

Post-Industrial Property

Among lawyers, perhaps the most famous description of property is William Blackstone's reference to the "sole and despotic dominion" of the real property owner. Even in Blackstone's day the statement was more theatrical than strictly descriptive, but theater can prove irresistible. Debates among property scholars about just how despotic the landowner's dominion should be have been heated and nearly all-consuming. The lecture will consider an opportunity cost of that preoccupation: The idea of property in land as the paradigm case of property exercises despotic dominion over property thinking, with unfortunate consequences for theory and doctrine alike.

In particular, the despotic dominion of the property-in-land paradigm has shaped the debate about whether intellectual property is property. Copyright and patent scholars have pursued that inquiry within a conceptual framework derived from common law real property doctrines and organized around the practical and theoretical problems associated with property rights in land. This state of affairs is especially odd because the resources at the center of contemporary intellectual property debates about the appropriate extent of rightholder control could not be more different from land. Intellectual resources are routinely sliced and diced, aggregated and fractionated, used and reused, in ways that land is not and could not be.

The lecture will argue that intellectual property is a species of property, but that understanding the significance of that label by reference to land as the paradigm case is a mistake. Property institutions organize access to resources, and so it is reasonable to expect them to differ in ways that respond to the underlying resources. What is needed is an account of property in intellectual goods — post-industrial property — that resembles property in land in some respects, property in natural resources in other respects, property in corporations in others, and property in intangible instruments in still others, and that also systematically diverges from each of those other forms of property. More particularly, an account of intellectual property must address four important points of departure from the land-centric model of property: the different incentives of multiple contributors; the variety of ways in which intellectual goods are produced; the central importance of intermediation within intellectual property ecologies; and the emergence of hybrid institutions between property and contract.