EXPANSIONS ARE PERFECTLY CONSISTENT WITH AT LEAST THE SHORT-TERM INTERESTS OF THE PARTIES PUSHING FOR THEM. LARGE SOFTWARE COMPANIES—THOSE THAT HAVE ALREADY BEEN SUCCESSFUL—WANT MORE PROTECTION FOR EXISTING SOFTWARE PROGRAMS, NOT SO MUCH BECAUSE THEY WANT TO ENCOURAGE NEW INNOVATION IN THE FUTURE (AFTER ALL, THAT IS USUALLY DONE BY SMALL SOFTWARE COMPANIES¹⁶³), BUT BECAUSE THEY HAVE A VESTED INTEREST IN PROTECTING WORKS THEY HAVE ALREADY CREATED. TO SAY THAT THE RESULT OF THESE EFFORTS IS ECONOMICALLY IRRATIONAL, AS BOYLE

¹⁶⁰I attack this assumption in some detail in Lemley, *supra* note (manuscript at 70) ("Problems of imperfect information, transaction costs, strategic behavior, and market power all impose barriers to the hypothetical efficient license.").

¹⁶¹See pp. 159-61 (claiming that most people adopting the propertization approach believe that it applies due to the supposed monolithic interests of large software companies).

¹⁶²See pp. 159-61.

¹⁶³See David J. Wallace, *Zisman Takes the Helm of Lotus in the Post-Manzi Era*, PHILA. BUS. J., Nov. 10, 1995, at B2 ("Most of the innovation [in the software industry today] comes from very small companies"); Clyde H. Wilson, Jr., *Software Piracy: Uncovering Mutiny on the Cyberseas*, TRIAL, Oct. 1996, at 25.

DOES,¹⁶⁴ MISSES THE POINT. I AGREE WITH HIM THAT DIVIDING THE PUBLIC DOMAIN INTO PRIVATE PROPERTY IS A BAD IDEA. BUT THAT DOES NOT MEAN THAT IT IS NOT HAPPENING, AND THE REASONS THAT IT IS HAPPENING SEEM TO ME TO HAVE FAR MORE TO DO WITH THE SHORT-TERM ECONOMIC INTEREST OF THE COMPANIES THAT BENEFIT FROM THE DIVISION THAN THE UNANTICIPATED AND UNSTATED EFFECTS OF THE AUTHOR PARADIGM.

IV. CONCLUSIONS

BOYLE'S BOOK IS WELL WORTH READING. HIS IDEAS ARE PROVOCATIVE AND WELL PRESENTED, AND THEY REWARD CAREFUL STUDY. HIS ATTEMPT TO UNIFY THE LAW OF INFORMATION MAY TURN OUT IN TIME TO BE A MAJOR CONTRIBUTION TO LEGAL SCHOLARSHIP, ONE WHICH I AM SIMPLY NOT QUALIFIED TO EVALUATE. FURTHER, THERE IS CERTAINLY SOMETHING TO THE IDEA OF ROMANTIC AUTHORSHIP AS A FACTOR IN INTELLECTUAL PROPERTY LAW, AT LEAST IN CERTAIN INSTANCES.

HOWEVER, FOR THE REASONS DETAILED IN PART II, I DO NOT THINK THE ROMANTIC AUTHORSHIP IDEA PERFORMS PARTICULARLY WELL AS AN EXPLANATION FOR THE LAW OF INTELLECTUAL PROPERTY. BOYLE'S EARLY REJECTION OF ECONOMIC ANALYSIS AS BEING INDETERMINATE LEADS HIM TO UNFAIRLY IGNORE ECONOMIC EXPLANATIONS FOR INTELLECTUAL PROPERTY LAW IN GENERAL, AND IN PARTICULAR FOR RECENT CHANGES IN INTELLECTUAL PROPERTY. IN SO DOING, I THINK BOYLE MAKES WHAT HE WOULD CALL A "CATEGORY ERROR," ASSUMING THAT BECAUSE THE THEORY IS ARGUABLY INVALID, IT MUST NOT BE RESPONSIBLE FOR SETTING THE PARAMETERS OF THE LAW.

IN FACT, THOUGH, MY CONCERN IS SOMETHING MORE THAN THE FLAWS IN BOYLE'S DESCRIPTIVE ANALYSIS OF INTELLECTUAL PROPERTY. I THINK BOYLE'S FAILURE TO ARTICULATE A CONSISTENT NORMATIVE THEORY OF INTELLECTUAL PROPERTY PROTECTION LEAVES HIS ARGUMENTS EVEN LESS DETERMINATE THAN THE ECONOMIC THEORY HE CRITICIZES. IF ROMANTIC AUTHORSHIP IS A POOR GUIDE FOR MAKING POLICY, AND IF ECONOMIC ANALYSIS IS UNAVAILABLE, BY WHAT MEANS SHALL WE MAKE DECISIONS ABOUT THE SCOPE OF INTELLECTUAL PROPERTY? BOYLE DOES NOT ANSWER THIS QUESTION

¹⁶⁴See p. 160. Specifically, Boyle states: "At present it may be in the *individual* interest of the individual drug company to secure biological material and ethnobiological knowledge for free. But it is in the collective interest of the companies in the drug industry to ensure the continued existence of their raw materials." P. 160 (emphasis in original). The same argument can be made with equal force for the importance of the public domain in virtually any area of intellectual property.

CONSISTENTLY.¹⁶⁵ HIS FAILURE TO PROVIDE A PRESCRIPTIVE VISION OF INTELLECTUAL PROPERTY MEANS THAT WHILE ON SEVERAL OCCASIONS HE ALLUDES TO THE IMPORTANCE OF THE PUBLIC DOMAIN,¹⁶⁶ HE NEVER OFFERS A STRONG REASON TO PRESERVE THAT DOMAIN.¹⁶⁷

WORSE, AT TIMES BOYLE BUYS INTO THE RHETORIC OF PROPERTIZATION, PARTICULARLY WHERE HE THINKS THAT SOURCES OF INFORMATION HAVE BEEN UNFAIRLY EXCLUDED FROM INTELLECTUAL PROPERTY PROTECTION.¹⁶⁸ THE LANGUAGE BOYLE USES IN THIS SECTION IS INSTRUCTIVE. HE REFERS TO THE DISAVOWAL OF INTELLECTUAL PROPERTY RIGHTS FOR THE "RAW MATERIALS" OF IDEAS IN THE DEVELOPING WORLD AS "THE INTELLECTUAL LAND GRAB," AND SAYS THAT THE FACT THAT THEY ARE IN THE PUBLIC DOMAIN MEANS THAT THE LAW "VALUES THE RAW MATERIALS FOR THE PRODUCTION OF INTELLECTUAL PROPERTY AT ZERO."¹⁶⁹ FURTHERMORE, BOYLE QUOTES APPROVINGLY FROM THOSE WHO WOULD GIVE INTELLECTUAL PROPERTY RIGHTS IN UNDEVELOPED USES FOR RAINFOREST PLANTS: "IT IS A QUESTION OF INTELLECTUAL PROPERTY RIGHTS. PEOPLE WHOSE MEDICAL LORE LEADS TO A USEFUL PRODUCT SHOULD HAVE A STAKE IN THE PROFITS. UNLESS WE RETURN SOME OF THE PROFITS TO THEM,

¹⁶⁵See Peter Huber, *Private Property*, N.Y. TIMES BOOK REV., Sept. 22, 1996, at 18 (acknowledging Boyle's effective critique of current theories of intellectual property, but criticizing his alternatives as inconsistent and empirically unsupported).

¹⁶⁶See pp. 130-31, 135, 141-42.

¹⁶⁷Indeed, it is remarkable—and perhaps instructive—that the defenses he does offer all come back to the classic economic argument that overprotection is inefficient. See, e.g., pp. 127, 131, 135, 139. For excellent defenses of the concept of the public domain, see, for example, Litman, *supra* note , at 967-68 (arguing that in the absence of a vigorous public domain, much of the work of authors, composers, playwrights, novelists, and lawyers would be illegal); Jeremy Phillips, *The Diminishing Domain*, 18 EUR. INTELL. PROP. REV. 429 (1996) (arguing that the extension of intellectual property rights, through copyright, patent, and trademark law, harms industry by limiting the opportunities for innovation offered by the public domain).

¹⁶⁸See pp. 125-30.

¹⁶⁹P. 126.

IT IS A KIND OF THEFT."¹⁷⁰ BOYLE TURNS TO THE RHETORIC OF THE CHICAGO SCHOOL TO JUSTIFY PROTECTION FOR SUCH SOURCES: "AN AUTHOR-FOCUSED REGIME THAT MAKES THE CONTRIBUTIONS OF SOURCES 'INVISIBLE' IS UNLIKELY TO REWARD THOSE CONTRIBUTIONS—EVEN WHEN AN ECONOMIC ANALYSIS MIGHT SHOW THIS TO BE DESIRABLE. SOURCES MAY BECOME A 'COMMONS' WHOSE EXPLOITATION IS JUSTIFIED OR OBSCURED BY AN AUTHOR THEORY, LEADING TO PREDICTABLY TRAGIC RESULTS" ¹⁷¹ HERE, BOYLE SEEMS TO SUGGEST THAT WE OUGHT TO REPLACE THE PREOCCUPATION WITH AUTHORS WITH A RULE THAT ALL VALUABLE IDEAS ARE OWNED BY OTHERS, EVEN IF THEY ARE PRODUCTS OF NATURE OR HAVE BEEN AROUND FOR HUNDREDS OF YEARS.¹⁷² BOYLE IS CERTAINLY CORRECT THAT THERE IS A TENDENCY IN MODERN INTELLECTUAL PROPERTY LAW TO "UNDERVALUE THE PUBLIC DOMAIN."¹⁷³ BUT IT WOULD BE IRONIC INDEED IF BOYLE'S ARGUMENT ENCOURAGED HIM OR ANYONE ELSE NOT TO SAFEGUARD THE PUBLIC DOMAIN, BUT RATHER TO PROPERTIZE IT.¹⁷⁴

¹⁷⁰P. 129 (quoting Daniel Goleman, *Shamans and Their Lore May Vanish with Forests*, N.Y. TIMES, June 11, 1991, at C1 (quoting anthropologist Dr. Jason Gray)).

¹⁷¹P. 130.

¹⁷²On this point, see ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, INTELLECTUAL PROPERTY, TECHNOLOGY TRANSFER AND GENETIC RESOURCES: AN OECD STUDY OF CURRENT PRACTICES AND POLICIES 7 (1996) ("[I]ntellectual property systems would not appear to have a clear role to play with regard to resolving concerns related to ownership or use of naturally occurring or socially maintained materials or information in the public domain.") and Richard A. Guest, *Intellectual Property Rights and Native American Tribes*, 20 AM. IND. L. REV. 111, 123 (1995-96) ("Most traditional seeds and folk crop varieties are in public use or on sale in the public domain and clearly fall outside the scope of protection.").

¹⁷³P. 130.

¹⁷⁴A similar problem concerns Boyle's undeveloped endorsement of sui generis protection for computer programs, see p. 172, along the lines Pamela Samuelson and others have suggested in their *Manifesto*. See Pamela Samuelson et al., *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308 (1994). The *Manifesto* proposes to add new intellectual property protections to those that already exist for software; Pamela Samuelson herself

BOYLE ANTICIPATES THIS OBJECTION. HE DENIES THAT ARGUING FOR THE PUBLIC DOMAIN IS AT ODDS WITH ARGUING FOR INTELLECTUAL PROPERTY RIGHTS IN NATURAL RESOURCES. RATHER, HE SAYS, "THE ANSWER WILL BE NOT TO HAVE FEWER INTELLECTUAL PROPERTY RIGHTS, BUT RATHER TO HAVE DIFFERENT ONES."¹⁷⁵ IT IS HERE THAT OUR DIFFERENT THEORETICAL APPROACHES ARE POINTED UP MOST SHARPLY. THE IMPORT OF ROMANTIC AUTHORSHIP THEORY IS THAT THE INTELLECTUAL CONTRIBUTIONS OF "AUTHORS" ARE OVERVALUED, AND THE INTELLECTUAL CONTRIBUTIONS OF OTHERS ARE CORRESPONDINGLY UNDERVALUED. BY CONTRAST, THE THEORY OF PROPERTIZATION SUGGESTS THAT STRONG PRESSURE EXISTS TO MAKE SURE THAT ALL VALUABLE INFORMATION IS OWNED BY SOMEONE, SIMPLY BECAUSE IT IS VALUABLE. ONE CANNOT RECTIFY THIS PROBLEM BY CREATING "DIFFERENT" NEW INTELLECTUAL PROPERTY RIGHTS; CREATING MORE SUCH RIGHTS WILL INEVITABLY WEAKEN THE PUBLIC DOMAIN, AND THE BENEFICIARIES OF THESE NEW PROPERTY RIGHTS ARE FAR MORE LIKELY TO BE MULTINATIONAL CORPORATIONS THAN TRIBES IN THE RAINFOREST.

noted that "it is difficult to predict how [Boyle] would react to the idea of granting additional legal protections to programs that would diminish the public domain he cherishes." Samuelson, *supra* note , at 2040.

¹⁷⁵Pp. 168-69.