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## INTELLECTUAL PROPERTY, PRIVATIZATION AND DEMOCRACY: A RESPONSE TO PROFESSOR ROSE

MARK P. McKENNA\*

The broad thesis of Professor Rose's article *Privatization: The Road to Democracy?* is an important reminder that no institution deserves all the credit for democratization, and that the success of any particular institution in promoting democracy depends to a greater or lesser extent on the existence and functioning of other political institutions.<sup>1</sup> While protection of private property has proven quite important to successful democratic reform, we should not be lulled into thinking private property can carry the whole weight of reform. That lesson has particular significance in the context of intellectual property, given proponents' general tendency to overstate the significance of intellectual property rights (IPRs) in encouraging innovation.<sup>2</sup>

But even if they play a small role in promoting democracy, this Paper argues that IPRs can and do play a role that should not be overlooked. In at least some cases, IPRs can help create the conditions in which democracy can succeed. Specifically, copyright protection shifts control over the content of creative expression away from the government and into the market. In so doing, copyright encourages development of a pluralistic and independent culture. At the same time, patent protection, particularly in the modern economy, can help create the economic conditions that allow for stable civil society. These arguments, of course, do not justify any and all extensions of an intellectual property (IP) regime. But they are based on solid evidence and deserve consideration by policy-makers hoping to promote democracy.

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\* Assistant Professor of Law, Saint Louis University. © 2006 Mark P. McKenna.

1. Carol M. Rose, *Privatization: The Road to Democracy?*, 50 ST. LOUIS U. L.J. 691, 693–94 (2006) (stating that “privatization and democratic governance cannot be seen simply as ancestor-to-successor, where the one (privatization) precedes the other (democratization). At most (to continue the family analogy) privatization and democratization are siblings, co-existing in a mixed environment of mutual support, dependence, and occasional rivalry”).

2. Michele Boldrin and David Levine have argued that IPRs are not necessary at all to promote innovation. Michele Boldrin & David K. Levine, *Perfectly Competitive Innovation 2* (Aug. 28, 2005) (unpublished manuscript), <http://www.dklevine.com/papers/pcibasic14.pdf> (“The claim that monopoly is necessary for innovation is not correct either as a matter of theory, or as a matter of fact.”).

## I. INTELLECTUAL PROPERTY AS PRIVATIZATION

Before discussing the democratizing effects of IP specifically, I want to make two points about the way in which Professor Rose frames her thesis. Though distinct points on some level, both urge a more granular approach to analyzing intellectual property's impact in encouraging democracy. "Intellectual property" is a relatively broad phrase that encompasses several different rights regimes (patent, copyright, trademark, trade secret, as well as other related rights), and each of those forms of protection has its own relationship with democratic development. A full account of those relationships is beyond the scope of this short Essay, but I hope to highlight a couple of ways in which a lack of context-sensitivity might obscure important aspects of the relationship between particular forms of IP and democratic society.

### A. *The Typology of Privatization*

Professor Rose frames her paper around a typology of privatization measures, identifying "recognition," "deregulation," "divestment," and "enablement" measures.<sup>3</sup> IPRs, according to Professor Rose, are prototypical "enablement" measures, which she defines as governmental measures to establish and protect property rights in resources that would otherwise not easily be turned into property at all.<sup>4</sup> This characterization of IP, however, oversimplifies the role of IPRs because it does not sufficiently account for the alternatives to particular forms of protection.

The concept of privatization implies a comparison with a prior baseline state of governmental involvement. To regard something as a privatization measure is to identify a shift from a system substantially under the control of the government towards a system substantially dependent on private ordering. Privatization, in other words, suggests a change from more government involvement to less. One can describe that change more particularly in a variety of ways: as a separation of economic decision-making and the public sphere or as a change in the nature of relationships from cooperative to competitive and exclusive, for example.<sup>5</sup> All of these elucidations, however, have in common a general sense that governmental involvement has decreased as compared to the prior baseline level.

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3. Rose, *supra* note 1, at 694–98.

4. *Id.* at 697.

5. See Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387, 395 (2003). Ghosh catalogs various definitions of privatization and notes that "[a]lthough much has been written about privatization, a general definition of the term in the scholarly literature is elusive." *Id.* Ultimately he settles on a definition that focuses on "the delegation of the decision-making function historically assigned to a governmental entity to a non-governmental entity." *Id.*

What Professor Rose calls “divestiture” measures, those by which whole enterprises are removed from governmental administration and placed in private hands, are paradigmatic of this shift.<sup>6</sup> “Deregulation,” one of Professor Rose’s other categories,<sup>7</sup> also fits the more-government to less-government model, because deregulation returns more economic decision-making responsibility to the private sector. But at least one of Professor Rose’s examples may run in the opposite direction.

What Professor Rose calls “recognition” measures, those that provide the administrative means to regularize private property ownership,<sup>8</sup> in some sense introduce greater governmental regulation than the baseline state. Land titling, for example, is a process through which a government recognizes and enforces previously inchoate and less stable claims that had been enforced informally.<sup>9</sup> Among other things, once land is titled formally owners can rely on the state to mediate disputes regarding their property rather than resorting to alternative private enforcement mechanisms.<sup>10</sup> Recognition measures, then, represent a move from less government to more government. There may be consequences for democratization that flow from such efforts, but in light of the pre-recognition level of state involvement, Professor Rose accepts too easily the characterization of those efforts as privatization measures. And because IP, which serves as Rose’s example of an “enablement” measure, is in this sense more analogous to recognition measures than to divestiture or deregulation, it fits uneasily into the privatization typology.

Professor Rose argues that IPRs “effectively privatize the uses of inventions and expressions that would otherwise be open to copying by the general public.”<sup>11</sup> I want to suggest, however, that IPRs are better viewed through a comparative institutional lens. At least some IPRs are grants of formal rights in place of less formal and less efficient measures that creators might take to protect the same matter in the absence of formal protection. Patent law, for example, has long been thought to promote disclosure of information that companies might not generate or would take inefficient steps to conceal in the absence of legal protection.<sup>12</sup> If the prospect of patent

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6. Rose, *supra* note 1, at 696.

7. *Id.* at 695.

8. *Id.* at 694.

9. *Id.*

10. *Id.* 703 (discussing the role of barrio insiders who accept payment to protect residents’ informal property claims); Bernadette Atuahene, *Land Titling: A Mode of Privatization with the Potential to Deepen Democracy*, 50 ST. LOUIS U. L.J. 761, 775–76 (2006) (noting the incentives that land titling creates to invest in society’s dispute resolution mechanisms).

11. Rose, *supra* note 1, at 697.

12. See *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979). Describing the purpose of the patent system, the *Aronson* Court maintained that

[f]irst, patent law seeks to foster and reward invention; second, it promotes disclosure of inventions, to stimulate further innovation and to permit the public to practice the

protection in fact induces disclosure of information that would otherwise remain secret, then the choice of whether or not to grant patent rights is not really one between “property” and “free access.” Rather, the choice is a more complicated one between the modes of protection that creators employ, assuming they are willing to create at all absent formal legal protection.<sup>13</sup>

So understood, IPRs sound a good deal like the formal rights granted in systems of regularized titling: they exist because of concerns that, in their absence, creators might otherwise take inefficient measures to protect their interests through more informal mechanisms.<sup>14</sup> And while some of those alternative methods of protection have government backing (trade secret protection, for example), there is little doubt that, with their registration systems and administrative apparatus,<sup>15</sup> the patent and copyright regimes reflect much greater government involvement than do the alternatives. That is true even if one can imagine regimes of even greater governmental involvement—perhaps systems of direct subsidization of research or patronage of cultural production like those that characterized the English system prior to American colonization.<sup>16</sup>

invention once the patent expires; third, the stringent requirements for patent protection seek to assure that ideas in the public domain remain there for the free use of the public.

*Id.*; see also Rebecca S. Eisenberg, *Patents and the Progress of Science: Exclusive Rights and Experimental Use*, 56 U. CHI. L. REV. 1017, 1029 (1989).

[I]t seems likely that the patent system at least facilitates disclosure by creating rights in inventions that survive disclosure. Secrecy makes it difficult for inventors to sell or license their inventions to others because it is difficult to persuade someone to pay for an idea without disclosing it, yet once the invention is disclosed, the inventor has nothing left to sell.

*Id.* The dilemma that Eisenberg describes as facing inventors is often called the “information paradox” and that nomenclature is widely credited to Kenneth Arrow. 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).

13. There is a distinction to be drawn here between the objects of patent protection and those of copyright protection. Patent protection serves two production side functions: to drive investment towards certain inventions that otherwise would not be pursued and to encourage disclosure of some inventions that would be produced even in the absence of patent protection. Copyright law probably does more of the latter since its effect is probably predominantly on the willingness of distributors to disseminate creative content.

14. See Rose, *supra* note 1, at 703–04.

15. See 17 U.S.C. § 101 (2000); 35 U.S.C. §§ 1–351 (2000).

16. Indeed, if privatization entails some comparison to a baseline condition, then to whatever extent recognition of intellectual property rights can be described as an instance of privatization, the privatization happened centuries ago in England. Though the scope of IP protection has broadened considerably over time, the basic concept of recognizing private rights in intangible information dates back at least as far as the Statute of Monopolies and the Statute of Anne. See Statute of Monopolies, 1624, 21 Jac. 1, c. 3 (Eng.); Statute of Anne, 1710, 8 Ann., c. 19 (Eng). The decision to recognize private property rights had the effect of shifting from the government to private parties the authority to decide how resources should be allocated to promote innovation

Here there is a clear contrast with tradable environmental allowances (TEAs), another of Professor Rose's examples of enablement measures.<sup>17</sup> Like IPRs, TEAs are formally created property rights that depend on government action. TEAs, however, can be distinguished from IPRs because they are necessary in the first place only because of background government regulation. Without government regulation of environmental pollutants, the possibility of and need for TEAs would disappear. Conversely, the need for inventions and creative output exists independent of any government regulation. The question for IP policy is how best to encourage production of such works in light of other societal values.<sup>18</sup>

### B. *Political Criticisms of Privatization Measures*

This leads me to my second general concern about Rose's thesis. Even accepting Rose's characterization as privatization efforts of each of the trends she identifies, Rose's criticisms of those efforts strike me to some extent as unfair attempts to evaluate specific instances of privatization against general normative arguments in favor of private property that may or may not have motivated the particular privatization effort.

The argument that privatization promotes democracy is a general, comparative argument that more private control of decision-making is better for democratic culture than is less private control.<sup>19</sup> The specific political arguments for privatization that Rose identifies—the priority argument, the power-spreading argument, the distraction argument, the symbolic argument, and the civilizing argument<sup>20</sup>—do not necessarily suggest any particular forms of private property (except perhaps the most fundamental, real property rights), but rather provide general support for a system that recognizes more private property, rather than less.

Take as an example the notion that recognizing private property promotes democracy because it enables commerce, which tends to “soften manners”—what Rose calls the civilizing argument.<sup>21</sup> That argument suggests that trade

and creative production. For more in-depth discussions of the history of patent and copyright protection, see PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY* (1994); Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History 1550–1800*, 52 HASTINGS L.J. 1255 (2001); see also Thomas B. Nachbar, *Monopoly, Mercantilism, and the Politics of Regulation*, 91 VA. L. REV. 1313, 1315–16 (2005) (detailing the political background of the Statute of Monopolies).

17. See Rose, *supra* note 1, at 698 nn.36–37 and accompanying text (referring to the United States' program for tradable emission rights in the gasses that form acid rain and the European Union's proposals to use tradable rights to control carbon dioxide emissions).

18. See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 285 (1996) (stating that “[c]opyright law's perennial dilemma is to determine where exclusive rights should end and unrestrained public access should begin”).

19. See *id.* at 3.

20. See *id.* at 15, 19, 26, 31, 37.

21. *Id.* at 37.

requires individuals to get to know each other and understand what each other value, and it acknowledges that private property is a precondition of trade.<sup>22</sup> For the most part, the civilizing argument does not depend on what particular types of property a society chooses to recognize, as long as the forms of property it recognizes are tradable. Thus, the civilizing argument does not necessarily support recognition of any particular property, even if it strongly supports a system of more private property. Criticisms of a particular privatization effort for failing to civilize then undermine neither the particular privatization effort nor the civilizing argument generally.

The broader point is that each of the various arguments in favor of private property that Rose articulates has more or less to say about different forms of privatization. The political arguments are not exclusive of one another, nor do they purport to offer totalizing views of privatization. Indeed, some forms of privatization may not have been based on any of the political arguments but instead were motivated principally by economic concerns. In those cases, arguments about how the efforts measure up to the political claims regarding privatization probably have little to say about their desirability.

For example, Rose criticizes efforts to privatize electric and telephone service on the ground that electric and telephone company workers sometimes are rude and offer poor service.<sup>23</sup> Similarly, Rose criticizes some divestiture measures for failing to spread power very far and for failing to act as a distraction from politics.<sup>24</sup> To some extent these are indications that privatization in some cases has not been done very effectively more than they are arguments against privatization.<sup>25</sup> Even on their own terms, however, it is not clear that Rose's arguments demonstrate a failure of privatization. If divestitures have been primarily economically motivated, and if deregulation of water was not particularly intended to spread power but simply make the delivery of water cheaper and more dependable, a goal Rose confirms privatization largely has met, then the fact that those measures failed to spread power is probably not a particularly trenchant criticism.

I make this point to stress that, when we are measuring IP against the political arguments, we should evaluate different intellectual property regimes independently of one another. "Intellectual property" is a big tent, and the various forms of protection are motivated to some extent by different concerns.

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22. *See id.* at 37.

23. Rose, *supra* note 1, at 707–10.

24. *Id.* at 699–700.

25. Questions about how well privatization is done clearly have a lot to do with the state of underlying political institutions, and in that sense, Rose's thesis is undeniably true. Privatization's ability to deliver on its promises depends on political institutions and their willingness and ability to perform a variety of functions fairly and effectively. But we should not lose track of the dynamic effect of privatization and its potential for incremental change of the political institutions themselves.

Copyright proponents, for example, have relied on political arguments much more explicitly than have patent proponents.<sup>26</sup> As a result, copyright law is more susceptible to criticism on political grounds, whereas some political criticisms of patent law, like the political criticisms of deregulation, probably seem to patent proponents and policy makers neither here nor there.

## II. INTELLECTUAL PROPERTY AND DEMOCRACY

Even if intellectual property does not fit neatly into Rose's privatization scheme, there are at least a couple of ways in which IP rights impact democracy that can be directly evaluated. At risk of redundancy, granularity is important here. The democratic impact of copyright protection is quite different than that of patent protection. By lumping all of IP together, in my view Professor Rose misses the opportunity to evaluate the particular effects of specific rights.

### A. *Copyright and Democratic Expression*

First, copyright scholars have long argued that copyright promotes diversity of cultural expression, which is good for democracy.<sup>27</sup> Copyright protects individuals in their expression and makes the success or failure of that expression a function of the market, rather than the whim of the sovereign. By contrast, pre-Statute of Anne regulatory systems were intimately related to censorship.<sup>28</sup> In medieval England, for both political and economic reasons, the Crown awarded to individual printers the exclusive right to print particular books.<sup>29</sup> Later the Crown vested the Stationers Company with a monopoly over publishing and relied on it to censor political dissent.<sup>30</sup> As Goldstein observed, the printers enjoyed and enforced a monopoly over publishing, but the printers were only allowed to publish books licensed by the Crown.<sup>31</sup>

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26. See Netanel, *supra* note 18, at 347–64 (stating that copyright law supports democracy through encouragement of creative expression of political and social ideas and through giving the creators of such expression financial support).

27. See, e.g., *id.* (arguing that copyright is a state measure that uses market institutions to enhance the democratic character of civil society, by serving production and structural functions). The notion that copyright is intended to promote democratic society dates back to the founding era and can be seen in discussion of the first federal copyright statute in 1790. See *id.* at 289 & n.17 (citing BRUCE W. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 137 (1967)).

28. See GOLDSTEIN, *supra* note 16, at 40.

29. See *id.* (“By granting an exclusive right—a patent, it was called—to print particular literary or legal or educational works to a given bookseller, the English sovereigns were able to tap into a continuing stream of loyalty and income.”). For other thorough discussions of English copyright history, see LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968) and BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT (1967).

30. GOLDSTEIN, *supra* note 16, at 42.

31. *Id.*

Thus, the Crown could rely on the Stationers Company to carry out its political will.

Under [the Licensing Act], the Crown determined what works could be published; under the printing patent, the Stationers suppressed trade not only in unauthorized copies of licensed works, but in unlicensed works as well. The Stationers got the economic rewards of monopoly; in return, the Crown got from the Stationers a ruthlessly efficient enforcer of the censorship.<sup>32</sup>

By recognizing copyright in authors and rejecting royal privileges in printing, the modern copyright system stripped the sovereign of an effective control over the content of publications, leaving to market forces the ultimate fate of a particular publication. This development, to be sure, was not an unqualified good. One potential advantage of government subsidization of intellectual production is that it allows for consideration of factors beyond potential economic success, and we might have good reason to think that certain forms of expression that are not economically valuable are nevertheless desirable. In those cases, the market might not properly reflect true societal demand, and those forms of expression will be under-produced.<sup>33</sup>

Governments in the United States and in Great Britain, among other countries, have recognized that risk, and for that reason copyright has never been the only way in which either country encourages cultural production. As Shubha Ghosh points out, governments also subsidize cultural infrastructure, “create cultural inputs that benefit private associations,” and can “aid in establishing rules that facilitate private associations.”<sup>34</sup> Governments also can provide direct grants to certain producers of cultural material, through entities like the National Endowment for the Arts.<sup>35</sup>

But if democracy is our concern, there are at least as many reasons to be concerned about other forms of government encouragement of cultural production as there are about leaving those decisions to the market. Grant and infrastructure funding are very likely to follow political winds, as we have seen with regard to funding of National Public Radio, the Public Broadcasting Service, and the National Endowment for the Arts.<sup>36</sup> As these modern examples make clear, those who control the funding are likely to want to

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32. *Id.*

33. See Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 965 (2005) (noting that the market often does not accurately measure or respond to societal demand).

34. Ghosh, *supra* note 5, at 411.

35. See generally *id.* at 411–12.

36. See Rob Owen, ‘Politics Theater’ Drags on at PBS, PITTSBURGH POST-GAZETTE, July 14, 2005, at W-37 (“Maintaining its government funding has been an issue for the entirety of PBS’s existence, but lately the media company has found itself wandering through a political minefield.”).

control the content of the creative output they fund.<sup>37</sup> As Justice Scalia noted in a recent speech about government funding of the arts, it has long been the case that “he who pays the piper calls the tune.”<sup>38</sup> The risk that governments which fund content will seek to call the creative tune is a lesson history teaches exceedingly well.

In the final analysis, modern copyright law reflects a belief that we are better off relying on markets to provide the incentives for cultural production.<sup>39</sup> Though markets sometimes fail, the possibility of failure has to be measured against the political risks inherent in greater government involvement in production.<sup>40</sup>

The scope of copyright law will have a lot to say about how well it furthers the goal of democratization, of course, as we are reminded by criticisms of copyright’s effect on culture.<sup>41</sup> Overly broad protection threatens to stifle the very expressive freedom copyright protection promises. If, however, market-driven copyright systems by and large succeed in creating environments in which diverse views flourish, then copyright, on balance, helps create democratic culture.<sup>42</sup>

37. In 1999, the Brooklyn Museum of Art sued the City of New York when the city withheld funding for the Museum because Mayor Giuliani was offended by some of the art the museum displayed, particularly a painting that depicted the Virgin Mary decorated with elephant dung. *Brooklyn Inst. of Arts & Sci. v. City of New York*, 64 F. Supp. 2d 184, 186, 190 (E.D.N.Y. 1999). The court entered a preliminary injunction against the City on the ground that the decision to withhold funding violated the First Amendment. *Id.* at 205.

38. See Daniel J. Wakin, *Scalia Defends Government’s Right to Deny Art Funds*, N.Y. TIMES, Sept. 23, 2005, at B5. The saying generally is attributed to the fable of the Pied Piper of Hamelin. J. A. Spittal, *He Who Pays the Piper Calls the Tune* (2003), <http://www.cambridgeconference2003.com/camconf/papers/3-2.pdf#search='he%20who%20pays%20the%20piper%20calls%20the%20tune'>.

39. See Netanel, *supra* note 18, at 345–48.

40. The distinction I have drawn is between the market on the one hand and government subsidization on the other. There is, of course, a third possibility that has sometimes played a historical role—the support of elite patrons. Relying on that type of support lessens to some degree the risk of undue government control of content, but it does little to ensure the type of diverse selection of views characteristic of democratic societies. *Cf. id.* at 288–89 (arguing that “sustained works of authorship”—books, articles, films, songs and paintings—form a central part of democratic discourse, and that a robust copyright is a necessary (though not necessarily sufficient) condition both for the creation and dissemination of that expression and for its independent and pluralist character”).

41. See generally LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (Penguin Press, 2004).

42. See Barbara Ringer, *Two Hundred Years of American Copyright Law*, in *TWO HUNDRED YEARS OF ENGLISH AND AMERICAN PATENT, TRADEMARK AND COPYRIGHT LAW* 117, 118 (Am. Bar Assoc. ed., 1977) (“We know, empirically, that strong copyright systems are characteristic of relatively free societies.”).

## B. *IP and Conditions Precedent to Democracy*

There is another way in which IPRs have an effect on democratization. Recognition of IPRs is one way to promote the economic conditions conducive to democratic development. A growing body of research suggests that intellectual property protection can have a significant effect on a country's economic prosperity.<sup>43</sup> Countries that protect intellectual property achieve greater foreign investment and raise their citizens' standards of living substantially faster.<sup>44</sup> This should hardly come as a surprise. IPRs are intended to promote innovation, and innovation has a significant effect on economic growth.<sup>45</sup>

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43. See Carsten Fink & Carlos A. Primo Braga, *How Stronger Protection of Intellectual Property Rights Affects International Trade Flows*, in INTELLECTUAL PROPERTY AND DEVELOPMENT 19, 20 (Carsten Fink & Keith E. Maskus eds., 2005) [hereinafter INTELLECTUAL PROPERTY AND DEVELOPMENT] (finding that stronger IPRs have a significantly positive effect on total trade, though also finding stronger patent rights irrelevant for certain high-technology products); Beata Smarzynska Javorcik, *The Composition of Foreign Direct Investment and Protection of Intellectual Property Rights: Evidence from Transition Economies*, in INTELLECTUAL PROPERTY AND DEVELOPMENT, *supra*, at 133, 134 (study of multinational companies' investment decisions; finding that weak IPRs have a negative effect on the likelihood of investments being made and that companies avoid investing in local production when IPRs are weak and instead focus on distribution). In the introduction, the editors conclude that the empirical evidence points to a positive role for IPRs in stimulating formal technology transfer, through foreign direct investment in production and research and development facilities and through cross-border technology licensing. Carsten Fink & Keith E. Maskus, *Why We Study Intellectual Property Rights and What We Have Learned*, in INTELLECTUAL PROPERTY AND DEVELOPMENT, *supra*, at 1, 8.

44. See generally Lee G. Branstetter et al., *Do Stronger Intellectual Property Rights Increase International Technology Transfer? Empirical Evidence from U.S. Firm-Level Data*, (Nat'l Bureau of Econ. Research, Working Paper 11516, 2005), <http://www.people.hbs.edu/ffoley/IPRReform.pdf> (presenting statistical analysis of firm-level data on U.S. multinational companies conducted at the International Investment Division, Bureau of Economic Analysis, U.S. Department of Commerce and concluding that their "results collectively imply that U.S. multinationals respond to changes in IPR regimes abroad by significantly increasing technology transfer to reforming countries" and that research and development spending by affiliates increases after IPR reform). Research on the impact of stronger IPR on domestic innovation in particular is mixed. See *id.* at 2 n.3 (citing studies from 1995, 2000, 2001, and 2002 that find no impact on domestic innovation and other studies from 2001 and 2005 that do find an impact).

45. Recognizing intellectual property rights is not the only way in which countries can promote innovation. See Press Release, European Commission, State Aid: Commission Launches Public Consultation on Measures to Improve State Aid for Innovation, (Sept. 21, 2005), <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/1169&format=HTML&aged=0&language=EN&guiLanguage=en>. The Press Release discusses the measures states can take to promote innovation under the Communication on State Aid for Innovation, including:

- 1) support for the creation and growth of innovative start-ups (through tax exemptions and subsidies);
- 2) additional flexibility for state aid to risk capital;

And economic growth and stability clearly aid democratic development. As today's world events make clear, it is very difficult to build a stable political environment when citizens are excluded from the prosperity shared by the developed world. I do not mean here only that property and commerce distract people from other strife,<sup>46</sup> although that certainly may be true, but rather that divergent economic conditions sometimes are themselves the source of discontent in developing areas.<sup>47</sup> Rose herself provides evidence of this dynamic when she points to India's experience with privatization and notes that the Congress Party and its allies defeated the BJP, the chief sponsor of India's deregulation efforts, largely because of the dissatisfaction of rural citizens who felt they were left out of the good economic times.<sup>48</sup> If intellectual property aids technology transfer and helps create greater economic opportunity, it can help create the stability on which civil society depends.

There is also a power-spreading argument to be made here, though a less direct one. According to the power-spreading thesis, private property promotes democracy because ownership of private property gives citizens a sense of security that enables their participation in the political process.<sup>49</sup> That thesis then argues for recognition of any private rights that offer greater economic security than citizens previously enjoyed. Intellectual property rights can offer that security, not so much because ownership of intellectual property rights is widespread, but because recognition of IPRs enables greater economic growth.

This point should not be overstated; Rose rightly cautions against giving any institution too much credit for democratization.<sup>50</sup> Even the most optimistic economic reports echo Rose's important caveat that the effectiveness of IP reform depends on the existence of other governmental institutions in which

3) expanding the scope of current state aid rules for Research and Development and authorising state aid for SMEs [small- and medium-sized enterprises] engaged in innovation activities (such as commercially-usable prototypes, technological design or feasibility studies);

4) subsidies for SMEs to buy services from innovation intermediaries;

5) subsidies for SMEs to recruit highly qualified researchers and engineers and to benefit from exchange of personnel with universities and large companies; and

6) supporting the development of poles of excellence through collaboration, clustering, and projects of common European interest.

*Id.*

46. See Rose, *supra* note 1, at 710.

47. See generally Juan Forero, *Latin America Fails to Deliver on Basic Needs*, N.Y. TIMES, Feb. 22, 2005, at A1 (illustrating that the high cost of utility services in countries like Bolivia contributes to political instability).

48. See *id.* at 28–29.

49. See Rose, *supra* note 1, at 705–10.

50. See *id.* at 693 (stating that “privatization alone cannot do all the work of democratization”).

the rights can be maintained and enforced.<sup>51</sup> So it cannot be said that recognition of IPRs is a sufficient, or even necessary, condition for democratic reform. But there are two general conclusions we can draw from the evidence: (1) it is no accident that most of the world's unrest is taking place in developing countries; and (2) recognition of IPRs clearly has a positive effect on economic conditions, which can help create greater stability. Thus, IPRs deserve a seat at the policy table when democratization is the goal.

### C. *Other Democratization Issues Relating to IP*

Rose makes two additional observations that are potentially relevant to the question of the impact of IPRs. First, Rose notes that the privatization efforts might arouse rather than dampen political passions if the effort affects those with vested interests.<sup>52</sup> This seems much more likely to be a possibility in the deregulation context,<sup>53</sup> and very unlikely to apply in the context of intellectual property. As I discussed earlier, unlike deregulation, in the context of IP there is no "status quo" that is affected by any particular movement. Indeed, it is hard in the IP context even to identify a particular shift in vested interests that might arouse opposition, since the subjects of IP protection come into existence simultaneously with protection. Thus, recognition of IPRs is not likely to shift the use of already existing assets, as water deregulation might.<sup>54</sup>

Finally, what about IP's symbolic role? Rose argues that IP represents an area of privatization which "cuts fairly sharply" against the symbolic argument because IP is more a lesson in other people's rights than in one's own.<sup>55</sup> That really is an empirical claim about how most people regard IP rights, and my sense is that it has the greatest purchase in the context of copyright. The fight against file sharing has had little effect on norms, other than to harden the

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51. See Carsten Fink & Keith E. Maskus, *supra* note 43, at 2, 12 (stating that "the effects of awarding stronger rights to protect technology will depend on the underlying circumstances in each country" and "a reformed legal regime is likely to be a necessary but not sufficient condition for local technology development").

52. See Rose, *supra* note 1, at 711.

53. With respect to deregulation, it might be true that, in the short run, privatization efforts would have to confront resistance from those with vested interests. But if it is true in the long run, then one wonders whether the effort really would enhance overall welfare. If it is just an interested group opposing, then presumably the rest of the people would have a greater interest and cause greater unrest if the system was not fixed to benefit them.

54. See *id.* at 711. A possible exception might be industries that depend for their existence on the absence of strong IPRs, perhaps makers of generic pharmaceuticals.

55. *Id.* at 715 ("[M]ost people perceive themselves as *obligated* by IP rights, since the rights belong to others.").

resistance of some.<sup>56</sup> Rose's claim certainly has resonance with regard to pharmaceutical drugs as well.<sup>57</sup>

But just because powerful companies and industrialized nations have used their power to structure IP regimes to benefit themselves disproportionately<sup>58</sup>—a dynamic not unique to IP but pervasive in any property regime and indeed any system of government regulation—does not mean that IP necessarily favors Goliath. Indeed, the symbolic story is a little murkier than Rose lets on. In the patent context, and to a lesser extent in the copyright context, there are many recent stories of IP serving as the sword of David. Microsoft has been named as a defendant in numerous recent patent cases,<sup>59</sup> and some of the smaller plaintiffs in those cases have won substantial verdicts.<sup>60</sup> Indeed, IP might be the only thing that allows the Davids of the technology world to compete with Microsoft at all; in the absence of IP rights, Microsoft can bring its greater resources to bear on any good idea and reap all of the benefits.

That IP-like rights can work in the little guy's favor is demonstrated by Rose's suggestion that the "dictatorial edges" of IP can be softened in part by recognizing a form of IP protection for folklore or traditional knowledge, subjects that have heretofore been excluded from the IP regime.<sup>61</sup> That suggestion reflects a recognition of the power of property rights—the solution to overly aggressive practices, at least in some cases, is property. Here, like in the examples above, the little guy can use property to fend off the imperialists. Rose argues that this undermines the legitimacy of the IP incentive theory,<sup>62</sup>

56. See David Scharfenberg, *Defying a Music Industry Crackdown*, N.Y. TIMES, Jan. 15, 2006, at 14WC-3 (stating that some data reflect growth in file sharing in the last two years while other data suggest a downturn).

57. See Rose, *supra* note 1, at 716 & accompanying notes.

58. See *id.* at 616–17.

59. Peter Galli, *Microsoft Settles with InterTrust*, EWEEK.COM, Apr. 12, 2004, <http://www.eweek.com/article2/0,1759,1565851,00.asp>.

60. A district court awarded Eolas, a company spun off from the University of California, \$521 million for Microsoft's infringement of Eolas's Web browser patent. See *Eolas Tech. Inc. v. Microsoft Corp.*, 70 U.S.P.Q.2d 1939 (N.D. Ill. 2004), *vacated in part*, 339 F.3d 1325, 1332, 1341 (Fed. Cir. 2005), *cert. denied*, 126 S. Ct. 568 (2005). The verdict may be reduced when it ultimately returns to the district court, if the case is not settled first.

61. See Rose, *supra* note 1, at 716–17. The historical exclusion of these forms of expression from the IP regime is a good example of Rose's central thesis—that the ability of private property to fulfill its political role depends in part on the underlying political institutions. See *generally id.* One possible conclusion is that these kinds of distributional concerns are so pervasive that no property regime can possibly achieve its theoretical ends—that allocation of property rights is very likely to be drawn according to political power, so that the existence of property rights will do little to affect politics. But my own view is that the distributional problems, while real and needing to be accounted for, have not undermined property's generally positive influence on politics.

62. *Id.* at 717.

but the utilitarian incentive justification need not be the only basis of protection. Property can and does serve autonomy interests.<sup>63</sup>

### III. CONCLUSION

To summarize, the overwhelming evidence confirms Rose's broad thesis that IPRs are far from sufficient to secure democracy, and that we should pay close attention to scope. But when we parse out the different forms of intellectual property protection, the evidence also suggests that the case for IPRs as promoters of democracy is somewhat stronger than Rose lets on. Thus, intellectual property deserves its seat at the policy table, and we are wise to pay it some heed.

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63. See generally Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).