

**When Metaphors Attack:
How Intellectual Property
Frustrates Access to Knowledge
in a Networked World**

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Abstract

Intellectual property is an encompassing metaphor for a disparate collection of proscriptions on the access to knowledge. Its proponents draw deliberate analogy to physical property, hijacking the vocabulary of common law property-rights to justify the commoditised apportionment of culture. An analysis of the metaphor reveals that it is problematic: many of the “rights” it describes were established as royal monopolies, and the compromises and provisos that guided their later evolution have increasingly been shed at the behest of re-established oligarchical pressure.

The entities of intellectual property do not behave like physical property, and nor do they exhibit the characteristics that give physical property its ultimate justification. Both the Intellectual Property and Moral Rights conceptions of creativity lead to solipsistic lacunae, fetishising “authorial originality” in a work whilst downplaying its roots in a rich shared culture. The initial proclaimed intent of IP legislation – a healthy public domain – becomes instead a bramble-patch to be razed.

Digital communications puts peculiar strain on the veracity of the Intellectual Property model. It reveals how cultural “products” can be created and distributed at negligible incremental cost. Media conglomerations respond with draconian legislation and technology in an attempt to quench the torrent of “unregulated” culture that befalls them. It is possible that the very success of this repressive reaction could be its hubristic doom.

I. The Ill-Conceived Property Metaphor

A large proportion of "Intellectual Property" theory concerns itself with labelling and identity. We should deem it appropriate to subject the term "Intellectual Property" itself to the analytical rigour it applies to its charges. Such an examination will be helpful in confirming the arbitrary configuration of the heterogeneous set of legal constructs that constitute its realm. In analysing the evolution of each aspect of Intellectual Property, it soon becomes apparent how ill equipped is the property model to serve a society in the throngs of the networked information age. In the cynical exploitation of a badly mapped metaphor, proponents of Intellectual Property often frustrate the fruitful access to knowledge even while proclaiming its promotion.

The term "Intellectual Property", hereafter sometimes referred to as IP, encompasses a number of legal and social constructs whose histories and philosophies vary significantly. Their current implementation and regulation vary completely. Richard Stallman, the founder of the *Free Software Foundation*, notes that the selection of the metaphor is hardly neutral:

One effect of the term is a bias that is not hard to see: it suggests thinking about copyright, patents and trademarks by analogy with property rights for physical objects. (This analogy is at odds with the legal philosophies of copyright law, of patent law, and of trademark law, but only specialists know that.)¹

Initially understood as little more than an encompassing metaphor, the term IP has gained apparent solidity as a *consensus gentium*. It has received generally uncritical acceptance as a valid enveloping term for a disparate collection of cultural restrictions, such that even formal institutions can receive titles like "*World Intellectual Property Organisation*"² with little dissent. Such dissent as there has been is usually limited to obscure academic analysis, or to those on the far political left or right³. Otherwise, it is taken as little more than a truism that the model of property adequately covers ideas, cultural emanations and all the other forms of non-corporeal patterns subsumed in IP regulation. Some in the legal establishment may claim that railing against the IP metaphor is a straw-man argument. They might suggest that the law has always entertained notions of non-corporeal property: in shares, deeds and so forth. There is a substantial philosophical difference between these fiats for scarcity and the propertisation of culture, however. Whatever the nuanced legal discourse concerning the peculiarities of non-corporeal rights, the simple idea-as-property metaphor has grabbed the Executive's imagination, and it is they who promote new legislation. In every example of such new legislation, the property model becomes ever more entrenched, and provisos that had limited its scope are being shed. The legal differentiation between an idea and the specific expression thereof is now eroded to the extent that the distinction is near meaningless: software and business method patents frequently place restrictions on concepts, abstract methods, algorithms and even relatively simple mathematical ideas⁴, most of which patent offices were theoretically supposed to prohibit.

In copyright, similar categorical overextension is occurring. The United States' *Digital Millennium Copyright Act (DCMA)* and the *European Union Copyright Directive (EUCD)* prohibit certain categories of communication outright⁵. Some digital media now have inbuilt technologies to prevent even the legitimate licensee of those media from using them in ways not considered "appropriate". These technologies are developed under the euphemistic term *Digital Rights Management* or *DRM* (Stallman suggests *Digital Restrictions Management*⁶ as more apt). One might want to remove the *DRM* "protection" from an electronic book, for example, in order to allow the blind to have that text read out to them electronically. Not only do the new copyright Acts forbid one from so doing, but the *DMCA* and *EUCD* forbid even the discussion of methods that could be interpreted as subverting these technologies. The chilling effect reaches far and wide:

1 Stallman, Richard: ' "Did you say "Intellectual Property"? It's a Seductive Mirage'. 2004
<http://www.gnu.org/philosophy/not-ipr.xhtml>

2 WIPO Online
<http://www.wipo.int/>

3 Kinsella, Stephan: 'Against Intellectual Property'. *Journal of Libertarian Studies*. Vol. 15, No. 1

4 Talft, Darryl K: 'Real Software Slams Microsoft Patent Effort'. *eWeek.com*. 21 February 2005
<http://www.eweek.com/article2/0,1759,1766949,00.asp?kc=EWRSS03119TX1K0000594>

5 King, Brad: 'Copyright Clash Shatters Speech'. *Wired News*. 2 May 2001
<http://www.wired.com/news/mp3/0,1285,43475,00.html>

6 Stallman, Richard: 'Can you trust your computer?' 2002
<http://www.gnu.org/philosophy/can-you-trust.html>

Several non-US scientists have issued statements indicating that they are afraid to travel to the US for fear of DMCA prosecution for conducting their research on encryption technologies. Other scholars and academics have indicated they must alter their course of study regarding certain technologies to avoid triggering liability under the DMCA⁷

There can now be little doubt that the de facto application of IP law allows the idea-as-property model an increasingly free rein, and that the ideas that it privileges receive a "protection" as ferocious as any bullion store's.

The tacit acceptance of the "Intellectual Property" umbrella term represents a victory for those who find value in taming the societal interplay of ideas through the strictures of property relations. Despite the current apparently broad acceptance of idea-as-property, the model is not incorrigible, and certainly not timeless. Indeed, IP has characteristics so radically different from conventional property that a whole subsection of jurisprudential special-pleading has arisen in an attempt to account for them⁸. Rather than taking these inconsistencies as a warning beacon of a question's being begged, the law continues to patch and darn the bundle of rights and restrictions so that it might fit the property model better. That IP needs such contrivances suggests that the property model associated therewith may have become pre-eminent not because of any self-evident natural applicability, but because it has had the benefit of political expedience and illusory convenience:

This fashion did not arise by accident - the term [Intellectual Property] systematically distorts and confuses these issues, and its use was and is promoted by those who gain from this confusion.⁹

Property is an ancient and broadly settled aspect of most common-law traditions¹⁰. Indeed, the right to property is one of the few state-mandated guarantees that even such juridical minimalists as libertarians are prepared to concede¹¹. Only a few far left ideologies reject any legal notion of property. One need not question the utilitarian validity of the property model as a whole, when it relates to scarce physical resources. One merely need concede the model's inadequacy in non-corporeal realms. The package of cultural prohibitions ensconced in IP has been placed within the established legal framework of property in the expectation that it should enjoy the support of a proven legal bedrock.

Those who have installed the idea-as-property metaphor into the heart of the legal system need to provide distraction from the inversion that takes place at the very start of this installation: namely, that the property framework is not selected because of any obvious connection with the cultural proscriptions entailed within "IP"; instead, the bedrock of property gives an illusion of naturally discrete commodity to a complex cultural flux. That the law itself should increasingly accept this cuckoo-in-the-nest interloping suggests expediency on its part: it is simpler for the legal establishment to find a place for the proposed bundle of restrictions within the rich vein of traditions and legal structure already present than to forge anew. With the right to property axiomatic in most legal systems, any legislation that can piggyback will find the ride comfortable.

II. The Inauspicious History of IP

As attorney and commentator Stephan Kinsella puts it:

Far from being 'natural' property rights grounded in the common law, patent and copyright are monopoly privileges granted solely by state legislation¹².

How tendentiously the restrictions within IP relate to any coherent notion of property can be noted by each restriction's history. The first restriction in the IP bundle to make a clearly-recognisable appearance was probably the system of patents. Several civilisations lay claim to early patent-like systems – for example, a

7 Gross, Robin D: 'Freedom of Speech: Void Where Prohibited' September 2001
http://www.eff.org/IP/Video/Johansen_DeCSS_case/200109_eff_johansen_article.html

8 Vaidhyanathan, Siva: 'Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity'. New York University Press. 2003

9 Stallman, Richard (1) *ibid*.

10 Milsom, S. F. C: 'A Natural History of the Common Law' Columbia University Press. 2004

11 Ely, James W: 'Main themes in the debate over property rights' Garland Science. 1997

12 Kinsella, Stephan: 'Do patents and copyrights undermine private property?' *Insight on the News*, May 21, 2001

15th Century scheme in Venice¹³ - but the Western system we know today originates in England at around the same time, with Henry VI's establishment of monopoly rights on certain realms of production and trade. These *Letters Patent* had absolutely nothing to do with promoting the value of progressive invention, and even less to do with recognising any inherent association of property therewith. The system was an aspect of Court patronage, and a means of filling the royal coffers. It was no less arbitrary than a window tax or the appointment of a *Groom of the Stool*.

The system's abuses and iniquities eventually became unbearable to the developing mercantile class, and so emerged the ameliorating Jacobite *Statute of Monopolies*, which introduced the necessity of novel invention, and placed a limit on the period of said monopoly's application. These concessions were hardly installed in recognition of any inherent right to the "property" of the conception of an invention; patents initially acted as little more than an auctioned tax, whose scope was later limited under duress¹⁴. Over time, though, these very limits inverted and grew to become the teleological justification for the system's existence in the first place, and brought forth ever increasing notions of the commodity, and eventually full-blown property, of ideas. A pragmatic concession transformed itself, over time, into a radical axiom, whose validity was rarely tested philosophically, politically and, least forgivably of all, economically¹⁵.

An examination of the history of copyright is even more striking in its evolutionary contortions. Initially, the system was little more than a method of control and censorship by the sovereign. In the time of rapid technological progress that followed the invention of the printing press, it became clear that information could be disseminated far more quickly and widely than previously scribed manuscripts would have allowed. Censorship required a troop of willing executioners, whose self-interests would be fulfilled in aiding the forceful implementation of these restrictions. England's Queen Mary sought to ensure that the economic interests of an information elite were served by complying with her political strictures.¹⁶ She privileged the *Stationers' Company* guild with the sole right of printing and distributing texts. Members of this guild were highly regulated, and, in turn, were brutal in their suppression of any publication, printing or distribution from without. As with patents, the system of copyright began as an enterprise of court favour and restriction. It was used in the attempt to prohibit the distribution of Protestant and other "seditious" material. The guild - effectively a regulated lynch-mob against free expression - began to covet its monopolies. Its members traded amongst themselves for the rights to publish and distribute material, with the author of that material having little say in such machinations, let alone a right to share any continued remuneration.

The *English Revolution* saw an end to such arbitrary Courtly monopolies. Indeed, they provided much of the impetus to revolution in the first place:

[A]n ever-growing host of offensive and useless monopolies were strictly enforced [...] Every aspect of economic life suffered from the feverish interference of a bureaucracy whose sole objective seemed to be the extraction of money by the imposition of a multitude of petty and irritating regulations, many of which were of dubious legality.¹⁷

It was in this context that patents, Stationers' copyright and related restrictions were understood, and most were swept away after the Revolution. The Stationers' Guild experienced the full fury of the free market, a development it did not relish. The cartel members had begun to suffer grand delusions. By now, they perceived their monopoly rights not as bribery for their loyal quiescence, but as naturally ordained and tightly rooted in the society's legal and ethical soil. To this end, some began to perceive their privileges as associated with common law property rights. They picked and chose precedents in the hope that some vague similarities with their present contingencies would prove convincing. The return of monarchy allowed them some success, culminating in the *Statute of Anne*. This represented an attempt at the regulated "nationalisation" of the last vestiges of Guild power. In finding a "noble" justification for copyright restriction, and in purposefully limiting the monopolies enshrined within, it buffed up into a glowing

13 Witcombe, Christopher L.C.E: 'Copyright in the Renaissance - Prints and the Privilegio in Sixteenth-Century Venice and Rome'. Brill. 2004

14 Newton, David C: 'New manufactures within this realm-: A chronology of law and invention since the statute of Monopolies, 1624' Science Reference Library. 1985

15 The National Academies Board on Science, Technology and Economic Policy: 'Project Summary on Intellectual Property in the Knowledge-Based Economy'
http://www7.nationalacademies.org/step/STEP_Projects_IPR_Phase_II_Description.html

16 Cooper, Andrew: 'Is Copyright Unconstitutional?'
<http://www.faircopyright.ca/potterarticle.html>

17 Stone, Lawrence, Brewer, John: 'The Causes of the English Revolution: 1529-1642', Routledge. 2001. 126

foundational attribute what had previously been little more than a circumscription. And so was born "*An Act for the Encouragement of Learning*". Thus, with little empirical evidence that such "encouragement" was necessary, or that such restrictions were the best way of providing such "encouragement", began the discrete commoditisation of cultural flux.¹⁸

Even if we concede the *Statute of Anne's* lack of evidence-based necessity, by its own terms it is clearly to be understood as a pragmatic concession, a trade, and not a recognition of any specific heir to common-law property rights. In a sense, the *Statute* was attempting to hold some purview over the expanding cultural reach that new technologies allowed, and to provide conciliatory assuaging to a powerful publishing clique. This clique was not satisfied, and overplayed its cards in trying explicitly to claim the perpetual copyrights they assumed they were due, having convinced themselves of their supposed common-law property associations. When the cartel interests tried to press their common-law case, they were soundly rebuffed by the House of Lords. The distasteful past of "IP" legislation heretofore was well acknowledged by the Court. The history of "patents and privileges" was soundly derided: "all of them the effects of the grossest tyranny and usurpation", as Lord Camden put it within his forceful judgement. The Court recognised the sophistry in this early pleading for naturally recognised "IP" rights, in describing the contortions of those making such an argument:

[B]y a variety of subtle reasoning and metaphysical refinements, have they endeavoured to squeeze out the spirit of the common law from premises in which it could not possibly have existence.¹⁹

III. A Comparison With Corporeal Property

The "subtle reasoning" continues to this day. In fact, it is usually not especially subtle - the continued promotion of terms like "piracy" and "theft" to enforce the illusion of unproblematised property, for example, and the ever increasing extension of copyright term and scope, suggest that the sophistry so clearly identified by the 18th Century House of Lords is barely recognised by many in both the executive and legislative branches today. It surprises even thoughtful people when they're forced to consider the "metaphysical refinements" associated in convincing a society to view its stream of culture as comfortably analogous with physical property. In the many organisations establish to propagandise the IP model, no ambiguity can be broached. For example, Britain's *Federation Against Software Theft*, (note the use of the pejorative term usually reserved for unambiguous property) answers its putative question baldly and without qualification: "What is Copyright? Copyright is a property right"²⁰. Lord Camden would no doubt have given them stern counsel.

Let us examine some critical characteristics of physical property: that it has delineated and unique identity, and that it usually exhibits the quality of scarcity. The very possibility to assert one's legal domination over such property in the act we call "ownership" is made sensible by these key characteristics of said property. Firstly, physical property can be delineated and identified uniquely. One needn't analyse the metaphysical notion of "identity" here, but merely outline a suitably positivist method of its verification. Two patches of land, or two objects on them, although duplicate in nearly every respect, will attain unique identity through any characteristic that finally differentiates them. In some cases, such differentiation will simply be their respective placements in space and time. The very laws of (macro) physics guarantee such basic identity. At the scale of our common understanding, the notion of two discrete pieces of physical property, identical in every respect including spatial and temporal locus, is nonsense.

A necessary condition in the confirmation of a discrete entity is that it has some unique characteristic within its set of attributes that differentiates that set of attributes from any other. Any number of identical sets of duplicate attributes necessarily identify but one unique object. It is only via a uniquely identifying set of attributes that we can claim ownership. However arbitrary our apportionment of the universe into discrete categorical bundles, it nevertheless proves itself amenable at a macro level to such identifiable apportionment. So long as we can each find different sets of characteristics with which to label aspects of physical totality, we can each identify potential discrete entities within that totality, and press a claim of ownership thereon – however successful or otherwise that claim might be.

18 Feather, John: 'The Book Trade in Politics: The Making of the Copyright Act of 1710'. *Publishing History*. 19(8), 1980

19 *Donaldson v. Beckett*, 2 Brown's Parl. Cases 129, 1 Eng. Rep. 837; 4 Burr. 2408, 98 Eng. Rep. 257 (1774); 17 Cobbett's Parl. Hist. 953 (1813)

20 'Federation Against Software Theft: Frequently Asked Questions'

<http://www.fast.org.uk/faq.asp#faq1>

We can physically modify an object, but still claim a nevertheless continuing identity for that object. To achieve this, we must modify the object's identifying set of characteristics so that it reflects this change. In keeping this identificatory set synchronised with the object it labels, we ensure consistency. If we change an identificatory attribute of an object without updating the set to reflect this, that set no longer necessarily describes any discrete entity in the universe: the stability of an object's unique identity is, by definition, bound in the unique consistency of its set of characteristics. As we shall see, non-corporeal "property" acts in a very different manner, whose behaviour questions its claim to membership of the pantheon of property in the first place.

When one determines that an entity has unique identity in space and time, one determines a necessary but not sufficient condition to the notion of legal property. A second key to our understanding of property is a compound variable entailing scarcity and interest. The strictures of property have little relevance in an environment where physical resources are superabundant, and where each possible delineation of that superabundance is considered of equal value. To lay claim to an inconsequential grain of desert sand as a piece of property would seem absurd. Such coveting could even be interpreted as a sign of insanity. The sand's superabundance is part of the key to this perception. In precise terms, this grain of sand, like any other labelled object, has a set of characteristics which delineates it uniquely; however, this set of characteristics has an almost infinite number of counterparts, each reflecting similarly unique entities strewn across the desert. Certainly, a grain of sand can be considered unique through the key differentiating attributes within its identificatory set – or perhaps even through just one differing attribute within that set, specifically the grain's contingent location. In this case, the identity reveals little of value to those who would covet it as property, because it is predicated on an attribute whose "hierarchy of interest" is flat. That is to say, the differing values for the attribute of location are determined as having approximately equal worth (or, indeed, worthlessness).

Should a characteristic be determined in a particular grain of desert sand whose "hierarchy of interest" is not flat, then this allows the grain of sand to attain value as property. If one were to find upon the grain of sand an attractive engraving, or if one were to determine the grain's having emerged from an extraterrestrial civilisation, its identificatory set gains a potential difference in the "hierarchy of interest" against those held by otherwise similar grains of sand, and receives thereby the first motive force to property. This hierarchy of interest is further composed of two factors: demand and scarcity. Demand is determined by a number of variables, be they aspects of biological necessity or contingent aesthetic desirability.

In determining whether an entity is a likely or appropriate candidate for the title of property, the factors of demand and scarcity are vitally codependent. That which is scarce but evinces little demand (perhaps a grain of sand with a highly unusual kink in its structure), or that which inspires demand but is not scarce (a lungful of air) has little place in the realm of property. Increase the demand (perhaps placed the kinked grain of sand within a piece of art) or the scarcity (change the air's location to an astronaut's breathing-tank in outer space) so that the value of both variables is raised, and the perception of the entity as property becomes possible. That which is in demand is socio-economically contingent. That which is scarce is determined by the fewness of the identified entities whose specific descriptive sets overlap.

IV. Physical Scarcity as a Motive to Property

To make a claim to property, we must be able to identify it uniquely. We must create a set of characteristics that identifies that property alone, and none other. Unless one is being capricious, the necessity of property should also be predicated on requirements of demand and scarcity. Economists have long known that the supply/demand curve is one of the few dependable aspects of their craft. As creatures with self-interest, we demand from our environment that it fulfil those interests to the greatest extent possible. In an environment that supports all such demands without negotiated intervention, property relations have little meaning, let alone utility. In such cases, the environment is treated as a "commons". This state of affairs continues so long as the commons provides that which is demanded of it to all interested parties. If the demands placed upon the commons increase beyond its ability to fulfil all of them equally, conflict arises. The eventual result of such unregulated plunder is described in the environmentalist Garrett Hardin's seminal essay, *The Tragedy of the Commons*²¹. The eponymous tragedy is meant in the sense of a procession to an inexorable conclusion. Hardin argues that this conclusion is the eventual destruction of a finite commons, which follows

21 Hardin, Garrett: 'The Tragedy of the Commons,' *Science*. 162(1968):1243-1248.

untrammelled freedom to exploit that commons' resources. The singular self-interest of an individual, in exercising the freedom to maximise his or her gain, can contradict the longer-term interest in sustaining the resources provided by that commons. Hardin's suggestion is that unregulated freedom in the midst of scarcity – even when such scarcity is temporarily disguised as abundance – is untenable.

Whilst Hardin's environmental argument is that we continue in the industrialised West to exploit the commons in a global context, he concedes that the ancient perception of such tragedy in a local context prefigures legal property:

In an approximate way, the logic of the commons has been understood for a long time, perhaps since the discovery of agriculture or the invention of private property in real estate.²²

Property, then, plays its role as a moderating mechanism in the allocation of finite resources to those interested in such resources. In a Marxian analysis, the apportionment that occurs in the name of property-rights progresses through the dialectical material agent of class struggle. The conclusion of these struggles, and the eventual goal of Marxism, is to establish some kind of rational and planned system of resource management which somehow renders property, and the iniquities within all systems thereof, obsolete²³. Thusfar, Marxist experiments have failed to demonstrate the practical efficacy of any such proposal. Private property remains the primary method through which successful communities regulate their manifold and conflicting demands for a finite set of physical resources. Despite its iniquities, property has an ancient and immediate simplicity that remains enticing. As Hardin puts it:

We must admit that our legal system of private property plus inheritance is unjust - but we put up with it because we are not convinced, at the moment, that anyone has invented a better system. The alternative of the commons is too horrifying to contemplate. Injustice is preferable to total ruin.²⁴

V. The Elusive Case of Non-Corporeal Identity

The system that describes and governs corporeal property satisfies certain conditions with respect to the identification and justification of that property. Rationally applied property rights have behind them an easily perceived “opportunity and motive”. To what extent do the “products” of IP satisfy these conditions? At first glance, the analogy between corporeal products and incorporeal emanations is tempting. Many civilisations have a tradition of treating thoughts, ideas and conceptions as somehow extrinsic. Indeed, Plato attributes true extrinsic reality to the realm of “forms”, deprecating our perceptions of corporeal reality as merely a shadowy glimpse askance at the idealised objects of true existence²⁵. The Western cultures that preceded Christianity were fascinated by Heraclitus's concept of *Logos*, a necessarily ambiguous word which describes words, thoughts, reasons and the conscious expressions thereof. In Heraclitus's perception, *Logos* represented a universal intelligence, a reasoned overlay upon the totality he perceived as constantly “flowing”²⁶. Christianity continued the fascination with *Logos* and its inextricable blending of the basely corporeal and the divinely ideal through the agency of vital reason. The ideal is given pre-eminence over the corporeal: “In the beginning was the Word, and the Word was with God, and the Word was God”. Ultimate reality in such a conception is with the “*Word*”, and not with the mere objects of perception. It is no surprise that a metaphor like Intellectual Property might prove fertile with such a cultural heritage. In a sense, the New Testament proclaims the whole universe as divine “Intellectual Property”. Non-Western societies too perceive the visionary realm as having a reality even more vital than corporeal existence: The Aboriginal “*dreamtime*”²⁷ and the Buddhist “*sambhogakaya*”²⁸, as examples.

Most cultures provide fertile ground for the idea-as-property metaphor. We can find the slippery associations between idea, imagination and reality fascinating in their ambiguous exchange. Indeed, Stallman terms the Intellectual Property metaphor a “seductive mirage”²⁹. As with all mirages, a closer examination reveals little

22 Hardin, Garrett, *ibid*.

23 Kolakowski, Leszek: 'Main Currents of Marxism: The Founders, the Golden Age, the Breakdown' W. W. Norton & Co Ltd. 2005

24 Garrett Hardin, *ibid*.

25 Plato (ed. Waterfield, Robin): 'Republic'. Oxford Paperbacks. 1998. 241

26 Heraclitus (ed. Kahn, Charles H): 'The Art and Thought of Heraclitus: A New Arrangement and Translation of the Fragments with Literary and Philosophical Commentary' Cambridge University Press 1981

27 Kleinert, Sylvia, Neale, Margo: 'The Oxford Companion to Aboriginal Art and Culture', OUP Australia and New Zealand. 2001. 12,13

28 Mills, Martin A.: 'Identity, Ritual and State in Tibetan Buddhism', RoutledgeCurzon. 2001. 90,126

29 Stallman, (1) *ibid*.

to justify the shimmering scene. Do ideas and the expressions thereof fulfil the “opportunity and motive” to propertisation? Firstly, we can uniquely identify physical property, and in so doing guarantee the perception of a unique apportionment. As already noted, when we change one of the characteristics of a physical entity, then the precise set of characteristics that had identified it no longer has any referent. We need to change the set of characteristics such that it synchronises with the changed entity it purports to identify.

If I purchase a table, its set of identifying characteristics would be the subset of the near-infinite number of possible descriptive characteristics. This subset would include all those characteristics necessary to distinguish it from any other similar object in existence. The fewer characteristics used in such a description, the higher must be their precision. For example, if the table were green, and I only had one table of that colour in my house, then it would be sufficient to have “my house” as the locale, and “green” as the colour in order to identify my table uniquely. If I did not specify the colour, I might have to be more precise instead about the room in which my table presently resided. Let us assume that the table's green hue is sufficient to identify that table uniquely. If I painted it red, its identification set, which contained “table” and “green” and “in my house” would now relate to no object in the world. To fix this, I would have to change the identifying set to include red rather than green.

My table's set of identificatory characteristics would need resynchronising with contingent reality in any number of circumstances: if the table were destroyed or removed from my house, the identifying set would no longer have a referent. If a carpenter built a copy of my now-red table and placed it in my house, the identifying set would no longer have an unambiguous referent, and would require further refinement. In a move to a non-corporeal comparison, let us compare what happens when I think of a tune. I can identify it by its key and sequence of notes. A friend to whom I hum my tune hums it back to me. To what does my identificatory set now refer? My performance? My friend's? All performances thusfar? Any possible performances? Its specification as sheet music? Its location in the Realm of Forms? The blueprint alone? We can only identify separate instances, and then only by adding to the set of descriptive characteristics the performer and the time of the performance. At this point, we no longer describe the tune, the musical template, but specific enunciations thereof, which may or may not diverge from that template. If I paint my table blue, its previous identificatory set points nowhere. If I re-imagine my song in minor key, its previous identificatory set *continues* to refer to my previous conception of my song. If someone on the other side of the planet conceives the exact same sequence of notes, there can be no identificatory set that uniquely specifies my song rather than his. Adding my name to the set of descriptions of my conception of the tune might give context to one particular causal path to that identified cultural entity, but crucially, it describes nothing intrinsic in or about the tune that would differentiate that tune in the universe from an identical conception thereof.

The macro laws of physics allow us to identify a unique physical object as distinct from even its most perfect duplicate. Two identical conceptions of an idea cannot similarly “nudge” one another apart, as can two objects in space, to provide even the most basic of differentiations necessary for the distinct identification that usually precedes the claim to property. If I cut a leg off my table, the universe does not overlay itself such that my intact table remains simultaneously extant. A friend cannot build a table identical in every way to mine such that the perception of two distinct tables becomes literally impossible. Such concepts are absurd. And yet we must allow such *Alice in Wonderland* absurdities free reign if we allow non-corporeal conceptions the title of “property”.

VI. The Fallacy of Non-Corporeal Scarcity

So much for identity: what about the social motivation that underpins property? Do the entities that make up IP endure the same environmental proscriptions? Does there follow a necessary tragedy of the commons if we avoid applying the property model to intellectual pursuits? For a physical entity to be coveted as property, it exhibits the characteristic of scarcity, and evinces demand. Plots of land in the centre of Manhattan are necessarily scarce, as the island has a necessarily limited area. These plots are under high demand, as many people wish to live and work on the island. A fractional apportionment must happen, and so it is no surprise that such plots are conceived as property, and valuable property at that. What about a different sort of plot: the plot of a novel? Let us assume that it too evinces demand: people wish to engage with the plot, and it attracts the imaginative attention of many. What of the other important aspect of the compound variable that helps to justify property: scarcity? In what sense might this plot be considered “scarce”?

A plot of land in Manhattan is scarce because only a relatively few entities may share the characteristics within the descriptive set of which the identifiatory characteristics are a subset. In comparison, there can be infinite conceptions of one idea – where the identifiatory set in each conception points to exactly the same “entity”. It is as if a plot of land in Manhattan suddenly attained the infinite capacity to home anyone who had the wherewithal to find it. A specific plot of land can be exhausted, destroyed, changed and manipulated so that its descriptive set must necessarily change correspondingly. A specific plot of a book, once conceived, cannot be “destroyed”, and any change to the plot does not require that we modify the identifiatory set of the original idea – rather, a new set springs into life identifying our new plot, whilst the old plot's identity remains distinct and extant. As such, scarcity, in the sense that justifies property, seems a nonsense. An infinite number of ideas and performative actions based upon those ideas does not seem immediate ground for conservatory proscription.

It would seem that ideas and their emanation are almost uniquely inappropriate candidates for the property model. We encounter substantial philosophical category errors at every turn. Lord Camden described the precedents and slippery analogy presented to his Court “that heterogeneous heap of rubbish”³⁰. Perhaps in that heap of rubbish, one might find a pragmatic justification for the property model's application in the realm of culture and ideas. The notion of scarcity is incompatible with the qualities inherent in creative ideas, true, but perhaps we might find a “meta-scarcity” hovering within artistic and practical culture. Despite its apparent absurdity, is there some large-scale logic to the idea-as-property scheme? There are those who make such claims. They argue that without the intervention of property rights, technical and artistic culture would stall, and our world would be significantly poorer in all respects. Some have claimed that the *Statute of Anne* and the American Constitution both exemplify this belief. Even so, neither specifically invokes a model of property. The Constitution specifically states that regulations may be imposed to “promote the progress of science and the useful arts by granting exclusive rights to authors and inventors for limited times”³¹. These exclusive rights of control have little to do with property, but are short term exceptions to a general freedom to share and publish. The proscriptions are utterly utilitarian in nature, placed there as a wager: the society bets some of its chips of freedom against later cultural gains. Regulations are just one means to the desired ends of a vital culture and a healthy public domain. As with a farmer who leaves a field to lie fallow during crop-rotation, the hope is that an act of apparent dormancy will yield later gains. Stallman describes how this initial barter of freedom might have seemed reasonable:

Well, a bargain could be a good one or a bad one. It depends on the worth of what you are giving up. And the worth of what you are getting. In the age of the printing press the public traded away a freedom that it was unable to use [...] It's like accepting money for promising not to travel to another star. You're not going to do it anyway.³²

The clear implication of the Constitutional clause is that, should the measures proposed prove inadequate in promoting the “progress of science and the useful arts”, then they should be re-examined, always with the nimble perception of the ends, and not in fetishising the means. A bargain that can be reasonable in one era can fail in another. The clear pragmatism intended by such conceptions of copyright and patent as exemplified in the constitution allow for just this, and bear little relation to the current swathes of legislation heavy and inflexible with the ill conceived property model entangled within. Ironically, genuine progress of science and the useful arts is often greeted by proponents of the property model in culture as a threat. Every new technology or artistic movement which might problematise the mirage of discrete culture is fought tooth and nail. In 1982, Jack Valenti, then head of the *Motion Picture Association of America*, was virulently opposed to the introduction of home video cassette recorders. He told Congress that:

I say to you that the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone.³³

In fact, video cassette recorders proved a boon to the film industry. These sorts of overblown portents of

30 Donaldson v. Beckett, *ibid*.

31 'The United States Constitution, Article 1, Section 8'
http://www.usconstitution.net/xconst_A1Sec8.html

32 Stallman, Richard: 'Copyright Versus Community in the Age of Computer Networks' (transcript by Carnall, Douglas). 2000
<http://www.gnu.org/philosophy/copyright-versus-community.html>

33 'The testimony of Jack Valenti before Congress Committee in 1982'
<http://cryptome.org/hrcw-hear.htm>

doom are repeated whenever progress threatens to demonstrate the final *reductio-ad-absurdum* of equating physical property with the cultural flux, and thus threaten the tendentious basis of whole industries.

VII. The Networked Threat to the IP Model

The Internet and its related technologies provide the latest such threat to those industries who enjoy the benefits of the idea-as-property model. As an interesting aside, the Internet's technologies were generally developed through a cooperative and utterly non-proprietary regime³⁴. It is almost impossible that a system would have developed in an environment where every protocol endured a restrictive copyright, and every idea within a disruptive patent. The Internet is an example of what a society achieves when it ignores the most insidious aspects of the idea-as-property model, and acts as a counter-example to all those who say that great cultural works are impossible without that model's paternal assistance. Before the Internet was available to the public at large, publishers, record companies and other media conglomerations were able easily to piggyback their "Intellectual Property" on actual physical property, each item of which incurred an incremental cost to produce. Record companies pressed physical records, tapes or compact disks. They paid for their manufacture. They paid for their packaging and distribution. One copy costs less to distribute than two; ten less than fifty. Book and journal publishers similarly provided a substrate for IP whose non-corporeality might otherwise exhibit all those characteristics which, in physical property, would be paradoxical. In the pre digital-network world, where physical property and the IP thereon were inextricably linked, the flaws and enormities of propertising culture were hardly noticeable. The actual property of the medium was allowed to infect our relationship with the message. The large middlemen exemplified by the media companies and publishers and their ability to create physical distributions of culture were necessary if one wished a cultural emanation to reach a wide audience.

Information communicated across computer networks does not exhibit to nearly the same degree the incremental costs that would be incurred when transmitting the same information upon a physical medium, be it a record or a book. To all intents and purposes, it costs about the same to make a musical recording available to one person as it does to a thousand. In removing the physical property that acted as a conduit for the intellectual, we reveal how little is Intellectual Property like its physical bondsman. When a teenager in his bedroom uploads a musical track so that it is globally accessible by millions, this becomes apparent beyond the wildest *gedankenexperiments* of generations past. Eben Moglen, Professor of Law and Legal History, Columbia Law School, puts it thus:

[F]rom the commoditization of art grew the belief that art could be owned. Which made sense even when art was bumps on a thin piece of tin foil in a plastic disc. But art has returned to the formlessness from which it came. It has returned to being what it was throughout the history of human beings until Edison: it has returned being something that must be shared to exist.³⁵

The final justification that the cultural industries give for their insisting on the property model is that the commoditisation it entails is necessary to provide the "incentives" to those who produce culture. To be convinced by such an argument, one must believe that culture was essentially moribund until the property model arrived to initiate it. In entertaining this belief, one endures the supreme irony in realising that much of the "property" of modern music derives from the forms brought to the West by African slaves, themselves perceived as "property", and who were certainly given no "incentive" to produce that music beyond its providing some balm to the viciousness of their circumstances.

Our species has the urge to create, to play with ideas and to communicate those ideas. The urge seems inherent, as unquenchable as any other drive that has led to the species's success. It has been so for millennia, letting bloom countless breathtakingly rich cultures even when physical existence was nasty, brutish and short. Creativity is not an endangered animal, whose delicate disinclination to breed requires careful tending. To suggest that the West, in time of unprecedented plenty, requires such base incentive to creativity is as strong an insult to the human spirit as any. We create, therefore we are. Moglen mocks the view to the contrary:

34 The open 'RFC' standards upon which the Internet is based
<http://www.rfc-editor.org/>

35 Moglen, Eben: "Die Gedanken Sind Frei": Free Software and the Struggle for Free Thoughts' 2004
<http://emoglen.law.columbia.edu/publications/berlin-keynote.html>

It has been objected that upon the abolition of private property in ideas and culture, all creative work will cease, for lack of "incentive", and universal laziness will overtake us.

According to this, there ought to have been no music, art, technology, or learning before the advent of the bourgeoisie, which alone conceived of subjecting the entirety of knowledge and culture to the cash nexus.³⁶

The "creative industries" might have helped in transmitting a specific subsection of specific cultures to an unprecedented audience, but that technocratic achievement leaves much to be desired in its cultural homogeneity it leaves in its wake. Certainly, society might wish to fund those with spectacular skills to continue to use those skills to the benefit of culture, but the "creative industries" have not been able to provide effective empirical validation to justify the use of the coercive sledgehammer of property rights in so doing. In the realm of patents, there has been virtually no research into whether they actually provide the incentives to technical progress they claim. A persuasive rational case can nevertheless be made for them, albeit without their present extraordinary scope. In the creative industries, however, the case for overarching property relations is more strained now than ever. As Moglen concludes:

If I can provide to everyone all goods of intellectual value or beauty, for the same price that I can provide the first copy of those works to anyone, why is it ever moral to exclude anyone from anything? If you could feed everyone on earth at the cost of baking one loaf and pressing a button, what would be the moral case for charging more for bread than some people could afford to pay? This represents the difficulty at which we find ourselves straining at the opening of the twenty-first Century.³⁷

VIII. The Blind Solipsism of "Moral Rights"

The idea-as-property model is not the only schema currently regulating culture, nor is it the only one that justifies the exclusive control and manipulation of specific ideas by privileged parties. The Continental European notion of Moral Rights over cultural creations gives solipsistic importance to the individual who creates an "original" work. The creator has sole say in the context of that work's use. These rights emerge from French Revolutionary notions of individuality, and initially seem more enlightened than the simple commoditisation implicit in the idea-as-property model³⁸. In analysing the Moral Rights model, though, one finds flaws just as distinct as with the property model. Its privileging of the author as the final arbiter of the fate of an "original work" is not unproblematic, to say the least. Culture begets culture, and every author and "creator" uses, orders and reorders the huge gift of pre-existing culture at his or her disposal. The creation would die were it not rooted in the deep cultural mulch of a shared language, musical heritage, quotation pool, gestalt poetic form, folktales and all other shared creative imagery. To privilege the author to too great an extent is to deify him or her, and to mask the broader context behind his or her achievement. To focus too intently on a creator's "Moral Rights" is to make it seem as if culture can be achieved atomistically, and to downplay the necessity of the shared commons of culture. Another chimera, it seems, just as seductive but illusory as ideas-as-property model.

Another flaw that both models share is their divisive distinction between the Creator and the "Consumer". In the property model, "consumers" are invited to visit the "property" - to look, but not to touch. In the Moral Rights model, supplicants are invited to worship at the Creator's feet: again, without daring to fiddle with the Canon. Both models imagine the reader, listener or audience member as a passive recipient of "content". In reality, mimesis is far more complex; necessarily, the reader participates creatively in a work just as intently as the author. Before the late 20th Century, too many cultural theorists had ignored this vitally reciprocal aspect of culture, obsessing instead about authorial intention and seeking in every cultural act some imprint of the creator's specific genius. The Romantic era was predicated on just this: the lone genius and his specific muse. In his famous essay, Roland Barthes deconstructs the cultural figure of the Author, and in so doing, indicates the origin of the ideas that lead to the Moral Rights model:

36 Moglen, Eben: 'The dotCommunist Manifesto'
<http://emoglen.law.columbia.edu/publications/dcm.html>

37 Moglen, Eben: 'Freeing the Mind : Free Software and the Death of Proprietary Culture'
<http://moglen.law.columbia.edu/publications/maine-speech.html>

38 Stamatoudi, Irini A.: 'Copyright and Multimedia Products: A Comparative Analysis' Cambridge University Press. 2001

French rationalism and the personal faith of the Reformation, it discovered the prestige of the individual [...] It is thus logical that in literature it should be this positivism, the epitome and culmination of capitalist ideology, which has attached the greatest importance to the 'person' of the author.³⁹

In making the simplistic originality of creation the linchpin of a Moral Right is to ignore the complex reality behind that creation:

We know now that a text is not a line of words releasing a single 'theological' meaning (the 'message' of the Author-God) but a multi-dimensional space in which a variety of writings, none of them original, blend and clash".⁴⁰

In the context where "[t]he text is a tissue of quotations drawn from the innumerable centres of culture"⁴¹, whence the atomic originality that so merits such covetous rights? Barthes concluded with his rallying call which, at the time, must have seemed of theoretical interest only to critics:

[W]e know that to give writing its future, it is necessary to overthrow the myth: the birth of the reader must be at the cost of the death of the Author"⁴²

In the world of networked communications, where the distinction between publisher, author and reader is increasingly meaningless, it seems prophetic and descriptive. In the world of blogs, wikis, musical cut-ups, collaborative software projects and systems like *Wikipedia*⁴³, who is the "Author" and who is the Reader? Who gives value to "content"? Those who initiate its script, or those who incorporate it within the tumult of discursive culture? Neither creaking legal metaphor – property nor moral-rights – describes a system which adequately comprehends the cultural maelstrom.

IX. The Battle for Culture

The effects of networked communication are leading to what might be termed a new global folk culture. Indeed, folk music has always had a sense of tilling its own cultural soil. In seeking new metaphors for describing the cultural process, and in finding legal frameworks better to support it, perhaps folk tradition provides some clues. It is therefore ironic that Bob Dylan, a man who so obviously used the rich culture of folk music in his creations, should have been one of the most vocal recent proponents for copyright term extension⁴⁴. That a man with his perspicacity and cultural roots could so completely have been seduced by the potent follies of the property and Moral Rights models of creativity is testament to the power of the propaganda that has bolstered them.

If we strip away the property facade, we find the true core of the current struggle within the realms of creative expression: a power-grab is being attempted by a restrictive cartel whose like we have not encountered since the days of the *Stationers'* guild. Certain conglomerations find that their business model, based on scarcity in distribution, has had the rug pulled out from beneath it by zero-increment network transmission. The unsentimental ruthlessness of the free market which is supposedly Capitalism's trump card should demand that these conglomerations either find a new business model in the new networked environment, or become extinct. Instead, they are tapping their reserves of power in an attempt to distort the market to fit the requirements of their increasingly obsolete business model, and fund the drafting of the laws necessary to bolster this veritable corporate welfare scheme. A culture that seems to be self-sufficient scares a media organisation which has been used to maintaining it on its own terms. A culture in which participatory

39 Barthes, Roland: 'The Death of the Author' 1968. *Image / Music / Text*. (Ed. and Trans. Heath, Stephen). Hill & Wong. 1977. 142

40 Barthes, Roland: *ibid*.

41 Barthes, Roland: *ibid*.

42 Barthes, Roland: *ibid*.

43 The Wikipedia Project

<http://en.wikipedia.org/>

44 Langvardt, Arlen W. and Langvardt, Kyle T: 'Unwise or Unconstitutional?: The Copyright Term Extension Act, the Eldred Decision, and the Freezing of the Public Domain for Private Benefit' 5 MINN. INTELL. PROP. REV. 193(2004) <http://mipr.umn.edu/archive/v5n2/Langvardt.pdf>

endeavours like the *GNU project*⁴⁵, the *Linux kernel*⁴⁶, the *Creative Commons*⁴⁷ project and *Wikipedia*⁴⁸ are flourishing is a palpable threat. With weapons like software patents, restrictive *DRM*, and laws like the *DMCA*, corporate entities hope to minimise the effect of such threats. In so doing, they explicitly act in ways that go far beyond what even the IP model was ever supposed to "protect".

As an example of how suppressive the current legal tools allow "content owners" to be is in the use of the US's *Digital Millennium Copyright Act*. Publishers are interested in releasing books in electronic form. They wish to protect their "intellectual property", and so wish to make these releases as restrictive as possible, preventing Fair Use rights, and even locking down public domain texts. In 2001, a Russian student and programmer named Dmitri Sklyarov visited the United States and gave a conference talk on the flaws in encryption technology of one particular company's electronic books, and how he was working on a project that allowed users free access to the text for which they purchased. He was then arrested and charged with a criminal offence under the *DMCA*⁴⁹. This begins to look like a direct attack on certain basic academic freedoms of expression and exploration. Alan Cox, a major British contributor to the *Linux* operating system kernel, feels that he cannot visit the United States for fear of being arrested for daring to publish information about insecure systems which publication might breach the anti free-speech clauses of the *DMCA*⁵⁰. This aggression against unauthorised cultural sharing continues apace. The president of the US Music Publishers' Association, Lauren Keiser, recently proposed that websites which publish the lyrics to pop songs should be imprisoned, rather than just fined:

[T]hrow in some jail time [and] I think we'll be a little more effective"⁵¹

As organisations realise how little protection their IP metaphor affords them in the torrent of networked communication, so becomes their reaction ever more hysterical. Not a month goes by without the proposal of some new draconian legislation to outlaw this aspect of culture or to restrict that, all in the name of "Intellectual Property" protection⁵². Technical proposals to bolster the draconian legislation include ever more restrictive *Digital Rights Management* technology (which Stallman suggests be redubbed *Digital Restrictions Management*), which prevents one from using one's legally licensed media except in the way proscribed by the "owner" of that media. A recent example of such technology included the installation by *Sony* audio compact disks of dangerously insecure *DRM* software on computers without the listener's knowledge⁵³. Technology companies are working with "content owning" companies to design a computer that, from top to bottom, only does with the data that passes through it what the corporations who nominally produce that data allow it to do. The user's system becomes the company's agent, rather than his or hers⁵⁴.

X. A Paradoxical Retaliation

At the moment, organisations like the *Electronic Frontier Foundation* and the United Kingdom's *Open Rights Organisation* are trying to draw to the public's attention these opening battles of the information age; the oligarchies are fighting with all their might to protect their notion of "*Intellectual Property*". At present, the battle is too esoteric for most people to care or to understand its potential significance. For those who do, the combatants seem hopelessly unequal. As Professor Lawrence Lessig commented after he had lost his case against copyright extension in the United States:

45 The GNU Project: a pioneering project in producing "copyleft" software
<http://www.gnu.org/>

46 The Linux Free Software Kernel: the core of an operating system released under a "copyleft" licence
<http://www.kernel.org/>

47 Creative Commons: cultural copyright licences, some of which allow "copyleft" rights
<http://www.creativecommons.org/>

48 *ibid.*

49 The EFF's 'US v. Elcomsoft and Dmitri Sklyarov Frequently Asked Questions list'
http://www.eff.org/IP/DMCA/US_v_Elcomsoft/us_v_elcomsoft_faq.html

50 "Declaration of Alan Cox in *Felten v. RIAA* (Aug. 13, 2001)"
http://www.eff.org/IP/DMCA/Felten_v_RIAA/20010813_cox_decl.html

51 Youngs, Ian: 'Song Sites Face Legal Crackdown'. *BBC News Online*. 12 December 2005.
<http://news.bbc.co.uk/2/hi/entertainment/4508158.stm>

52 'Text of the Family Entertainment and Copyright Act of 2005'
<http://www.publicknowledge.org/content/legislation/s167>

53 Krebs, Brian: 'Calif. Lawsuit Targets Sony'. *WashingtonPost.com*. 8 November 2005.
http://blogs.washingtonpost.com/securityfix/2005/11/calif_ny_lawsui.html

54 Schoen, Seth: 'Trusted Computing: Promise and Risk'
<http://www.p2pnet.net/trusted1.html>

Here was a case that pitted all the money in the world against *reasoning*. And here was the last naive law professor, scouring the pages, looking for reasoning.⁵⁵

If "all the money in the world" can bolster the ideas-as-property model so that it delivers a bedrock of privileges to an information elite, is there any hope for a model more suited to the flux of networked culture? The harsh IP landscape has engendered a modicum of ingenuity. One such "hack" on the current copyright regime is termed *copyleft*⁵⁶; this entails creating copyright licences which explicitly give users of a cultural "artefact" the right to share and manipulate that artefact, so long as they do not preclude the same rights of others in further enjoyment of the manipulated result. A famous example of such a licence is the GNU *General Public Licence*⁵⁷, under which whole swathes of computer software have been released as Free Software⁵⁸. Whilst not divorcing themselves from the ideas-as-property regime, these licences remove the sting from its worst excesses. Beyond such ingenuity, activist groups suggest that the public be "educated" about the threats to their creative freedom. Unfortunately for these groups, the issues currently remain too arcane and technical to rouse any particular public ire. Activist organisations might manage successfully to ameliorate particularly repressive legislation. They may have a victory here and a victory there, just sufficient to head off the worst excesses of the content oligarchies.

Winning such battles might be pyrrhic; in taking the sharp edges off the worst enormities of oligarchical excess, activist organisations may be falling into a trap. Each amelioration means one further opening of a safety valve. Were that valve to be left closed, it might eventually burst open, and in so doing, arouse public consciousness into a finally awakened state. If one fights the status-quo with weapons one knows will always be too puny to land the killing blow, one might inadvertently aid that status-quo's evolution. This represents a paradox whose counter-intuitive implications might be the most effective in countering "all the money in the world" and its IP model.

History demonstrates that tyranny always finally collapses under its own inefficiencies and contradictions. No lover of liberty would be satisfied to ameliorate repression so that it falls just below the level of tyranny; it is an honest but painful utilitarianism that realises that an eternity of noxious stable equilibrium is worse than a temporary purgatory of tyranny. The content oligarchies can only, finally, support their dying property-encumbered business models by the imposition of a cultural tyranny. Perhaps their worst excesses might be defeated through the paradoxical encouragement of those same worst excesses. If one has a belief that the Property model is so utterly antithetical to the networked cultural flux, then one must believe that its inconsistent thesis can be destroyed most effectively by allowing it to run its full course, *reductio ad absurdum*. The truly radical activist would report his neighbour for IP theft, report local businesses for software "piracy", search for obscure patent violations in as many popular technologies as possible – and report them to the patent owners. The true activist would encourage the most repressive, debilitating *DRM*, and encourage a multitude of technical and legal locusts – from computers that refuse to copy your data to business method patents that prevent you from competing in your career. Perhaps an information tyranny beyond Jack Valenti's wildest imaginings could be encouraged to emerge, teeter and finally bring down the whole wobbling carbuncle of "*Intellectual Property*" as currently conceived. Professor Moglen outlined the dialectic clearly:

With the adoption of digital technology, the system of mass consumer production supported by mass consumer culture gave birth to new social conditions out of which a new structure of class antagonism precipitates.⁵⁹

As with any class antagonism, the surest way to drive the dialectic forward is to encourage that antagonism to its logical conclusion. And the surest way to encourage that antagonism is to support those with "all the money in the world" in purchasing their class's demise. Hardin described the Tragedy of the Commons. It

55 Lessig, Lawrence: "Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity" The Penguin Press. 2004. 241

56 The Free Software Foundation: 'What is Copyleft?'. 2001
<http://www.gnu.org/copyleft/copyleft.html>

57 The GNU General Public Licence
<http://www.gnu.org/copyleft/gpl.html>

58 The Free Software Foundation: 'The Free Software Definition'. 2004
<http://www.gnu.org/philosophy/free-sw.html>

59 Moglen, Eben: 'The dotCommunist Manifesto' 2003
<http://emoglen.law.columbia.edu/publications/dcm.html>

seems that there in the digital realm, there might be a converse Tragedy of Property, whose inexorable progression one merely need catalyse.

Arguing that the status-quo can be the quickest route to its own destruction might seem counter-intuitive, but it has telling historical counterparts. Part of the success of the Civil Rights Movement's non-violent approach was in encouraging the predictable violent response that indeed ensued. The effect on middle-class opinion of the contrast between the peaceful protest and the violent reaction represented the tipping point in the movement's success. Rosa Parks's success was not in the predictable activist reaction of waving placards, writing letters to her Congressman or in rioting. Instead, she and her fellow non-violent protesters provoked the status-quo into the tyrannous over-reaction that would be its demise:

Nightly news reports enabled northern and international audiences to witness for the first time beating of non-violent civil rights protestors by segregationist law-enforcement officers. The 'American Dilemma' [...] had never been so graphically highlighted. This was a major factor in winning over public support for civil rights legislation [...] ⁶⁰

Some have argued that such paradoxical effects can even be observed in geopolitical affairs. Ronald Reagan's substantially escalating the cold war, and forcing the Soviet Union to spend itself out of existence, has been interpreted in this vein by some commentators⁶¹. It seems a specific example of a general martial arts strategy to use one's opponent's force against him or her. In some instances, this allowance can lead to the opponent's apparent success – but it is that success which causes him or her to lose concentration, lose balance and collapse.

Earlier in the century, the Temperance Movement was ironically destroyed by its final success in achieving prohibition. The establishment of the 18th Amendment demonstrated the final absurdity of the Movement's absolutism to the public with a far greater degree of success than any counter-education had. In every sense, the movement's downfall was seeded in its final success. When “reasonable” members of the general public suddenly realised they were to be considered criminal merely for enjoying a drink, the Amendment was doomed. Lawrence Gostin puts it succinctly:

Prohibition failed as social engineering primarily because it infringed upon the rights of many.⁶²

Powerful brewing concerns too had their hand in bringing Prohibition to a swift conclusion. Neither the majority of the American public, nor a large business interest therein, had any continued interest in continuing the experiment any further. Prohibition led to little but scorn, gangsterism and a destruction of small brewery businesses. It also led to the destruction of the Temperance Movement as a power block. In the Intellectual Property realm, allowing the content oligarchies to achieve their cultural equivalent of Prohibition could well provide an empirical education more effectively than any *EFF* campaign. Thus shall be revealed, the true nature of such repression in a society where “information wants to be free”⁶³. People will find their very instincts to share information – to communicate – will be frustrated arbitrarily at every turn.

The brewing interests helped to catalyse Prohibition's end. In any equivalent Intellectual Property “Prohibition”, we may well find the electronics manufacturers play a similar role. Until now, most have acceded to the demands of the content oligarchies, even though the latter have a much smaller market share. This reflects a conflict of interests: the electronics manufacturers often own the content oligarchies, and the schizophrenic corporate mechanics have not yet hit the balance books. If the “content companies” begin to promote legislation that is so destructive of greater culture that it affects the sales of the electronic goods that could conduit that culture, the electronics manufacturers - they who produce genuine, identifiable property - may flex their muscles just as the brewers did before them.

60 Verney, Kevin: 'Black Civil Rights in America'. Routledge. 2000. 60.

61 Herrmann, Richard K and Lebow, Richard Ned: 'Ending the Cold War: Interpretations, Causation, and the Study of International Relations'. Palgrave Macmillan. 2004. 48, 149, 154

62 Gostin, Lawrence A: 'Public Health Law and Ethics: A Reader'. University of California Press. 2002. 134.

63 Clarke, Roger: 'Information Wants to be Free'. Analysis of the origin of the expression. 2001
<http://www.anu.edu.au/people/Roger.Clarke/II/IWtbf.html>

"Intellectual Property" represents a metaphor over which battles will be fought. Our radically inter-networked culture reveals the atomic apportionment of imagination as divisive folly. Professor Moglen declaims it dramatically:

We, the creators of the free information society, mean to wrest from the bourgeoisie, by degrees, the shared patrimony of humankind. We intend the resumption of the cultural inheritance stolen from us under the guise of "intellectual property" [...] We are committed to the struggle for free speech, free knowledge, and free technology.⁶⁴

For those who know the property-as-idea model is untenable in this point of our species' cultural evolution, the best catalyst to the model's demise will be in encouraging its greatest hubris.

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64 Moglen, Eben: *ibid.*