Your Right to What's Mine: On Personal Intellectual Property

Paul K. Saint-Amour

Abstract: *Today's copyright clearance culture endows intellectual property owners with personal claims on their works and places users at an impersonal, transactional distance as good or bad customers. This essay argues for the existence of a personal property relation between users and protected works. Building on Margaret Jane Radin's influential work on property and personhood, it proposes that we are overdue for a tenants' rights revolution in intellectual property law. Such a development would recognize that IP users can, through a sustained engagement with a protected work, begin to constitute themselves as persons in relation to that work much as a tenant does in relation to a rented habitation, with all the attendant circumscriptions of the owner-landlord's sovereignty. After proposing a new, fifth fair-use factor that would heed the character of the user's relationship to the work, the essay closes with a thought experiment in the kinds of expressive deployments such a provision could enable.*

Keywords: *copyright law / fair use / personal property / tenants' rights / Margaret Jane Radin / fungible property*

> Though the earth, and all inferior creatures, be common to all men, yet every man has a *property* in his own *person*: this no body has any right to but himself. The *labour* of his body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*. It being by him removed from the common state nature hath placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other men: for this *labour* being the unquestionable property of the labourer, no

Law & Literature, Vol. 25, Issue 1, pp. 103–121. ISSN 1535-685X, electronic ISSN 1541-2601. DOI: 10.1525/lal.2013.25.1.103.

> man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.
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> —John Locke, "Of Property," *Two Treatises of Government*

Locke's "Of Property" remains one of possessive individualism's core narratives, rooting ownership in bodily self-possession. Provided I am unenslaved, I own my body and the fruit of its labor; property is both what I produce by mingling my labor with the commons and the reward for that productive comingling. So long as I leave "enough, and as good" of the common stock from which my property is laboriously drawn, my dominion over that property annuls the rights of others to mix *their* labor with it in the hope of acquiring it. But imagine, for a moment, a form of property whose common stock is not a natural, uncultivated plenitude—not a divine gift of apples and sprawling acreage, as in Locke—but the already cultivated property of others. Imagine those owners had, in turn, produced *that* property by mingling their labor with the extant property of still prior owners, and so on. Might this porous property form coexist with the exclusive model envisioned by Locke? How would a legal system that recognized such a form ensure that each new property sufficiently rewarded the owner-laborer while also serving as a second-order Lockean commons for the next owner-laborer? And what would it mean to leave—in fact, to be required to leave—"enough, and as good" for others not only in the common stock but also *within* one's own property? What right, according to this social understanding of property, would you have to my property?

Without configuring them as rights, many copyright regimes provide means by which you may fashion your intellectual property out of mine. U.S. fair use doctrine, for instance, permits you not only to copy my protected expression but also to propertize some of it for yourself, provided you have sufficiently transformed it through your labor. In such transformative instances, the intellectual property I once produced by amalgamating fresh and extant ideas and expression serves, in effect, as part of the commons from which you produce your intellectual property. This is true even while my rights persist in a given work. And when those rights lapse with the termination of my copyright, my work joins the expressive equivalent of Locke's commons: the public domain, from which new intellectual properties may be quarried without having to meet the criteria of fair use.

By thus employing my public-domain works, you produce new properties not from what *is* mine but from what *was* mine (or my heirs' or assignees'). Temporally limited copyright ensures that others may use my work as raw material in their own property-making by imposing a term on my exclusive rights in it.

Anglo-American copyright law both creates and limits property owners' exclusive rights according to a rationale of societal benefit. Individuals, says this rationale, need exclusive rights as incentives to create and publish new work. Society creates these exclusive rights because it benefits from new work. But it also needs to ensure that the rights in question do not abridge freedom of speech, so it constrains them. The core rationale for copyright, then—"To promote the Progress of Science and useful Arts" so long as that promotion does not interfere with freedom of speech—is oriented primarily toward the collective good, and only secondarily toward individual good. But might there be rationales over and above this one for preserving and even expanding constraints on property owners' exclusive rights? What happens, for example, if we posit that one person's self-production might require limitations on another's property rights? My essay proposes what is likely, at least in the near term, to remain in copyright's alternative future: a personal property right in *other people's* intellectual property on the analogy of Margaret Jane Radin's discussion of tenants' rights and domestic rent control regulations.[1] I propose this analogical right in the spirit of imagining possibilities rather than as an attempt to reinterpret extant law, although the personal property arguments on which I base my discussion attempt to discern an implicit logic operating within certain areas of the law. Along the way I attempt to demonstrate why the prospect of a personal property right in intellectual property—whether one's own or another's—does not simply duplicate or reinforce the possessive-individualist authorship paradigm that emerged in tandem with early British copyright statutes and that, according to many IP scholars, remains an active, even a dominant, paradigm in present-day U.S. copyright law.[2] The essay concludes by formulating a personal property provision as a fifth factor in fair use and offering a thought experiment in what kinds of expressive deployments such a provision could make possible.

Before engaging the question of intellectual property per se, I will review the distinction Radin makes in her article "Property and

Personhood" (1982) between personal and fungible property. Radin is brought to this distinction by the observation that courts tend, in their decisions, to privilege certain types of property interest over others on apparently moral grounds, but without those decisions' normative criteria having been explicitly worked out in property theory. The home and its effects, for instance, are held to be more sacrosanct than other spaces and properties in the face of unwarranted government surveillance, search, and seizure and the eminent domain "takings" of the state. Even when that home is rented rather than owned, the tenant (at least since the landlord-tenant revolution of the 1970s) enjoys certain defensive rights against retaliatory, capricious, or profiteering eviction by the landlord, with the result that the renter's claim on the property trumps the owner's sovereignty in certain cases.[3] Radin argues that in both scenarios the preference is based on an implicit bias in favor of a *personal property* relation. "An object is closely related to one's personhood," she writes, "if its loss causes pain that cannot be relieved by the object's replacement," as opposed to the fungibility of "an object that is perfectly replaceable with other goods of equal market value." Because the home is "affirmatively part of oneself"—because it is "the scene of one's history and future, one's life and growth"—because "one constitutes oneself there," the home as personal property trumps the landlord's less personal, more business-oriented interest in the property and at least some of the state's powers of eminent domain and criminal investigation.[4] Radin is careful to point out that the ascription of a stronger moral claim to personal property does not always conduce or correspond to progressive wealth redistribution. In the case of new tenants' rights, the tenant's advantage inheres even in cases where wealth gets distributed to tenants who are richer than their landlords. Finally, we should be aware that there is a normative brake on the category of personal property: a personal property relation should not be preferred if it exists between an owner and a thing deleterious to the human flourishing of others, as in the case, say, of the apartment-dwelling military history buff with a penchant for collecting live landmines.

We should keep in mind here Radin's insistence that the distinction between personal and fungible property is a continuum rather than a bright-line dichotomy. The poles of this continuum are, on the personal extreme, one's own body, which is "literally constitutive of personhood"

(so much so, in fact, that it may paradoxically be "too 'personal' to be property at all") and, on the fungible end, money, which in most cases is purely instrumental, the embodiment of general equivalence as opposed to intrinsic and idiosyncratic worth.[5] In addition, aspects of both kinds of property can inhere in a single possession at different times in its life cycle. Radin gives the wedding ring as an example of this multiplicity: "It is fungible when owned by a jewelry store for resale, but it may be personal when owned by someone who feels it has symbolic emotional significance . . . [and] it could become abruptly depersonalized, perhaps reverting to fungible [status], if the relationship with which it was associated suddenly became a source of resentment or betrayal." The possession can toggle between fungible and personal, too, depending on the evaluative context. As Radin says, "When the owner seeks an appraisal of the ring, to obtain insurance, for example, she has no trouble understanding it as a fungible market commodity separate from herself. She doesn't tell the agent that it is 'priceless' and that she is insulted by having the appraiser put a dollar value on it. Nor does this fungible understanding vis-à-vis obtaining insurance undermine the personal understanding vis-à-vis her spouse."[6] Radin's aim in elaborating the distinction between personal and fungible property is to spell out a criterion already immanent in property disputes and thereby to provide a basis for making more consistent and normatively rich decisions in future disputes. "Where we can ascertain that a given property right is personal," she concludes, "there is a prima facie case that that right should be protected to some extent against invasion by government and against cancellation by conflicting fungible property claims of other people. The case is strongest where *without* the claimed protection of property as personal the claimants' opportunities to become fully developed persons in the context of our society would be destroyed or significantly lessened."[7] (The normative overtones of personal property theory are audible in every word of the expression "fully developed persons.")

Surprisingly, Radin's inventory of personal property forms omits mention of intellectual property, whose absence likely results from the essay's Hegelian understanding of the self as produced in relation to material property. Though of course copyrighted works must be "fixed" in a medium in order to be defensible, even that medium of fixation in the digital age has become increasingly dematerialized, and in any event the non-thingliness or at least dispersive materiality of intellectual property has

always been one of its defining characteristics. Yet it has long been said of intellectual property that it is the ownership form most uniquely, intimately, and exclusively related to its owner; that it is, more even than the fruits of physical labor, the repository of the owner's will; that it is the property form in which the self-development and self-understanding of the owner are most intensely bound up. What Radin says of the home might be even truer of one's intellectual property: that it is affirmatively part of oneself, that it is the scene of one's history and future, one's life and growth; that one constitutes oneself there. One's intellectual property, according to such a view, is sacrosanct, a kind of domicile that should be protected against the incursions of the state and the infringements of those with only fungible interests in it—the public, the consumer, the reader, the user, the fan. In any property disputes with these more disinterested, neutral, and remote parties, the author's claims should surely prevail.

So, at least, one would expect advocates of maximal intellectual property rights to argue. Yet oddly, IP maximalists have *not* been quick to enlist Radin's work on personal property in such a manner.[8] One can think of several possible reasons. The argument that personal property claims should supersede or qualify those of fungible property is part of Radin's broader critique of liberalism's bright-line divisions between subject and object, commodifiable and uncommodifiable phenomena, alienable and inalienable property. Such a critique holds little appeal for copyright maximalists, who tend to be interested either in universal commodification or in drawing the boundary between uncommodified and commodified realms at the point of maximal advantage to themselves.[9] Additionally, the Anglo-American copyright regime—the very one that maximalists want to subject to either universal commodification or tendentious tinkering—in certain ways embodies a Radin-esque skepticism about the aforementioned bright-line distinctions. As I indicated above, limited terms, fair use provisions, the idea/expression dichotomy, the public domain itself—these basic elements of the U.S. copyright system recognize limits and exceptions to the commodifiability of both ideas and expression. They evince something like Radin's notion of "incomplete commodification": the co-presence of market and nonmarket paradigms, of monetizable and nonmonetizable participant understandings. If this is so, it makes sense that the maximalist camp, far from invoking personal property, wants to close the very apertures in

copyright law that make it a system of incomplete commodification—in essence, to de-Radinize copyright.[10]

But the absence of complete commodification in copyright does not imply the presence of a personal property logic operant in the law. As I noted above, the rationales for limiting exclusive IP rights are rooted predominantly in First Amendment arguments. In other words, current doctrine limits the author's personal intellectual property in the name of unfettered public discourse, not in the name of the user's personal property claims on a given work. Thus fair use imagines the IP user as someone with privileged fungible property claims on a work, not as someone whose creative or critical use of a work might constitute a legitimate personal property relation to it. So we could say that whereas fair use does qualify one party's personal intellectual property (the author's or owner's), it does not do so in the name of another party's personal intellectual property (the user's) and is not, therefore, yet analogous with tenants' rights. The way is still open, I contend, for us to think about what personal property rights IP users might be said to have in the intellectual properties they rent, as it were, from their IP landlords, and how those rights might be implemented. Recognizing such rights on the part of the user could, among other things, produce the sort of normatively rich decisions the First Amendment rationale has not always been able to.

What, then, would it mean to claim a personal property interest in someone else's intellectual property? Unlike Marx's distinction between property in one's own labor and property in another's labor, Radin's personal/fungible property dichotomy is grounded not in the origin of property but in its destination. For Radin, one may have a legitimate personal property claim to an object created and even maintained by another's labor, whether that object is a home, a wedding ring, or a book. If, as Radin suggests, "much of the property we unhesitatingly consider personal . . . is connected with memory and the continuity of the self through memory," then few things can rival the personal property status of one's library. Here I do not mean only the books as physical objects, nor would I limit "library" here to the books one owns. The "continuity of the self through memory" is worked out in relation to all the ideas and expressions in all the books we have ever read, particularly those that have shifted our intellectual or spiritual or aesthetic or political coordinates in some way; it gets worked out in relation to other IP forms as well: music

and films, billboards and broadcasts, inventions and trademarks, websites, choreography, sermons, and celebrity. More and more, we "constitute ourselves as continuing personal entities in the world" through our repeated, intimate engagements with intellectual property, the vast majority of it belonging to other people or to corporate entities. As consumers and transformers of intellectual property, we are tenants putting down roots and making a home in the rented apartment of the archive, the library, the global media ecology. Surely the personal dimension of our relationship to this property should curtail, even if it does not trump, the property claims of our landlords?

This is not the same as claiming that I should, say, be able to copy any work indiscriminately in the name of "creating the scene of my future" or "constituting myself as a person in the world." Indeed, to envision a personal property claim in others' IP is to recognize that many, even most of our relations with others' works will *not* rise to the level of the personal. I would submit that we enter into a personal property relation with a work through extended interaction with it—by living with it in an engagement that is like habitation, mingling our thoughts and feelings with it, making it part of the domicile of our intellectual, creative, and political self-production. The new book or .mp3 or DVD that we acquire on spec falls outside the personal property radius: our relationship with it is still fungible at this point, and should not supersede or diminish the personal or fungible claims of its creator. But once we have acquired such intellectual properties and immersed ourselves in them, wrestled with them and in some manner internalized them, might we not claim a personal property in them? Again, not the right to limitless free copies of such a property; one would not expect a hundred free downloads of a song to distribute to one's friends on the basis of having listened to and memorized that song oneself. But the concert bootlegger whose fandom is a key site of personal and social identity-making; the creator of works that derive from an immersive engagement with an original; the parodist or satirist whose critiques and send-ups are the fruit of such engagements; the teacher or scholar whose syllabus or monograph results from such engagements but whom copyright law (in conjunction with aggressive rights holders and gun-shy universities and presses) prevents from producing affordable course readers or books—might we not imagine exemptions for such users of IP on the basis of a personal property claim?

One begins to envision an IP tenants' rights provision that would curb rights holder sovereignty to a greater extent than do our present, often tattered exemptions and provisions such as educational fair use, transformative uses such as parody, and the continually deferred absorption of private intellectual property by the public domain. To take just one example: recent cases have established a precedent for granting fair use exemptions to parodies, but these exemptions remain at best para-statutory and are limited to parodies of the text replicated by the parody.[11] In other words, a work that duplicates or imitates Text A must also take Text A as its main parodic object; a work that duplicates or imitates Text A in order to lampoon Subject B is deemed a "satire" and denied a fair use exemption, despite the fact that it does not cannibalize the market for Text A any more than a parody does. An IP tenants' rights canon would supplement the First Amendment aspects of the present fair use doctrine, creating the possibility of an exemption for satire in addition to parody on the basis that the satirist, no less than the parodist, has produced her "derivative work" through an intimate, personal agon with the original. Such a canon would thus broaden the generic array of derivative works eligible for exemptions. At present, with the exception of parody, there is little provision under fair use for the substantial reuse of source texts in fresh creation. As a result, authors of derivative texts have had to shoehorn their works into that privileged genre (parody) in the hopes of winning an exemption from infringement. A prominent example of such a text is Alice Randall's *The Wind Done Gone*, an appropriative riposte to Margaret Mitchell's *Gone With The Wind* that was granted the parody exemption by an appellate court only after a lower court had found the text infringed Mitchell's original.[12] Randall's book is both more and less serious than the term "parody" warrants: it is more serious in its aims, inasmuch as it engages in a thoroughgoing performative critique of Mitchell's novel and of the antebellum nostalgia crystallized in it; and it is less serious than "parody" in its legal indebtedness to Mitchell's original, inasmuch as it reproduces far fewer expressive (i.e., propertizable) than algorithmic (i.e., unpropertizable) elements of the earlier text. A conception of IP tenants' rights could equip us to constrain the IP rights in the original work with respect to derivative texts that perform a broader, and not necessarily *less* transformative, range of operations than "parody" in relation to that original. Such a broadening would not come too soon, given the growing

evidentiary dependence, particularly in an oculocentric mass culture, of derivative works on original ones, and given the concomitant growth in such derivative works' effectiveness.

A personal property provision for IP could take a number of forms, both statutory and judicial. But the most obvious location is among the "Limitations on exclusive rights: Fair use" provisions and factors enumerated in Section 107 of the U.S. Copyright Code. Note that although the current factors of fair use address the nature of the protected work and the purpose, character, amount, substantiality, and potential market effect of the use, they make no mention of the user's relationship to the work. The omission testifies to the law's confining portrait of the user as one who participates in a legally meaningful *action* but not in a legally meaningful *relation*: only the use matters, not the engagement out of which it precipitates. Consider the following emended version:

. . . In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit or educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
(4) the effect of the use upon the potential market for or value of the copyrighted work; *and*
(5) *the character of the user's relationship to the work, including whether such relationship is personal or fungible.*[13]

Instead of constructing a fair or infringing use as an action with possible future market ramifications but no past, these emended fair use factors allow that an IP use may be the culmination of a relation between user and property. In effect, they endow your use of my intellectual property with a past that may inform the fairness of your use—a past that is distinct from my relation to the work as its author. It would be for you to demonstrate, and for a court to decide, whether that past consisted of a glancing, fungible relation or a protracted, personal one. But if the latter proved the case—if you had indeed labored, in good faith, in the second-order commons of my intellectual property—and if the other factors did not overbalance the finding, the court would have the latitude to ensure that I had

left "enough, and as good" in that commons for you by naming your use a fair one and even affording you protection in what you had made there.

Of course there's no shortage of questions and objections one might raise in response to this exploratory discussion. First of all, since copyright, at least, protects only expression, isn't the most valuable aspect of literary property—that is, the ideas encoded in its protected expressions—already in the public domain? Second, and relatedly, most intellectual properties are nonexcludable—that is, they are public goods susceptible of nonrivalrous consumption once they are published. What more access do consumers need? As Justin Hughes puts it, "If a person were deprived of all his music and books, he would have a great sense of personal loss, but yet would still know Satie's *Gymnopédies* by heart, would still remember much of Faulkner, and could still go to the library to read or listen to these favorites."[14] Why should IP users also have the right not only to read a book and play a piece of music but also to copy, perform, or create derivative works from those texts without remunerating their creators? Third, surely the personal property argument about the home is inapplicable to intellectual property. At least according to dominant Western norms of personhood, you need a home to be a person, as witnessed by the fact that bankruptcy law generally allows bankrupts to retain their homes and some of their personal effects; but why do you need free access or copying rights to others' intellectual property to be a person?

This last question, in particular, is too complex to take up here, although it is worth observing that personal property claims need not be premised on a sine qua non relationship to personhood; in other words, you can argue that we habitually recognize a personal property claim in a wedding ring without necessarily implying that that particular property relation is indispensable to being a person. This would be to concede the limits of the IP/domestic rental property analogy without invalidating the prospect of a personal property in another person's IP. In other ways, recognizing the limits of the analogy might actually strengthen the case for personal property rights in IP use. The supposedly nonrivalrous consumability of IP content, for instance, sets it apart from personal property in domicile. Rental properties are subject to rivalrous consumption in that they cannot be inhabited simultaneously by an unlimited number of tenants at zero marginal cost; such properties are not, in other words, a public good. As a result, social welfare analysis of tenants' rights must weigh the incumbent

tenant's welfare gain in being able to remain in the rental property against (among other factors) the loss of welfare to prospective tenants who are thereby prevented from living in the same property. By contrast, one user's personal property claim in a particular intellectual property would not preclude the "tenancy"—whether fungible or personal—of additional users. Again, the argument in favor of a personal IP provision may be the stronger in proportion as the analogy with tentants' rights is partial: the fact that a given intellectual property has a certain number of users with personal property claims in it does not prevent a vast number of other users from maintaining their fungible relationship (i.e., their conventional consumer's relationship) to it. For the same reasons, the IP rights holder stands to lose far less wealth than does the landholder or lienholder of a rental property governed by rent control and other tenants' rights provisions.[15]

In suggesting that we apply Radin's personal property arguments to IP *users*, I do not mean to argue for a monolithic end-user-sovereignty model of IP. Among the chief virtues of Radin's model are its rejection of such monolithic understandings and its flexibility in wanting to recognize and weigh varieties of claims on a property both simultaneously, by different individuals or groups, and across that property's lifespan. This flexibility could allow us to increase the spectrum of claims and rights recognized by IP law, and at a moment when that spectrum seems in many ways to be narrowing. If we apply the personal property argument only to IP authors and rights holders, we complete the maximalist project of inverting the inaugural statutory and constitutional rationales for copyright law; what began as a means to the end of "the Encouragement of Learning" in the United Kingdom and "promoting the Progress of Science and useful Arts" in the United States becomes an absolute property right that exists to guarantee creators an intrinsic, extensive sovereignty over their creations.[16] Completing such a project concedes everything to the so-called Romantic model of authorship, which regards meaning-making as a solitary act of creation *ex nihilo* rather than as a social act reliant on prior ideas and expressions and on the semantically productive reception of fresh ideas and expressions. Far from denying authors' claims to a personal property in their IP holdings, I simply want to insist that they are not the only ones whose property interest in those holdings might be considered personal. The real value of Radin's distinction with respect to IP inheres in its power

to mitigate the Romantic authorship argument by strengthening, even consecrating, the position of its critics without doing so in a way that simply alienates the IP creator from her labor. Instead, it seeks to disalienate the user's labor of self-production by recognizing how that labor depends on immersion in and contention with another person's intellectual property.

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Before closing, I'd like to provide a more concrete example of the difference a more elaborated notion of personal IP might make, by way of a thought-experiment—a counterfactual version of a story whose real-world counterpart, featuring Rufus Wainwright and Judy Garland, had a happier ending (Fig. 1). The counterfactual version is meant to illustrate two points: that personal intellectual property considerations might address IP's role in *collective* and *intersubjective* as well as individual self-making; and that such considerations could facilitate politically reparative work on behalf of marginalized communities not only through their creation but also through their use of intellectual property.[17] Imagine that a prominent gay male singer-songwriter wishes to replicate a historic Carnegie Hall performance by a now-deceased singer who has, in the years since her death, ascended to totemic status in gay culture. The original performance is widely recognized as the intrepid, against-all-odds comeback that secured the dead singer's identity as a camp icon, and the effectiveness of the latter-day tribute will depend on fully reproducing the original set of songs. Friends advise our protagonist to skip the live concert and just record his cover versions of these songs, in which case he would not need rights holders' permission, he would simply pay a royalty under the compulsory licensing system.

But the live concert tribute is the point, so the singer-songwriter perseveres. And when he approaches the copyright holders in the songs—the relevant composers, heirs, and corporations—for permission to perform their songs in a public, for-profit venue, a number of these rights holders deny him permission. The standard categories of fair use are of little help. Provisions for "criticism, comment, news reporting, teaching, scholarship, and research" do not appear to hold in this instance, and even if one of them did, the fact that he will perform short works in their entirety in a commercial venue would seem to vitiate whatever leeway he gained

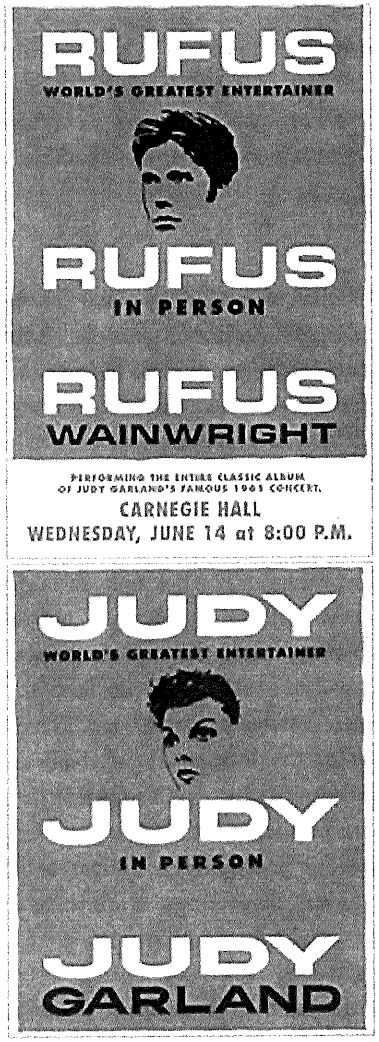

FIGURE 1:

through a claim to be teaching or commenting. Nor does the singer-songwriter, who envisions the concert as a tribute to the dead singer and to her gay cultural legacy, wish to misrepresent the concert as a parody in the (probably vain) hope of invoking that fair use defense. It is true that recent decisions (that in any event have not been tested in the U.S. Supreme

Court) have found "transformative" a growing range of nonparodic reuses of material "for a different purpose" than the originals—images of rock concert posters in a book on the Grateful Dead, digital thumbnails of copyrighted art as part of an online search tool.[18] But an exacting re-creation of a whole concert seems unlikely to meet even these cases' wider construals of "transformative" use, which in any event have not been tested in higher courts. Under our current laws, then, the singer-songwriter would either risk a lawsuit by performing these forbidden songs without permission or—much more likely—drop them from the setlist altogether.

An intellectual property right grounded in personhood might not guarantee our protagonist the right to perform all the songs he hopes to, but it would make for what I earlier called more "normatively rich" outcomes than the dead end to which the current system brings him. By arguing that he has for years produced his musical, cultural, and sexual identities in intimate relation to these songs, he would claim a right to perform them that might trump or at least qualify the rights holder's claim. Note that the performer's claim here need not simply reinscribe a liberal, possessive individualism on the side of the end-user; instead, it recognizes that individual self-production occurs through a process that is personal insofar as it is also collective and intersubjective—in this case, the posthumous resignification of a Hollywood figure as a gay icon.[19] Where current fair use provisions prescribe a fairly small range of operations (criticism, comment, etc.) as warranting a First-Amendment-based exemption from permission and licensing, a personal IP provision opens the door to a less prescriptive, more site-specific view of protected works' legitimate uses—and to a view of the consumer, adaptor, or performer as having a more-than-functionalist relationship to the property in question.

Such a provision could imagine, for instance, that the social identities of historically marginalized groups and individuals might have been quarried with exceptional difficulty from the intellectual properties of others. It could see how, for a certain kind of individual or community, even a reverential, nonparodic rendition of a song might signify as "transformative" thanks to the song's commingled history with that individual or group. And it might allow that one importantly "transformative" use—perhaps the most important—is the use that transforms the users. A personal IP provision would also be able to attribute to rights holders different mixes of personal and fungible property relations—those of a living composer,

versus those of a deceased composer's heirs, versus those of a Hollywood publishing company that commissioned songs under the work-for-hire doctrine or an assignment contract—in weighing the relative claims of owner and user. And at the most basic level, such a provision could help us undo a strange speciation, the product of copyright narratives that see authors and users as utterly different in kind, the former as radiant creators who imbue their intellectual properties with their personhood, the latter as more distant figures whose use of others' creations, whether legal or illegal, is only ever fungible in nature.

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To conclude: what does it mean to call expression "property"? Our current intellectual property laws and their authorizing cultural narratives are good at answering the question "What does it mean to call *my* expression *my* property?" But they provide pretty unimaginative answers to the question "What does it mean for *me* to call *others'* expression *my* property?" or, conversely, "What does it mean for *others* to call *my* expression *theirs*?" The words with which we answer these questions—parody, piracy, infringement, plagiarism—have their places, at least within a market economy dominated by the convention of possessive individualism. But I would suggest that even within such a convention—especially within it—we need a more flexible and a more populous continuum of positions, one that comports better with our experience of a world that is more intellectual-property-saturated every day, and in which protected expression constitutes a growing proportion of the raw material of our public discourse, our fresh creations, our collective cultural identities, our pedagogical objects, our dissenting speech, and our ability to constitute and recognize ourselves *as* selves in relation to others. I would add that the need for a more generative and diversified IP regime is all the more urgent (though perhaps for the same reasons the less likely to be met) in a legislative climate that has tended to favor rights holders, to carve substantial copyright term extensions out of the public domain, and to permit the withering of many kinds of fair use. In such a climate it will be all we can do to hear the call of property up and down its bandwidth, in the full range of its competing and inconvenient voices.

1. The personal property right discussed here is distinct from, though related to, the provisions for "lawful personal use" proposed by Jessica Litman in "Lawful Personal Use," 85 *Texas Law Review* 1871 (2007). Litman defines personal use as one "that an individual makes for herself, her family, or her close friends." *Id.* at 1894. It is the largely uncodified zone of activities that includes the creation of archival copies of digital content besides computer programs; the spontaneous creation of derivative works in the home; playing protected music at volumes loud enough to be heard outside the home. Litman wants to put personal use back at the center of the copyright conversation, in part so that the zone of permissible personal uses does not shrink at the behest of content owners. Her discussion is rooted not in a broad distinction between fungible and personal property but in a sense that the user's copyright "liberties" are "both deeply embedded in copyright's design and crucial to its promotion of the 'Progress of Science.'" *Id.* at 1879.
2. On the emergence of this paradigm (often called "Romantic" as a shorthand), see Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge MA: Harvard University Press, 1993); and Martha Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'," 17 *Eighteenth-Century Studies* 425, 425–28 (1984). On the persistence of the Romantic paradigm, see James D. A. Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Cambridge MA: Harvard University Press, 1996). For a corrective to the assumption that early U.S. copyright law simply duplicated the possessive-individualist model of British law, see Meredith L. McGill, "The Matter of the Text: Commerce, Print Culture, and the Authority of the State in American Copyright Law," 9 *American Literary History* 21 (1997).
3. Radin summarizes the aftermath of the landlord-tenant revolution thus: "After: Tenants are entitled to habitable premises, and landlords are under a legal obligation to maintain habitability; landlords are fully liable to tenants in tort for injuries due to dangerous conditions both patent and latent within the dwelling, as well as for failure to protect properly against outside intruders and for intentional infliction of emotional distress; tenants have tenure rights against the landlord's attempting to terminate the tenancy for a bad reason, including various forms of prohibited discrimination as well as retaliation against the tenant for exercising legal rights; in many urban jurisdictions tenants have the benefit of rent control and landlords no longer have the right to set whatever price they wish; tenants' entitlements are largely not waivable (i.e., the revolution is more than a change in the default rules); the doctrine of independent covenants has been abolished, meaning that tenants can defend against eviction for nonpayment of rent by raising the landlord's breaches as setoffs; and in many jurisdictions there are limits on the landlord's exit." Margaret Jane Radin, *Reinterpreting Property* (Chicago: University of Chicago Press, 1993), 173.
4. Margaret Jane Radin, "Property and Personhood," 34 *Stanford Law Review* 957 (1982); rpt. in Radin, *Reinterpreting Property*, *supra* note 3, at 37, 57 (subsequent citations are to this publication).
5. Radin, "Property and Personhood," *supra* note 4, at 41.
6. Radin, "Introduction: Property and Pragmatism," in *Reinterpreting Property*, *supra* note 3, at 16–17.
7. Radin, "Property and Personhood," *supra* note 4, at 71.
8. A possible exception is Justin Hughes, "The Personality Interest of Artists and Inventors in Intellectual Property," 16 *Cardozo Arts & Entertainment Law Journal* 81 (1998). Hughes is not a maximalist per se, as he affirms the importance of limited copyright and patent terms and has elsewhere argued in favor of broadening fair use provisions in works as their copyright ages; see Justin Hughes, "Fair Use Across Time," 50 *UCLA Law Review* 775 (2003). But his discussion in the 1998 article is concerned entirely with the personhood interests of creators (a category he seeks to widen) and evinces some skepticism about the "deconstructionist" approach to personality interests (Boyle, Jaszi, Woodmansee, et al.), particularly about its putative concern for the "personality interest of consumers" (see Hughes, *supra*, at 82). For a more recent and unambiguous exception, see Lee Marshall, *Bootlegging: Romanticism and Copyright in the Music Industry* (London: Sage, 2005).

9. Think of how Disney vigorously mines the historically remote reaches of the public domain while using term extensions to stave off what it regards as the public domain's encroachments on the company's IP holdings.
10. We might expect Radin, then, to be conscripted not by copyright maximalists but by those who want to expand the flexibility of the present regime in order to extend its protection to creators who have hitherto been excluded from it. We are beginning, in fact, to see just such a deployment of Radin's work with respect to traditional societies' intellectual property rights. Madhavi Sunder has warned against a public domain advocacy that unintentionally denies indigenous communities the use of intellectual property law as a tool for enhancing their political and cultural autonomy. Such a use, she adds, can revivify both intellectual property and human rights law by, in a sense, cross-pollinating them:

> This campaign conceives intellectual property rights as human rights—specifically, as human rights to protect cultural integrity and self-determination. This conception of intellectual property stands in stark contrast to the economic-utilitarian understanding of rights as incentives for creation that has been the predominant theory of intellectual property in the United States. At the same time, indigenous intellectual property claims challenge the traditional focus of human rights law on civil and political rights, turning instead to distributive justice claims and social and economic rights.

See Madhavi Sunder, "Property in Personhood," in *Rethinking Commodification: Cases and Readings in Law and Culture*, eds. Martha M. Ertman & Joan C. Williams (New York: New York University Press, 2005), 167.

Sunder goes on to describe the indigenous intellectual property campaign as rooted in the connection between property and personhood. Presumably this means (since Sunder does not dilate on the personal property claim) that the obstacles IP law poses to granting indigenous cultural property rights ought to be removed or mitigated on the grounds that a community's knowledge, practices, images, and narratives help make up the scene of its history and future, its life and growth; that they are affirmatively part of the community's capacity for self-constitution and self-recognition; that their loss would be irreplaceable. Western IP law, as we know, is doctrinally biased against propertizing works of unspecific communal authorship, works with unfixed expression, "products of nature" such as plants used as traditional cures, or works belonging to a common cultural heritage—in other words, the works most often at stake in indigenous cultural property. A personal property argument—which need not, we should note, be a radically individualist argument—says that the fungible property claims that would govern such works by default (e.g., the large pharmaceutical company's patenting the previously unprotected traditional cure) should give way to the (collective) personal property claims of the source community, and that for this yielding to be meaningful the source community would require an expanded IP regime that could recognize its property in the unfixed or communal work, the naturally occurring cure.

11. For the parody–fair use defense, see *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); for the restriction of the defense to parody (as against satire), see *Dr. Seuss Enterprises v. Penguin Books USA*, 109 F.3d 1394 (9th Cir.), *cert. dism'd* 521 U.S. 1146 (1997).
12. See *Suntrust Bank v. Houghton Mifflin, Co.*, 136 F.Supp.2d (N.D. Ga. 2001); and *Suntrust Bank v. Houghton Mifflin, Co.*, 252 F.3d (11th Cir. 2001).
13. 17 U.S.C. § 107; n.b.: italicized item is my own addition.
14. Hughes, *supra* note 8, at 87.
15. But it is by no means clear that IP *is* susceptible to nonrivalrous consumability in the manner that would weaken the analogy between IP users and tenants in domestic rental properties. I have argued elsewhere that imaginative literature offers a powerful rebuke—and one with supra-literary ramifications—to the notion that a text's ideas are its only indispensable contribution to public

discourse. See Paul K. Saint-Amour, *The Copywrights: Intellectual Property and the Literary Imagination* (Ithaca NY: Cornell University Press, 2003), ch. 4. The idea/expression dichotomy is supposed to provide incentives for the creation and circulation of ideas by propertizing and thus monetizing their expressive embodiments; whereas expression is the vehicle of monetary value, then, its propertization is a means to the end of those more collectively valuable ideas it incarnates. But literature inverts this hierarchy of expression and ideas: we generally hold expression—the particular sequence of particular words—to be the more collectively and enduringly valuable aspect of a work of literature, the aspect that constitutes most of the work's public presence. What we cherish in a Faulkner novel, and what we would be likeliest to redeploy creatively in a derivative work, is not its ideational content—a summary of its plot, say, or a description of its technique—but the language itself, the expression.

Or perhaps it would be more accurate to say that literature demonstrates the mutually constitutive relationship between form and content and thereby vexes the idea/expression dichotomy, which rather crudely imagines ideas as the payload delivered by an expressive vehicle. As intellectual and cultural beings, we constitute ourselves out of a universe of ideas that are, in many cases, utterly fused with their expression; but because that expression is propertized, we cannot use expression-dependent ideas as raw material in our creative and critical efforts—efforts equally central to our self-constitution. The claim that ideas alone are subject to nonrivalrous consumption presupposes three things one might well contest: first, that the idea/expression dichotomy is descriptively and normatively robust; second, that the thing being most signally and importantly consumed is the unpropertized "idea" rather than the propertized "expression"; and third, that the "consumption" imagined as nonrivalrous in the public good of IP is an acquisitive act rather than a process of critical and creative engagement, interaction, cohabitation, and remaking that produces a public issue. If we contest these presuppositions, we might well demand a wider range of cases in which the rights holder's property in *expression* is qualified: because expression is not the incidental clothing of an idea, and because in a massively mediated culture, expression-dependent ideas are, more and more, the building blocks of creation and dissent.

16. Copyright Act 1709 (8 Anne c.21), the inaugural copyright statute in Great Britain, entitled "An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned"; U.S. Constitution (Art. I, § 8).
17. Such personal property rights in the use of intellectual property would provide a kind of "end-user" complement to the indigenous property rights discussed by Sunder (see note 10, above). It is worth considering what the differences between Sunder's and my exemplary communities—traditional societies in Sunder's discussion versus a subset of the LGBT community in mine—might tell us about the asymmetrical models of the "personal" being adduced in our discussions, and how reversing the examples (i.e., thinking about a nonfungible LGBT-generated intellectual property or an end-user personal intellectual property right for indigenous communities) might further expose those asymmetries.
18. See, for example, *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811(9th Cir. 2003); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).
19. In its applicability to intersubjective forms of self-making involving intangible rather than material property, a personal IP right would be less open than Radin's own examples (e.g., the wedding ring, the rented apartment) to the charge that personal property emphasizes the individual's relations with objects over—and even to the exclusion of—her relations with subjects. I would add that personal IP partakes in fewer of the oppressively normative aspects of Radin's formulations in proportion as it departs from the analogy of tenancy and the highly normative concept of the home.