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Ideology, Illusion and the Global Copyright Regime

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Introduction

The US Chamber of Commerce takes intellectual property (IP) seriously. It believes that copyright, patents and trademarks underpin 'economic prosperity and human progress' (Global Intellectual Property Center 2008, 1). It has set up the Global Intellectual Property Center (GIPC) to champion intellectual property rights (IPRs) because they are 'vital to creating jobs, saving lives, advancing global economic growth, and generating breakthrough solutions to global challenges' (Global Intellectual Property Center 2008, 1). These are strong words and large claims about desirable objectives – who could possibly be opposed to saving lives or solving global challenges?

As it turns out, there *are* people who don't care much for IP. The GIPC says there are two 'serious threats' to the current IP regime in the world – and hence, presumably, to prosperity, progress and 'breakthrough solutions'. The first comes from organised crime and terrorist groups, 'criminals who have built a $600 billion global criminal enterprise of counterfeiting and piracy that destroys jobs, undermines innovation, and endangers consumers' (Global Intellectual Property Center 2008, 1). The second comes from a group of people driven by 'ideology'. These are the critics of the copyright and IP system, and they constitute:

> a growing movement of anti-IP activists drawn from universities, foundations, non-governmental organizations (NGOs), ideologically driven interest groups, and even governments. These activists promote the idea that IP rights should not be recognized and that the protection of IP impedes progress and hurts the poor. They are spending tens of millions of dollars annually to transform this ideology into governmental and multinational policy. (Global Intellectual Property Center 2008, 1)

Authors of critical texts on the copyright system may find it chilling to be identified as a serious threat – and by the largest lobbying organisation in Washington, no less – alongside the owners of a '$600 billion global criminal enterprise'. It would be uncharitable, nevertheless, to suppose that any such effect was intended, and it is encouraging to know that the world's biggest business federation keeps up with the academic literature, even if, on the basis of the summary quoted, it has not grasped all the nuances of the debate.[2]

By contrast, if the global scale of routine copying and downloading is anything to go by, ordinary people do not share the Chamber of Commerce's concerns. They treat IPRs with scant respect. They ignore the law whenever they want to make a photocopy of a text, or to download a popular

1 This chapter extends arguments about the political economy of IP first put forward in Darch 2004, 488–501. An earlier version was presented to the III CopySouth Workshop in Brazil in June 2010.

2 At the risk of stating the obvious, few critics would seriously argue in such crude terms that 'IP rights should not be recognized' or that 'the protection of IP impedes progress'. The critique is rather that there are too many protections and they last too long, that the main beneficiaries are corporations rather than creators, and that developed countries derive significant advantage at the expense of poor countries.

song or movie, not caring whether such behaviours are legal or illegal. The boundary between original, copy and counterfeit is blurred. People buy cheap 'pirate' CDs and DVDs, football shirts and sports shoes, and even – recklessly – medicines from street vendors and discount stores. In this environment, IPRs become 'as fleeting as the scent of jasmine':

> BEIJING – Settling not on the industrious sons of China, nor on their ware-covered blankets, ownership rights of intellectual property fluttered silently by, unseen, on Monday, as does the gentle mayfly on a warm harvest-time breeze. 'Is this a pirated DVD of Transformers 2 dreaming it is an original? Or is it an original Transformers 2 dreaming of an adventurous life as a pirate?' a sidewalk merchant in Tiananmen Square whispered to a moment already gone, as his hands clutched some worldly illusion of the Michael Bay film. 'Eight dollars. Plays anywhere in the world'. In their great wisdom, the merchants also carried forth the ancient teachings of Zhuangzi – who spoke of how time is a riddle answered by eternity – to the equally fleeting earthly conceits of trademarked wristwatches, electronics, clothing items, Starbucks, and automobiles. ('Intellectual property rights' 2009)

We can guess from the references to Zhuangzi and the butterfly's dream that *The Onion* is onto something serious here.[3] When digital objects – films, recorded music, software programs and written texts – can be reproduced at negligible cost, 'authentic' and 'inauthentic' copies may be indistinguishable, and IPRs can indeed become as fragile and fleeting as a 'mayfly's wing in autumn'.[4]

These then are two contrasting views of the socio-economic importance of the copyright and IP system. One sees the system as beneficial in terms of wealth creation and innovation. If some IP protection is a good thing, more IP protection is even better. The other sees copyright as an irrelevant legal technicality that is largely unenforceable. It can be made fun of. The point that both sides agree on is that breaking the rules has never been easier. How can these contradictory viewpoints be reconciled and explained?

This chapter first presents an examination of the matrix of discourses that characterise the literature on copyright and IP, showing the role played by ideology, illusion and deceit. Second, starting from the premise that the modern, generalised expansion of protection (propertisation) is a system failure, the text argues that the change from metaphorical to literal in reading the expression 'intellectual property' is both cause and effect of the shift towards privatising knowledge. Third, appropriating aspects of Lowi's 'abdication theory' to describe how copyright policy is made and diffused, evidence is presented to show how industry bodies such as the Recording Industry Association of America (RIAA) or the Motion Picture Association of America (MPAA) help constitute a form of sub-government or 'iron triangle' (McCubbins 1999, 32). Bureaucrats, politicians and the self-selected members of industrial interest groups collude to make policy, pass legislation and protect big capital from risk – especially in the entertainment industries – at public expense. This is an unacknowledged core function of IP in the age of the knowledge economy. The conclusion to the chapter turns to the claim that piracy and counterfeiting are sources of funding for terrorist groups and organised crime, citing research that argues for a less alarmist and more nuanced assessment of this 'fear and threat leavened topic' (van Duyne and Vander Beken 2009, 262).

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3 In an extensive literature, see especially Chong 2006, 370–91.

4 The *counterfeiting* of tangible goods such as medicines constitutes a distinct category of offence against IP protection mainly because in the absence of quality control the consumer is exposed to risk. But this is an argument for regulation rather than patent protection, since generics are safe.

IP and Competing Discourses

The first response to the problem of reconciling the assertion that vigorous IP protection is fundamental to human well-being with an almost universal lack of respect for copyright law, is to point to a *disjuncture* in the discourses around the issue. The system is seen by many to be 'broken', and the means of ignoring the law – photocopiers, video machines, computers – are readily available to almost everybody in the global north and to many in the global south, with little risk of consequences. As a result, copyright and IP are the subjects of parallel and sometimes competing discourses. There are legal, political, economic and information-science analyses that are frequently compartmentalised from each other. There are multiple debates and propaganda wars. There are technical apologetics and political critiques. Within this cross-disciplinary and methodological matrix it is possible to discern four broad categories of intervention, characterised below as 'conventionalist', 'deconstructionist', the 'champions' and the 'conjurers'.

This situation derives from technological developments that gathered momentum in the 1970s, and destroyed the implicit social contract at the heart of IP. Before this, copyright violations were typically committed only in the sphere of commercial competition; subsequently, consumers themselves became the main offenders, and in vast numbers. The first change came in the area of photocopying. In the mid-1970s, the Xerox Corporation, which had enjoyed a near monopoly in dry photocopying from the 1950s, became involved in a series of anti-trust lawsuits that led to the freeing of its patents and its abandonment of the small-copier end of its market (Owen 2004, 279; Jacobson and Hillkirk 1986, 70–75; Kearns and Nadler 1993, 62–8). Cheap, adaptable machines from Japanese manufacturers made it possible for individual consumers to accumulate personal libraries of journal articles and chapters from books at a lower cost than buying the original works. Soon afterwards, in the 1980s, improvements in the quality of audio cassettes allowed listeners to put together their own extensive recorded music collections, more flexibly and cheaply than by buying vinyl records. The introduction of the video cassette created a similar environment for recording television programmes and broadcast films. The last step was to move from analogue appliances to digital devices. The distinction between text, music, video and image disappeared. All became digital objects, and 'entertainment devices [... became] copying machines with easy distributive capacity' linked globally by the Internet and the World Wide Web (van Duyne and Vander Beken 2009, 262).

This process in several previously distinct fields – printed text, recorded music, film – created a new popular perception about legitimate practice with regard to protected material. Behaviour changed significantly. For the first time, instead of reading a scholarly article in the library while making notes, students could take a photocopy home at negligible financial cost. Music fans could make cassette anthologies of their favourite pieces, organised in any way they pleased.[5] The battles that have raged in recent years over the protection of 'content' from this kind of consumer freedom – and the threat to the profits of the international entertainment industry – have been fought with a sharp awareness of the fragility of IP in public consciousness.

One outcome has been a panicky tendency on the part of the big entertainment conglomerates to go after their own customers, with mixed results. In a report published in late 2007, for example, the *Washington Post* wrote that 'despite more than 20,000 lawsuits filed against music fans ... the recording industry has utterly failed to halt the decline of the record album or the rise of digital

5 Ironically, the Hollywood film *High Fidelity*, starring John Cusack (2000, dir. Stephen Frears) includes scenes in which the main protagonist ruminates on the aesthetic principles of making such tapes for his girlfriends.

music sharing' (Fisher 2007). A year later, in 2008, the industry federation, the RIAA, switched tactics and decided to start suing Internet service providers instead (Albanesius 2008). Consumers, distributors and analysts seemed as far apart as ever, talking different languages and deploying different discourses.[6]

Conventionalists or Conceptual Technicians

In terms of legal philosophy, 'conventionalists' – often academics – operate within a framework of legal formalism. This position treats law as a self-contained and coherent thought system that need take little account of social reality. Thus the fairness, effectiveness and character of the IP system are taken for granted; the questions asked are about its administration. Surprisingly, perhaps, there is even a body of literature in this category produced by African scholars (see, for example, Uvieghara 1992; Mazonde and Thomas 2007; Seuna 2008), uncritical apologists of the copyright regime *as a regime*, concerned primarily to explain its workings in their own national circumstances and to implement it locally as fully as possible, starting from the assumption that:

> the developing world lags behind in taking advantage of the move towards the commercialising [of] intellectual property. (Mazonde and Thomas 2007, 1)

IP is assumed to play a developmental role, and to function in the same way in both industrialised and pre-industrial economies.

Deconstructionists or Critics of the System

Unlike conventionalists, the deconstructionists are philosophically more inclined to legal realism. They are interested in how concrete knowledge of local social conditions might lead to better IP policies. They share the belief that the system is 'broken' and needs to be either fixed or abandoned. They dispute whether IP still serves the purpose of encouraging creativity; whether it has ever served such a purpose, or was always a mechanism to restrain trade and benefit particular entrepreneurs; whether it now acts internationally, by design or accident, to keep control of knowledge production in the global north.

The argument about original purpose takes the title of the Statute of Anne and the wording of the copyright clause in the US Constitution at face value. These expressions of an Enlightenment sensibility identify the primary beneficiaries of protection as authors and creators. Unfortunately, the idea that this group benefits significantly:

> is no longer true ... Proposals ... to extend the term of copyright ... present us with a striking snapshot of how far adrift current copyright thinking is ... Instead of protecting authors, these proposals are heavily weighted in favor of distributors such as publishers ... term extensions are being pushed by the estates of long deceased authors. (Patry 1997, 908)

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6 For a detailed analysis of this particular tactic, pursued mainly by the RIAA and MPAA federations rather than the companies themselves, see Hughes 2005, 725–66. Hughes criticises the quality of statistical data on downloading, and describes the argument that 'every music download corresponds to a lost sale' as 'obviously wrong' (Hughes 2005, 736).

But another view of the copyright system says it was designed from the beginning to benefit *distributors* (printers, booksellers and publishers). The rest is merely smoke and mirrors:

> the publishers ... created this right for themselves as a necessary protection for their business ... the interest protected was still essentially, in its practical effect, the publisher's exclusive right to copy. (Phillips et al. 1997, 12)[7]

Either way, contemporary copyright is far from being 'a vehicle for the promotion of learning' and has become rather a 'form of business protectionism divorced from the creation of new works ... little more than a set of industry-drafted technical requirements prohibiting all access except as approved by the corporate rights holder' (Patry 1997, 909–10).

The third argument takes this insight a step further. Copyright has a negative effect on information flows between industrialised or developed countries and the global south. This issue has only recently begun to attract widespread analytical attention, mainly by scholars from Asia, the Americas and Africa (see, for example, Navarrete 2006). The argument rests on a particular approach to the political economy of the information society (Story et al. 2006). Indeed, by following 'the usually reliable idea that one looks for the largest source of revenue to discern motive' it is easy to see that the international IP regime may well not be entirely 'consistent with the public interest', at least in poor countries (Patry 1997, 925, fn. 82 contd). A key moment in the development of the southern critique of IP occurred in the mid-1990s, when international trade rules were redefined during the demise of the GATT system. The new regulations imposed:

> a definition of intellectual property rights directly disadvantageous to Third World countries which [... had] been brought within the scope of a regime where they will be held strictly accountable for their state of exponentially increasing indebtedness. (Frow 1996, 89)

Deconstructionists may be academics but can also be artists, writers and activists. Although they are critical of the way in which the IP regime works, they do not necessarily agree on the remedy: some want to abolish or abandon protection altogether, in favour of other ways of rewarding creators, while others believe that the system can be reformed. The group includes such figures as John Perry Barlow, Lawrence Lessig, Jessica Litman, Siva Vaidhyanathan, Peter Drahos, James Boyle and others. Their critique of copyright derives mainly from a northern perspective – in other words, they have no special interest in the impact that IPRs have in the global south in terms of culture, language or access to education.

The Champions or Organisational Defenders

The institutional weight of government agencies and international organisations such as WIPO, Unesco and others, is usually placed behind the rapidly expanding global regime of IP protection. Thus the World Trade Organization (WTO) pushes for TRIPS agreements, while the Office of the US Trade Representative (USTR) has a special section (the Office of Intellectual Property and Innovation) which 'uses a wide range of bilateral and multilateral trade tools to promote strong intellectual property laws and effective enforcement worldwide' (Office of the US Trade

7 For a more detailed account of this argument, see Darch 2004, 493–5.

Representative 2011). This includes negotiating, implementing and monitoring trade agreements, especially bilateral ones, which are designed to protect US economic interests. The USTR also publishes an annual report card that takes a patronising tone towards sovereign governments that it places on a 'priority watch list' for IP violations. Thus, Thailand could try harder, and its government:

> made little progress over the past year in addressing the widespread problems of piracy and counterfeiting. The United States is encouraged, however, by the positive statements made by senior Thai officials ... on the new Government's intentions to make IPR protection and enforcement a higher priority and to address the longstanding deficiencies. (Office of the US Trade Representative 2009, 21)

This discourse is characterised not only by its tone of unquestioning self-righteousness, but by an assumption that IPRs are both neutral and absolute, socially and economically beneficial and have only to do with trade.

The Conjurors or Vested Interests

Large commercial vested interests are often organised into industry federations or think-tanks, producing ostensibly objective research and statistics. Two of the most influential of these have already been mentioned, the Recording Industry Association of America (RIAA) and the Motion Picture Association of America (MPAA). Other examples taken more or less at random might include the Alliance Against Counterfeiting and Piracy (AACP); the Alliance Against IP Theft; Business Action to Stop Counterfeiting and Piracy (BASCAP); the International Federation of the Phonographic Industry (IFPI); and the International Intellectual Property Alliance (IIPA). There are many others, sometimes nested into each other like Russian dolls.

These organisations are 'conjurors' because they produce and perpetuate 'facts' – assertions unsupported by evidence – out of thin air. To take a specific example, it has often been stated that 750,000 jobs have been lost in the United States because of IP infringement, and that the annual cost of such infringements is somewhere between $200 and $250 billion – that is, about 28 percent of the total value added to the US gross domestic product by the 'core copyright industries' in 2007.[8] These 'authoritative' figures were being quoted as early as 2002, and continue to be cited up to the present in both industry and government publications, with reference to fields as diverse as earth-moving equipment and high fashion (US Customs and Border Protection 2002; US Chamber of Commerce 2007; 'From fake handbags to fake cars' 2009; Miller and Taylor 2010). They appear in documents issued by US government agencies such as the Department of Commerce, the Customs and Border Patrol, and the Patent and Trademark Office. However, the real source of these numbers is untraceable:

> Try to follow the thread of citations to their source, and you encounter a fractal tangle of recursive reference ... Usually, the most respectable-sounding authority to cite for the numbers (the FBI for the dollar amount, Customs for the jobs figure) is also the most prevalent – but in each case, that authoritative 'source' proves to be a mere waystation on a long and tortuous journey. (Sanchez 2008)

8 Total value added taken from Siwek 2009, 3.

The earliest occurrence of the number of job losses attributable to IP infringement appears to have been nearly a quarter of a century ago, in 1986, when US Secretary of Commerce Malcolm Baldridge was quoted as estimating the figure as falling in the range 'anywhere from 130,000 to 750,000' (Sanchez 2008). Similarly, the $250 billion figure can be tracked back to an article on counterfeit products in *Forbes Magazine* for 25 October 1993 (Sanchez 2008). But what the magazine article actually says is that counterfeiting is a global industry worth '$200 billion'. It is obvious that the value of a worldwide industry, however illegal, is unlikely to be the same as the losses incurred by the national economy of the United States as a result of its existence.

The seemingly endless chain of references to these numbers creates the powerful impression that despite the best efforts of the valiant defenders of creativity and innovation, the whole mighty edifice of IP is about to come crashing down about our ears:

> both numbers are seemingly decades old, gaining a patina of currency and credibility by virtue of having been laundered through a relay race of respectable sources ... these numbers are always invoked as proof that the piracy problem is still dire – that everything we've done to step up international enforcement of intellectual property laws has been in vain [... the International Anti-Counterfeiting Coalition]'s 2005 publications still cite ... 1995 congressional testimony, from which it seems safe to infer that they have no more recent source. (Sanchez 2008)

It seems likely that other numbers like the GIPC's '$600 billion global criminal enterprise' – are of similarly doubtful provenance. The clear lesson is that in the field of IP analysis, perhaps more than in any similar sub-discipline, an attitude of Cartesian scepticism, especially towards statistical data, is absolutely essential.

Metaphorical and Literal Readings of the IP Concept

The 'propertisation' of the scientific record and literary production is the logical consequence of a process of labelling.[9] If we call something 'property', even metaphorically, then we should not be surprised if it ends up being treated as property, as something that can be stolen (Turner 2010). What metaphors do is to take two points of reference and map them conceptually onto one another. 'All the world's a stage', Shakespeare famously said; life is similar to a theatre because we make an entrance when we are born, we play a part or parts throughout our lives, and we make an exit when we die. It is clear, however, that while the world may be *like* a theatre in some respects, this is not the same as saying that it actually *is* a theatre. In the sphere of law, to take another example, improperly obtained evidence is *like* the 'fruit of a poisoned tree' because the impropriety at the root of the process 'poisons' everything that depends on it. Again, we understand that this is not the same thing as saying that improperly obtained evidence is *literally* toxic. By analogy, although IP may be *like* real property in significant respects, this is not the same thing as saying that *it is* real property. The metaphorical character of many phrases has weakened over time until they can be described as 'dead metaphors'. An idea may be easy to 'grasp', for instance, even though a moment's thought tells us that we cannot actually take hold of it with our hands.

Colourful and metaphorical expressions are commonplace *within* IP discourse, although some of them may not even be noticeable as such. The most obvious examples include 'pirates' and

9 'The duration and scope of IP rights expand without limit. Courts ... describe IP as a type of absolute property, bereft of any restraints' (Carrier 2004, 4).

'piracy', but even 'theft' in this context is a metaphor.[10] Nevertheless, hardly any researchers have systematically explored the idea that the choice of the word 'property' to describe IP itself has had a determinant effect on the way we conceptualise it, and thus on the 'propertisation' outcome.[11] By calling ideas property, we 'choose sides' and align ourselves with those who argue that:

> intangible creations deserve to be treated the same as material – corporeal – holdings, with many of the same attributes and the same rights of ownership in perpetuity. The use of the word 'property' in this sense serves as a metaphor intended to underline the identity ... between corporeal things and intangible matter. (Baron 2007, 7)

Such a formal 'property' relation in ideas is technologically determined. It cannot exist before the invention of printing, although very early texts do recognise problems around what might be termed moral proto-rights. The Bible contains a stern warning on respecting textual integrity,[12] and the Romans seem to have recognised 'plagiarism' as a moral offence, as an often-cited quotation from Martial demonstrates.[13] But even Martial was using the word *plagiari* (kidnappers of children for sale as slaves) *metaphorically* to describe those who 'stole' his poetry. Although it is widely believed that 'intellectual property' is a comparatively recent coinage, dating from the middle of the nineteenth century, recent research has traced usages of the word 'property' attaching to authors' and publishers' rights in such expressions as 'literary property' back to the beginning of the modern copyright period. Its use in other European traditions is widespread and venerable. In Spain, for example, the term 'propiedad intelectual' was conterminous with copyright throughout much of the nineteenth century (Hughes 2009, 15). Early drafts of the Statute of Anne mention 'the Property of Copies of Books', although this usage may have been referring to the physical objects themselves rather than intangible 'works' in the modern sense (Hughes 2006, 1012).

The two key cases of eighteenth-century British copyright law (*Millar* v. *Taylor* [1769] and *Donaldson* v. *Beckett* [1774]) can be read as marking the end of this early literalism about the 'property' character of copyright,[14] although copyrights continued to be 'unequivocally viewed as property' well into the nineteenth century (Hughes 2009, 1018). It is hard, therefore, to argue that any shift from a metaphorical to a literal understanding of the term 'intellectual property' was linear or chronological. Nonetheless, there are still significant differences, even today, between property and intellectual property.

By mapping the relationship between property and 'intellectual property' graphically, it is possible to see how such a change in understanding has occurred, and what the implications are. In Figure 6.1, the expression 'intellectual property' is mapped as metaphor, explicitly as 'ideas ≈ property' or 'ideas are similar to property'.[15] The overlapping area marked 'some shared similarities' is the area of congruency, where the shared characteristics of property and IP exist. The remaining areas, which do not overlap, are where the non-congruent qualities of property and IP lie. Thus, for example, while economic IPRs can be alienated or sold, moral rights are inalienable; IP is non-rivalrous; and it is intangible.

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10 For an analysis of *internal* metaphor in the field, see Loughlan 2006, 211–26.

11 'relatively little work has been done to isolate and analyse the use of metaphor in the discourse of intellectual property' (Loughlan 2006, 216).

12 Revelation 22:18–19 threatens extremely severe consequences for either adding to or taking away from 'the words of the book of this prophecy'.

13 Martial, *Epigrams*, 1:52.

14 'The lesson of these two cases [is] one in which the property construct failed' (Hughes 2009, 1018).

15 Note that the mathematical symbol is ≈, not =, i.e. 'is similar to' not 'is equal to'.

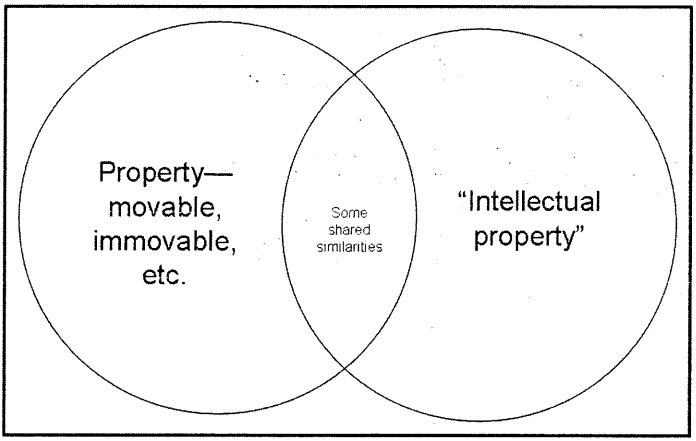

Figure 6.1 Intellectual Property as Metaphor

The second stage in the propertisation process is the transformation of IP into a conceptual category that is neither similar to nor subordinate to property – i.e. is not a *sub-category* or *kind* of property – but is rather *coordinate* with it, a parallel concept. Thus we may map the two concepts as 'ideas ≠ property', or 'IP and property are not the same', but are logically coordinate with each other. The force of metaphor is partly lost, as 'intellectual-property' becomes a special legal relation with its own sub-categories (see Figure 6.2).

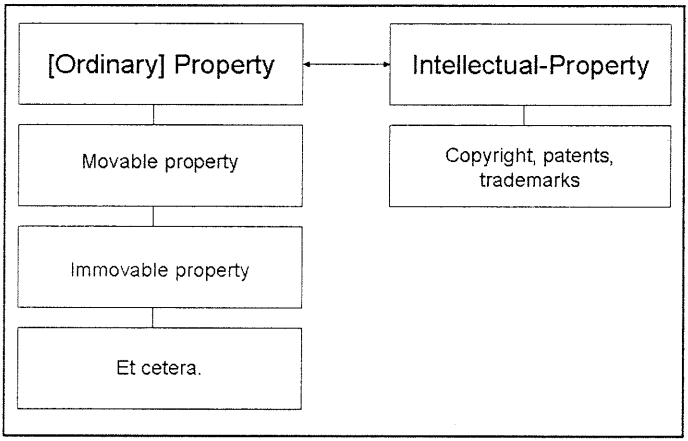

Figure 6.2 Intellectual Property as a Parallel (Coordinate Category)

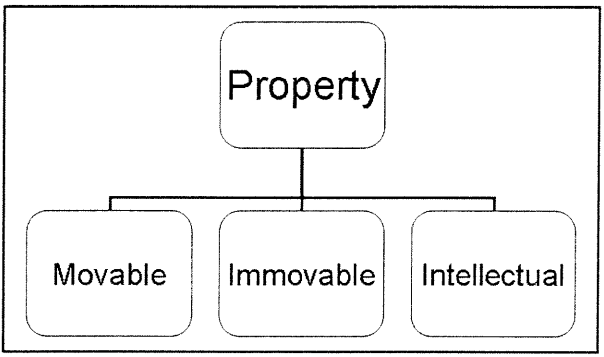

Figure 6.3 Intellectual Property as a Sub-Type of Property

The final stage in the process occurs when 'propertisation' is complete, and intellectual property becomes simply another kind of property, alongside the tangible sub-categories. The metaphorical character of the expression is completely embedded, and we can map the relation between the two terms as 'ideas ≤ property' or 'ideas are a subgroup of property' (see Figure 6.3).

But if IP is a metaphorical conceptualisation that has got out of hand, what are the alternatives? An easy thought experiment has been proposed to rethink non-exclusive ways of expressing a creator's legitimate interest in literary, cultural or scientific works. We might, for example:

> think of intellectual property ... as an agricultural marketing board, with intellectual property law functioning as the market intermediary. Intellectual property law provides a guaranteed return on investment (an incentive) for creators, and determines a fair price for consumers ... we might think of intellectual property as a state corporation, such as a public utility. Intellectual property law makes decisions about the amount and distribution of knowledge assets based on governmental policy ... We might even characterize intellectual property as a form of state subsidy ... a response to a systemic private sector funding gap in a particular industry or geographical location. Intellectual property law fulfills a similar function, providing the necessary supplemental financing to the private sector to fund the production of knowledge assets. (Adams 2009)

By recognising that there is an 'unacknowledged process of associative thinking that accompanies linear legal reasoning' we can thus begin to imagine other ways in which the benefits of cultural and scientific behaviours might be shared in society (Adams 2009). Metaphors can and do assist in 'constructing legal meaning' and the property metaphor is not the only possible way of constructing meaning around authorship and the diffusion of ideas.[16] At the present time, however, it remains the determinant one.

16 For an exercise in exactly this kind of re-imagining, see Smiers and van Schijndel 2009.

Political Economy, 'Financier's Copyright' and Abdication Theory

The GIPC, already mentioned, has no doubt about the overriding importance of IP and IPRs. They are, says the GIPC, 'the defining economic currency of the 21st century [... they drive] innovation, job creation, and [US] global competitiveness' (Global Intellectual Property Center 2008). The first part of the statement may be partially true, but the second part is by no means the whole story. To fully grasp what is actually going on, it is necessary to understand the importance of the so-called 'copyright industries' to the US economy; the 'distinct conception of copyright' that the film and recorded music industries have been instrumental in developing (Drahos with Braithwaite 2002, 176); the role of the state in socialising large-scale economic risk in the United States, and the consequent capture of the legislative process by organised special interests; the imposition by the United States of its own IP system on the rest of the world; and the distortion of IP discourse by the 'conjurors' in the service of this process.

First, the economic importance of IP, especially in the United States; there is compelling evidence that the 'copyright industries' do indeed make a significant ongoing contribution to US economic well-being. The *core* copyright industries, as defined by the World Intellectual Property Organization (WIPO) for statistical purposes, consist of nine broad categories, namely the press and literature; music, theatrical productions and operas; motion pictures and video; radio and television; photography; software and databases; the visual and graphic arts; advertising services; and copyright collective management societies (*Guide* 2003, 28). Between 2003 and 2007 these 'core copyright industries' consistently accounted for over 6 per cent of the total US gross domestic product, amounting in dollar terms to $700 billion at the beginning of the period and just under $890 billion by the end (Siwek 2009, 3). By a broader definition, which includes the core industries listed above and three other more marginal WIPO-approved categories, the sector was worth $1.52 trillion or 11 per cent of US GDP by 2007 (Siwek 2009, 3). These percentages held steady up to the end of 2007 – it is still unclear what impact the global recession that started in December 2007 has had. Moreover, in 2007, according to a presumably authoritative survey by the International Intellectual Property Alliance:

> the 'core' and 'total' copyright industries' contribution to real economic growth was 22.74% and 43.06%, respectively, having increased from 13.40% and 31.19% in 2006, more than double the current dollar shares of US GDP achieved by the copyright industries in those same years. (Siwek 2009, 3)

These industries did not become important through the unmediated operation of market forces, however, but through a venerable tradition of 'cartelism and protectionism' initiated by the Hollywood motion picture industry, and supported by the major media and entertainment multinationals, including the recorded music industry (Drahos with Braithwaite 2002, 174). The concept of 'financier's copyright', as Drahos and Braithwaite have termed it:

> rests on the view that copyright must serve the financier of copyright works by guaranteeing rights of exploitation in whichever markets the financier chooses to operate. If new technologies ... come along ... then the financier is entitled to new rights that allow him or her to manage the contingencies of the technology ... all other interests ... are subordinated to the producer's interest in maintaining a global system of production and distribution ... private informational assets must never enter the public domain where they can be the subject of market competition ... Ideally in

> this world corporations would be globally recognized as the actual authors of copyright works. (Drahos with Braithwaite 2002, 174)

What are the mechanisms through which an industrial sector – Hollywood, recorded music, publishing, entertainment – manages to manipulate the legislative process to produce in law a concept of IP that includes not only a literalist reading of the 'property' metaphor, but also a complete abandonment of Enlightenment purpose? How can a sector manipulate political processes to produce simultaneous but contradictory public perceptions that IP is an immensely powerful instrument in the service of social well-being, and so fragile that it is under threat from organised crime, terrorism and even academic criticism?

To answer these questions, which have a direct bearing on an increasingly globalised IP regime, it is necessary to look to a debate about the emergence of the 'administrative state' in the United States. The US Congress, it is argued, has historically delegated more and more of its policy-making power to Federal agencies governing such sectors as trade and commerce, agriculture, transport and securities. In the 1930s these sectoral bureaucracies freed themselves from effective political oversight by elected politicians, and grew significantly in size and number, first under the New Deal, and then in conditions of wartime:

> parceling out policy-making power to the most interested parties tends strongly to destroy political responsibility. A program split off with a special imperium to govern itself is not merely an administrative unit. It is a structure of power with impressive capacities to resist political control ... The public is shut out. (Lowi 1979, 59)

By the 1960s, bureaucrats themselves were making policy, under the influence of organised interest groups lobbying for particular outcomes. The Congress had become a 'consensual body', and had 'abdicated' its responsibilities (Lowi 1979, xii). Indeed, after the Roosevelt administration, argued Lowi, 'the historic continuity of [US] national politics [had] been broken' (Lowi 1979, xiii).

Lowi's 'abdication thesis' is mainly of interest here for the extraordinary accuracy with which it characterises the processes by which copyright legislation is currently drafted and adopted in the United States – and hence, eventually, enforced in the rest of the world through such devices as 'harmonisation' or bilateral Free Trade Agreements. Policies, says Lowi, do not come:

> from voter preferences or congressional enactments but from a process of tripartite bargaining between the specialized administrators, relevant members of Congress, and *the representatives of self-selected organized interests*. (Lowi 1979, xii)

There is evidence that the process of developing copyright legislation fits the abdication thesis closely, with only formal gestures towards what Lowi called the 'process of tripartite bargaining' between industry representatives, agencies and elected representatives. In a short memoir written in 1996, Patry describes how copyright interest groups 'draft legislation [that] they expect Congress to pass *without any changes*' (Patry 1996, 141, emphasis added):

> they [i.e. the interest groups] are drafting the committee reports and haggling among themselves about what needs to be in the report ... some copyright lawyers and lobbyists actually resent members of Congress and staff interfering with what they view as *their* legislation and *their* committee report ... we have, I believe, reached a point where legislative history *must* be ignored

> because not even the hands of congressional staff have touched committee reports. (Patry 1996, 141, emphasis in original)

Patry describes how in May 1994 an 'industry consensus' bill was submitted to Congress, and although it was initially rejected, 'a revised bill *drafted entirely by the industry*' was eventually passed in June 1995 (Patry 1996, 142, emphasis added). He comments that processes like this are 'not legislating. It is letting those who had a seat at the private sector table divvy up the spoils among themselves' (Patry 1996, 143).

The last stage in this process is spreading these industry-defined IP practices from the United States to other countries around the world. This is increasingly done through the imposition of bilateral trade agreements:

> Promoting the enforcement of IPR is an important component of US international trade policy. Since ... 1995 ... trade policy has been used to enforce IPR abroad ... The United States ... pursues international IPR support through regional and bilateral free trade agreements (FTAs), which often include IPR commitments by US partners exceeding their TRIPS Agreement obligations ... Other trade policy tools also are available for US efforts to advance international IPR ... the Office of the US Trade Representative (USTR) identifies countries providing inadequate IPR protection in its annual 'Special 301' report ... the United States may consider a developing country's IPR policies and practices as a basis for offering preferential duty-free entry to certain products from the country, and can suspend GSP benefits if IPR protection is lacking. (Ilias and Ferguson 2009, unpag. summary)

When financier's copyright meets congressional abdication and trade policy in this way, global taxpayers shoulder the burden of insuring national copyright industries. Lowi calls this the 'state of permanent receivership' (Lowi 1979, 279–89). In such a situation, the state socialises business risk by underwriting in various ways 'any institution large enough to be a significant factor in the community', guaranteeing social and economic stability 'regardless of inequities, inefficiencies, or costs of maintenance'.[17] We have seen this system in operation in the series of bailouts that followed the financial crisis of late 2007. But any company or sector that is regarded as too big or important to be allowed to fail itself represents a regulatory failure, because ordinary market forces are inoperative. Whatever else one thinks of it, capitalism *cannot* mean insuring commercial enterprises from mistakes, environmental changes or competition. It is necessary to realise that the copyright system itself is also a vital part of this 'general floor under risk'. Its function is *precisely* to guarantee the stability of US core copyright industries and to protect them *against* both market forces and technological change. The rest is illusion.

IP, Organised Crime and Terrorism

It is common for industry associations to declare that counterfeiting and other IPR violations generate funds for 'organised crime' and terrorist organisations. Such claims have been made by, amongst others, the Alliance against Counterfeiting and Piracy (AACP), by the International Federation of the Phonographic Industry (IFPI), and by Rand Corporation researchers on behalf of the Motion Picture Association (*Proving the Connection* 2003; *Music Piracy* 2004; Treverton

17 Lowi 1979, 279–80.

et al. 2009). The idea that such a link might exist derives from police intelligence information. In the United Kingdom the National Criminal Intelligence Service, which was merged into the Serious Organized Crime Agency in 2006, started the ball rolling in its National Threat Assessment for 2000, where 'IP theft' was listed for the first time as a 'threat':

> Although anecdotal, we knew that these links existed because of the evidence which our members' anti-piracy units were turning up ... none of it was being systematically documented. Then, for the first time, the National Criminal Intelligence Service (NCIS) listed intellectual property theft in its 2000 National Threat Assessment and accorded it a high impact assessment ... The connection was reinforced in the following year's National Threat Assessment, but there were issues ... which caused a real lack of coordination of any hard facts. (*Proving the Connection* 2003, 1, emphasis added)

The European Organized Crime Threat Assessment (OCTA) for 2006 also identified intellectual property theft as requiring 'focused attention on the common EU level' (van Duyne and Vander Beken 2009, 276). But in the opinion of some researchers, this is all a 'ritual dance with lots of smoke and shady procedures to decide on the "truth" about organized crime' (van Duyne and Vander Beken 2009, 275). There are indeed difficulties, above all in the fuzziness of the concepts deployed. The term 'threat', as in threat assessment, does not mean exactly the same as 'risk', or the likelihood and consequences of something happening:

> agencies tasked with the responsibility of public and national security ... generally rely on the negative aspect of impact, and thus the likelihood of events or actions (which they then define in terms of threat) is often the defining variable. The main focus of threat assessments is on the intent and capability of the criminal actors involved ... not on the consequences ... this might cause ... It is also possible ... to study ... to what extent capable and willing offenders (threat) have the opportunity to commit their acts and cause harm to society (impact) ... there is a fundamental flaw: none of the terms being used has an operationalised, unambiguous content. (van Duyne and Vander Beken 2009, 273)

Similarly, 'organised crime' is a contested concept, with varying definitions: 'it is like an elephant – it is difficult to describe but you know it when you see it' (quoted in van Duyne and Vander Beken 2009, 267). In fact, the whole process is deeply flawed:

> are these manifestations of 'knowledge based' policy making sincere or just displays of ritual dancing accompanied by socially and politically acceptable incantations? Our description and analysis point at a predominance of ritualism. This ... can be observed from the onset of organised crime policy making, in which 'belief statements' exceed fact/observation based statements ... organised crime political decision making is actually not knowledge based at all. Decisions are made and budgets spent because this is what decision makers want to do, not what evidence shows them to do. Further, the secrecy and rituals hamper discussions ... and cover up substantial data collection problems and important flaws in the conceptual framework. (van Duyne and Vander Beken 2009, 278–9)

So, although the conjurors would like us all to believe that by taking a critical view of copyright and IP we are crossing over to the dark side and aligning ourselves with *Mafiosi* and terrorists, there are sufficient doubts around methodology, data collection and definitions for Cartesian scepticism

to hold sway here too. Of course street vendors are likely to be hustlers too. Of course counterfeit medicine or counterfeit spare parts for aircraft represent a danger to consumers. Of course authors and musicians should be able to earn a decent wage. All this goes without saying. What does need to be said is that the copyright and IP system as it operates at present has been corrupted and co-opted by cynical vested interests who manipulate it against the best interests of the citizenry. We have a duty to examine their claims about its true nature with a very beady eye indeed.

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