

The Rio Papers

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.’² 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’.³ 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

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² Global Intellectual Property Center (GIPC), *Intellectual property: creating jobs, saving lives, improving the world* (Washington DC: US Chamber of Commerce [2008]), p.1. Available at http://gipcdev.blackbarn.net/sites/default/files/reports/documents/gipc_ipbook.pdf, accessed 1 March 2010.

³ GIPC, *Intellectual property*, p.1.

terrorist groups, '[...] criminals who have built a \$600 billion global criminal enterprise of counterfeiting and piracy that destroys jobs, undermines innovation, and endangers consumers.'⁴ 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.⁵

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. 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.

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 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. Of course street vendors are likely to be hustlers. 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. But in when downloading a song and selling counterfeit drugs are treated as the same crime, IPRs easily become 'as fleeting as the scent of jasmine':

⁴ GIPC, *Intellectual property*, p.1.

⁵ GIPC, *Intellectual property*, p.1.

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.⁶

We can guess from the references to Zhuangzi and the butterfly’s dream that *The Onion* is onto something serious here.⁷ 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’.⁸

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 (proptertisation) 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) exercise a wildly disproportionate influence on the form and

⁶ ‘Intellectual property rights as fleeting as the scent of jasmine, mayfly’s wing in autumn’, *The Onion*, 22 July 2009, available at http://www.theonion.com/content/news_briefs/intellectual_property, accessed 2 March 2010.

⁷ In an extensive literature, see especially Kim-chong Chong, ‘Zhuangzi and the nature of metaphor,’ *Philosophy East and West* vol.56 no.3 (July 2006), p.370-391.

⁸ 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.

detail of the actual legislation in which they have a direct commercial interest.⁹ Bureaucrats, politicians and these 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.

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 competing and sometimes overlapping discourses.¹⁰ 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’.

These divergent discourses arise 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, however, 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

⁹ M. D. McCubbins, ‘Abdication or delegation? Congress, the bureaucracy and the delegation dilemma,’ *Regulation* vol.22 no.2 (1999), p.32.

¹⁰ Laura J. Murray has argued that ‘*at least two competing copyright discourses exist*—broadly identified with copyright-owners and the public interest respectively—but they are not entirely independent from one another’ (see her ‘Copyright talk: patterns and pitfalls in Canadian policy discourses’ in: *In the public interest: the future of Canadian copyright law*, ed. Michael Geist (Toronto: Irwin Law, 2005), p.16, emphasis added.

abandonment of the small-copier end of its market.¹¹ 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.¹²

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.¹³ The battles that have raged in recent years over the protection of ‘content’ from this kind of consumer freedom—and the perceived 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 music sharing’.¹⁴ A year later, in 2008, the industry federation, the RIAA, switched tactics and decided to start suing internet service providers

¹¹ D. Owen, *Copies in seconds* (New York: Simon and Schuster, 2004), p.279; G. Jacobson and J. Hillkirk, *Xerox: American samurai* (New York: Collier Books, 1986), p.70-75; D. T. Kearns and D. A. Nadler, *Prophets in the dark: how Xerox reinvented itself and beat back the Japanese* (New York: HarperBusiness, 1993), p.62-68.

¹² J. Hughes, ‘On the logic of suing one’s customers and the dilemma of infringement-based business models,’ *Cardozo Arts and Entertainment Law Journal* vol.22 (2005), p.725.

¹³ 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 girl-friends.

¹⁴ M. Fisher, ‘Download uproar: record industry goes after personal use,’ *Washington Post* (30 December 2007), available at <http://www.washingtonpost.com/wpdyn/content/article/2007/12/28/AR2007122800693.html>, accessed 9 March 2010.

instead.¹⁵ Consumers, distributors and analysts seemed as far apart as ever, talking different languages and deploying different discourses.¹⁶

This is partly, as Laura J. Murray has argued in the Canadian context, because

*the copyright struggle is being waged not only by means of rhetoric, but about rhetoric [...] few words are careless: metaphors and buzzwords are strategically chosen. All parties try to reflect and manipulate citizens' or legislators' 'common sense'; the middle ground is as common a goal of battle as the high ground.*¹⁷

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,¹⁸ 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*¹⁹

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

Conventionalists, locked into a paradigm that takes the assumed general beneficence of the IP system as its starting point, are generally unable to explain what Christopher Jensen has aptly termed 'the social fact of copyright noncompliance' or to suggest solutions other

¹⁵ C. Albanesi, 'RIAA confirms it will take piracy fight to ISPs.' *Extreme Tech* (19 December 2008), available at <http://www.extremetech.com/article2/0,2845,2337337,00.asp>, accessed 9 March 2010.

¹⁶ For a detailed analysis of this particular tactic, pursued mainly by the RIAA and MPAA federations rather than the companies themselves, see Hughes, 'On the logic of suing one's customers,' p.725-766. 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' (p.736).\$600 billion global criminal enterprise.

¹⁷ Murray, 'Copyright talk,' p.17.

¹⁸ To cite three examples more or less at random, see E. E. Uvieghara (ed.), *Essays on copyright law and administration in Nigeria* (Ibadan: Y-Books, 1992); I. N. Mazonde and P. Thomas, *Indigenous knowledge systems and intellectual property in the twenty-first century* (Dakar: CODESRIA, 2007); C. Seuna, *Droit d'auteur et droits voisins au Cameroun* (Yaoundé: SOGESIC, 2008).

¹⁹ Mazonde and Thomas, *Indigenous knowledge systems*, p.1

than the reinforcing of trends towards criminalisation and propertisation.²⁰ Although conceptual difficulties such as the non-property-like characteristics of IP or the general public failure to see IP issues as moral questions are clearly visible, they remain inexplicable within a conventionalist problematic:

[...] the relevance of the unique features of intellectual property cannot be overlooked. They matter to the point that it is hard for the public to not only comprehend that a theft has occurred—after all no tangible product has been taken; but, also to the point that the public becomes outraged at such behavior. Once the public becomes outraged, it becomes a social problem that needs to be addressed and corrective actions can be put into place to prohibit the behavior. Up until now, those most likely to abhor the behavior are those who would benefit from its protection. Business groups and trade associations [...] are lobbying the government to become more involved in protecting intellectual property rights domestically and abroad.²¹

It has therefore been left to what the GIPC sweepingly if inaccurately describes as ‘anti-IP activists’ to attempt to analyse the system from a critical point of view in order to see what has gone wrong and what the solutions and alternatives might be.

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 want to develop a rigorous and justiciable concept of public good, rather than property, in relation to words and ideas. 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

²⁰ C. Jensen, ‘The more things change, the more they stay the same: copyright, digital technology, and social norms,’ *Stanford Law Review* vol.56 (November 2003), p.537.

²¹ N. L. Piquero, ‘Causes and prevention of intellectual property crime,’ *Trends in Organized Crime* vol.8 no.4 (Summer 2005), p.43.

*[...] 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.*²²

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.*²³ *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'.²⁴ It is worth emphasising that a critical attitude towards the ongoing expansion of IPRs—especially copyright terms—is far from being limited to fringe groups, as the GIPC implies. The New York Times, for example, has editorialised that present law 'gives an author and the author's descendants more than adequate control over creative work—a minimum of the author's life plus 70 years. The public is better served if copyrights have a reasonable limit.'²⁵ Similarly, The Economist has believed for some years that going back to 'the 28year copyrights of the Statute of Anne would be in many ways arbitrary, but not unreasonable.'²⁶*

Individual figures as John Perry Barlow, Lawrence Lessig, Jessica Litman, Siva Vaidhyathan, Peter Drahos, or James Boyle might be described as deconstructionists to varying degrees. However, most of these analysts criticise copyright mainly from the perspective of the global north—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. But according to recent work carried out mainly in developing countries, copyright restrictions can also be shown to have a negative effect on information flows between industrialised or developed countries and the global south, as well as on knowledge production itself. This issue has only recently begun to attract widespread analytical attention, mainly by scholars

²² W. Patry, 'The failure of the American copyright system: protecting the idle rich,' *Notre Dame Law Review* vol.72 (1997), p.908.

²³ J. J. Phillips, R. Durie and I. Karet, *Whale on copyright*, 5th ed. (London: Sweet and Maxwell, 1997), p.12. For a more detailed account of this argument, see Darch, 'Digital divide or unequal exchange?' p.493-495.

²⁴ Patry, 'The failure of the American copyright system,' p.909-910.

²⁵ 'The legacy of Baker Street,' *New York Times* (23 January 2010), available at <http://www.nytimes.com/2010/01/24/opinion/24sun4.html>, accessed 5 May 2010.

²⁶ 'Copyright and wrong: why the rules on copyright need to return to their roots,' *The Economist* (8 April 2010), available at http://www.economist.com/opinion/displaystory.cfm?story_id=15868004, accessed 5 May 2010. See also an earlier editorial arguing that '...copyright has grown to such ludicrous proportions that it now often inhibits rather than promotes the circulation of ideas' ('Protecting copyright in a digital age,' *The Economist* [23 January 2003], available at http://www.economist.com/opinion/displaystory.cfm?story_id=1547223, subscription content only.)

from Asia, the Americas and Africa.²⁷ The argument rests on a particular approach to the political economy of the information society.²⁸ 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.²⁹ 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.*³⁰

Deconstructionists may be academics but can also be artists, writers, and activists. These groups have diverse interests in copyright protection. Many musicians earn more from performance than from recording, for example. It is often the case that academics do not themselves have a direct financial interest in their work, and in fact welcome wide distribution since it is likely to contribute to their reputation among their peers. Reflecting this diversity, although deconstructionists are usually highly critical of the way in which the IP regime works in practice, 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.³¹

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 Organisation (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

²⁷ As an example, see Lillian Álvarez Navarrete, *Derecho de ¿autor? El debate de hoy* (Havana, Cuba: Editorial de Ciencias Sociales, 2006).

²⁸ A. Story, C. Darch and D. Halbert (eds.), *The Copy / South Dossier: issues in the economics, politics, and ideology of copyright in the global South* (Canterbury: Copy / South Research Group, May 2006), available from <http://www.copysouth.org/en/documents/csddossier.pdf>, accessed 10 March 2010.

²⁹ Patry, ‘The failure of the American copyright system,’ p.925, fn.82 contd.

³⁰ J. Frow, ‘Information as gift and commodity,’ *New Left Review* no.219 (September-October 1996), p.89.

³¹ I am not aware of any easily available summary of the range of alternative proposals.

worldwide'.³² This includes negotiating, implementing and monitoring trade agreements, especially bilateral ones, that 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 [...]*³³

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 Conjurers 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 (AACCP); 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 'conjurers' 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 US because of IP infringement, and that the annual cost of such infringements is somewhere between \$200 to \$250 billion—that is, about 28 percent of the total value added to the US gross domestic product by the 'core copyright industries' in 2007.³⁴ These 'authoritative' figures were being quoted as early as

³² Office of the US Trade Representative, 'Intellectual property,' available at <http://www.ustr.gov/trade-topics/intellectual-property>, accessed 10 March 2010.

³³ Office of the US Trade Representative, *2009 special 301 report* (Washington DC: USTR, 30 April 2009), p.21.

³⁴ Total value added taken from S. E. Siwek, *Copyright industries in the US economy: the 20032007 report* (Washington DC: International Intellectual Property Alliance, 2009), p.3.

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.³⁵ 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.³⁶

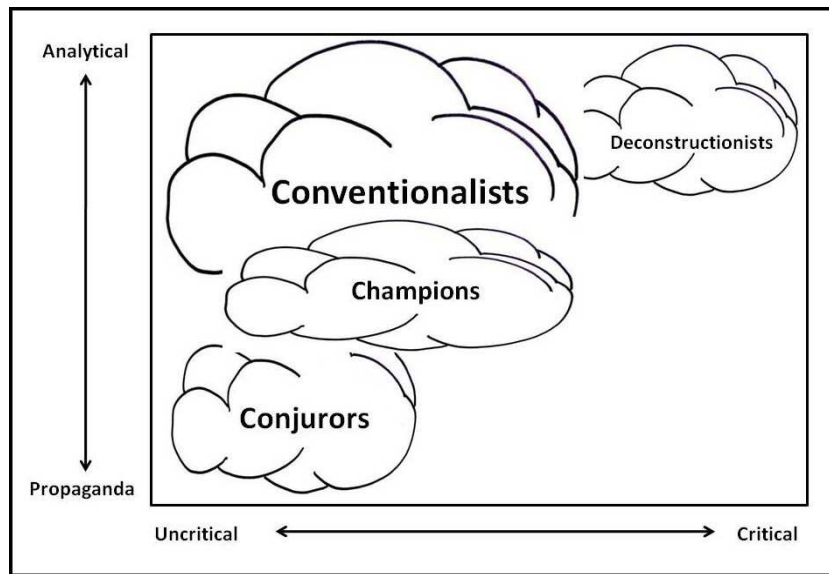
The earliest occurrence of the number of job losses attributable to IP infringement appears to have been nearly a quarter of a century ago, in 1986, when US Secretary of Commerce Malcolm Baldrige was quoted as estimating the figure as falling in the range ‘anywhere from 130,000 to 750,000’.³⁷ Similarly, the US\$250 billion figure can be tracked back to an article on counterfeit products in *Forbes Magazine* for 25 October 1993.³⁸ 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.

³⁵ US Customs and Border Protection, *US Customs announces international counterfeit case involving Caterpillar heavy equipment* (news release, 29 May 2002), available at http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/legacy/2002/52002/0529200_2.xml; US Chamber of Commerce, ‘US Chamber and US Patent and Trademark Office partner to educate businesses on threats of counterfeiting and piracy,’ (June 13, 2007), available at <http://www.uschamber.com/press/releases/2007/june/07-102.htm>; ‘From fake handbags to fake cars, the problem is real: at *Harper’s Bazaar*, fakes are never in fashion,’ (22 April 2009), available at http://www.fakesareneverinfashion.com/fakes_summit_09.asp; C. M. Miller and J. A. Taylor, ‘Combating counterfeiting in an electronic era,’ (3 February 2010), available at http://www.cafezine.com/depts/article.asp?id=24034&deptid=3#_ftn1, all accessed 12 March 2010.

³⁶ J. Sanchez, ‘750,000 lost jobs? The dodgy digits behind the war on piracy,’ *Ars Technica* (8 October 2008), available at <http://arstechnica.com/tech-policy/news/2008/10/dodgy-digits-behind-the-war-on-piracy.ars>, accessed 12 March 2010.

³⁷ Sanchez, ‘750,000 lost jobs?’

³⁸ Sanchez, ‘750,000 lost jobs?’

Fig.1: Relations between Competing IP Discourses

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 [...].³⁹

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.

In order to illustrate the relationship between these four main types of discourse, they may be charted onto a graph divided into quadrants, with the vertical axis running from 'propaganda' to 'analytical' and the horizontal axis running from 'uncritical' to 'critical'. In fig.1 [previous page] each discourse type is represented as an overlapping cloud, to emphasise the fact that the boundaries between discourses are not always sharply defined. Nevertheless,

³⁹ Sanchez, '750,000 lost jobs?'

it is immediately obvious that broadly speaking the dominant discourses generally accept the copyright system as necessary and beneficial, regardless of the quality of their analysis. The deconstructionists are represented as both aiming for analytical rigour and taking a critical position towards copyright as a system. Critical propaganda is effectively non-existent.

Metaphorical and Literal Readings of the IP Concept

The 'proptertisation' of the scientific record and literary production is the logical consequence of a process of labelling.⁴⁰ 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.⁴¹ What metaphors do is to take two points of reference and map them conceptually onto one another. 'All the world's a stage', says Shakespeare famously; 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. Even such an establishment newspaper as *The Economist* does not believe in the idea that IP is really property: 'Copyright was originally the grant of a temporary government-supported monopoly on copying a work, *not a property right*.'⁴² 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

⁴⁰ 'The duration and scope of IP rights expand without limit. Courts [...] describe IP as a type of absolute property, bereft of any restraints.' M. A. Carrier, 'Cabining intellectual property through a property paradigm,' *Duke Law Journal*, vol.54 (2004), p.4.

⁴¹ See, for instance, among many similar examples of such heated rhetoric, M. Turner, 'James Murdoch: illegal downloading is theft,' *Hollywood Reporter* (11 March 2010), available at http://www.hollywoodreporter.com/hr/content_display/technology/news/e3if3d775aa9c43698e9c3e0250a20eb6fe, accessed 15 March 2010.

⁴² 'Protecting copyright in a digital age,' *The Economist* [23 January 2003], emphasis added, available at http://www.economist.com/opinion/displaystory.cfm?story_id=1547223, subscription content only.

include ‘pirates’ and ‘piracy’, but even ‘theft’ in this context is a metaphor.⁴³ 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.⁴⁴ 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.*⁴⁵

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,⁴⁶ and the Romans seem to have recognised ‘plagiarism’ as a moral offence, as an often-cited quotation from Martial demonstrates.⁴⁷ 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.⁴⁸ 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.⁴⁹

⁴³ For an analysis of *internal* metaphor in the field, see P. Loughlan, ‘Pirates, parasites, reapers, sowers, fruits, foxes... The metaphors of intellectual property,’ *Sydney Law Review* vol.28 (2006), p.211-226.

⁴⁴ ‘[...] relatively little work has been done to isolate and analyse the use of metaphor in the discourse of intellectual property.’ P. Loughlan, ‘Pirates, parasites, reapers, sowers, fruits, foxes,’ p.216.

⁴⁵ R. A. Baron, ‘Metaphor and polemic in the wars over the public domain,’ *Art and Museum Law Journal* vol.2 no.1 (2007), p.7

⁴⁶ Revelation 22:18-19 threatens extremely severe consequences for either adding to or taking away from ‘the words of the book of this prophecy’.

⁴⁷ Martial, *Epigrams*, 1:52.

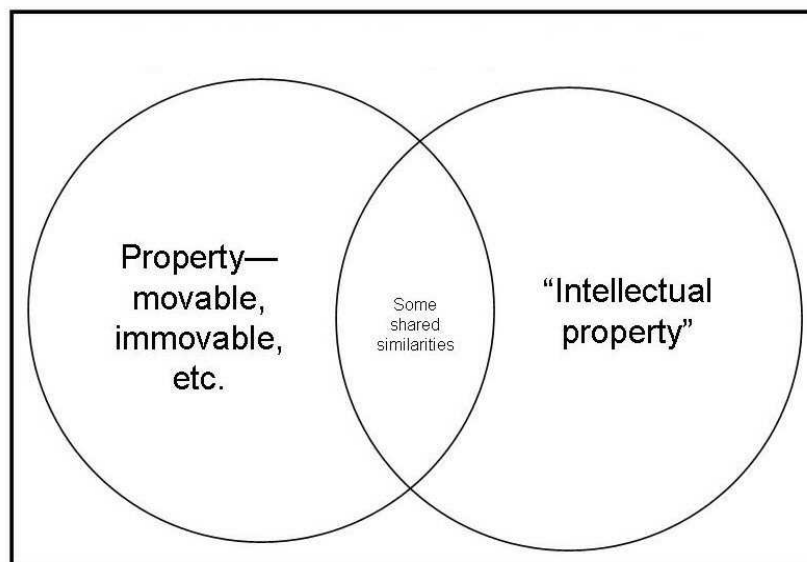
⁴⁸ Hughes, ‘Notes on the origin of “intellectual property”: revised conclusions and new sources,’ (July 2009), p.15 (Benjamin N. Cardozo School of Law Jacob Burns Institute for Advanced Legal Studies, Working Paper no.265), cited by permission of the author.

⁴⁹ Hughes, ‘Copyright and incomplete historiographies: of piracy, propertization, and Thomas Jefferson,’ *Southern California Law Review* vol.79 (2006), p.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,⁵⁰ although copyrights continue to be ‘unequivocally viewed as property’ well into the nineteenth century.⁵¹ 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 the first figure below, the expression ‘intellectual property’ is mapped as metaphor, explicitly as ‘ideas \approx property’ or ‘ideas are similar to property’.⁵² 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.

Fig.2: Intellectual Property as Metaphor



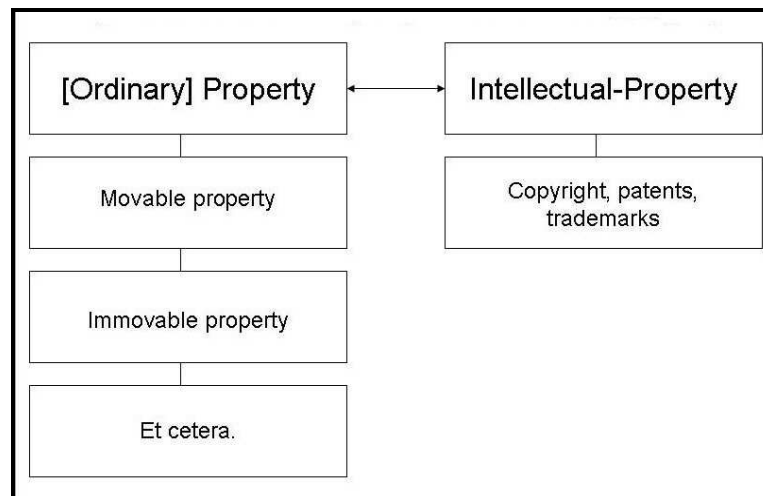
⁵⁰ ‘The lesson of these two cases [is] one in which the property construct failed.’ Hughes, ‘Copyright and incomplete historiographies,’ p.1018.

⁵¹ Hughes, ‘Copyright and incomplete historiographies,’ p.1020.

⁵² Note that the mathematical symbol is \approx , not =, i.e. ‘is similar to’ not ‘is equal to’.

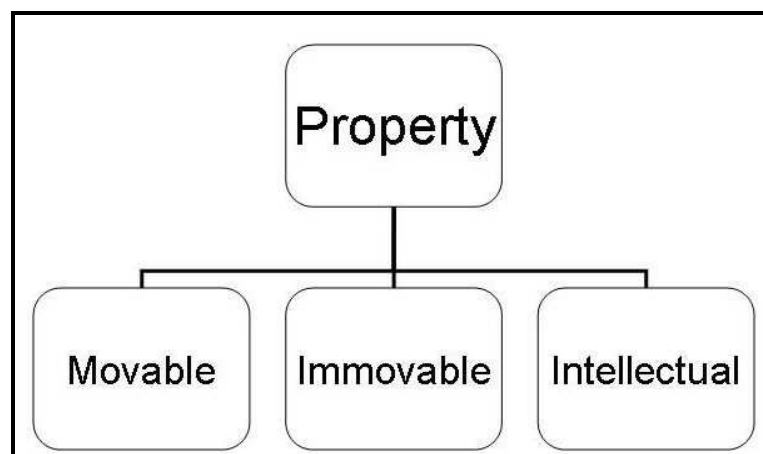
The second stage in the propertisation process is the transformation of IP into a conceptual category that is neither similar to nor subordinate to property—i.e. is not a *sub-category* or *kind* of property—but is rather *coordinate* with it, a parallel concept. Thus we may map the two concepts as ‘ideas \neq 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:

Fig.3: Intellectual Property as a Parallel (Coordinate) Category



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 \leq property’ or ‘ideas are a subgroup of property’:

Fig.4: Intellectual Property as a Sub-Type of Property



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 nonexclusive 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.⁵³

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.⁵⁴ 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.⁵⁵ At the present time, however, it remains the determinant one.

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

The GIPC has already been mentioned and is easily identifiable as belonging somewhere in the cloudy borderland between champions and conjurors (see fig.1). It 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'.⁵⁶ The first part of the statement may be partially true in the sense that large profits are at stake, 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

⁵³ W. A. Adams, 'Meaning and metaphor: associative thinking and the unacknowledged images of "use" in intellectual property' (McGill University, Faculty of Law, 2009), available at http://m-m.mcgill.ca/sem1_WAA.html, accessed 12 March 2010.

⁵⁴ W. A. Adams, 'Meaning and metaphor.'

⁵⁵ For an exercise in exactly this kind of re-imagining, see J. Smiers and M. van Schijndel, *Imagine there is no copyright and no cultural conglomerates too: an essay* (Amsterdam: Institute of Network Cultures, 2009).

⁵⁶ GIPC, *Intellectual property*, p.1

and recorded music industries have been instrumental in developing;⁵⁷ the role of the state in socialising large-scale economic risk in the US, 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 ‘conjurers’ in the service of this process.

First, the economic importance of IP, especially in the United States; there is evidence that the ‘copyright industries’ do indeed make a significant ongoing contribution to US economic well-being. Ironically, we must turn to sources produced by the vested interests themselves to quantify this contribution. Although such data should probably be treated with caution, it seems intuitively likely that copyright industries are in fact extremely important to the economies of Europe and North America. The *core* copyright industries, as defined by the World Intellectual Property Organisation (WIPO; itself a champion) 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.⁵⁸ Between 2003 and 2007 these ‘core copyright industries’ consistently accounted for over six percent of the total US gross domestic product, amounting in dollar terms to US\$700 billion at the beginning of the period and just under US\$890 billion by the end.⁵⁹ By a broader definition, which includes the core industries listed above and three other more marginal WIPO-approved categories, the sector was worth US\$1.52 trillion or eleven percent of US GDP by 2007.⁶⁰ 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 U.S. GDP achieved by the copyright industries in those same years.⁶¹

⁵⁷ P. Drahos with J. Braithwaite, *Information feudalism: who owns the knowledge economy?* (London: Earthscan, 2002), p.176.

⁵⁸ *Guide on surveying the economic contribution of the copyright-based industries* (Geneva: WIPO, 2003), p.28.

⁵⁹ Siwek, *Copyright industries in the US economy*, p.3.

⁶⁰ Siwek, *Copyright industries in the US economy*, p.3.

⁶¹ Siwek, *Copyright industries in the US economy*, p.3.

At this point, a little deconstruction is in order, so that we can understand how conjurers' discourse disguises the real workings of the system. These industries did not become important through the unmediated operation of market forces, 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.⁶² 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 [...]*⁶³

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 [...]*⁶⁴

⁶² Drahos and Braithwaite, *Information feudalism*, p.174.

⁶³ Drahos and Braithwaite, *Information feudalism*, p.176-177.

⁶⁴ T. J. Lowi, *The end of liberalism: the second republic of the United States*, 2nd ed. (New York: Norton, 1979), p.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.⁶⁵ Indeed, after the Roosevelt administration, argued Lowi, 'the historic continuity of [US] national politics [had] been broken'.⁶⁶

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.*⁶⁷

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*.'⁶⁸

*[...] 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.*⁶⁹

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 1995.⁷⁰ 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.'⁷¹

⁶⁵ Lowi, *The end of liberalism*, p.xii.

⁶⁶ Lowi, *The end of liberalism*, p.xiii.

⁶⁷ Lowi, *The end of liberalism*, p.xii, emphasis added.

⁶⁸ Patry, 'Copyright and the legislative process: a personal perspective,' *Cardozo Arts and Entertainment Law Journal* vol.14 (1996), p.141, emphasis added.

⁶⁹ Patry, 'Copyright and the legislative process,' p.141, emphasis in the original.

⁷⁰ Patry, 'Copyright and the legislative process,' p.142, emphasis added.

⁷¹ Patry, 'Copyright and the legislative process,' p.143.

The last stage in this process is spreading these industry-defined IP practices from the US 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.⁷²

The Special 301 reports have a direct and often negative impact on the economies of the United States' trading partners. They have been sharply criticised for exceeding the mandate provided by existing trade legislation, for their vague and opaque evaluation criteria, for their uncritical reliance on 'data provided by copyright industry lobbyists', and for the absence of any provision for response to 'complaints identified by the ... International Intellectual Property Alliance', an industry lobbying organisation.⁷³

Nevertheless, despite appeals that 'US foreign policy on intellectual property [...] and trade should serve the interests of all stakeholders in the knowledge economy,'⁷⁴ all the indications at the time of writing (early 2010) are that US policy is likely to become more aggressive in this area. The Wall Street Journal carried a report in February 2010 that US television executives were urging the Obama administration to 'develop and implement a national strategy to combat intellectual-property fraud'. The same report quoted the GIPC to the effect that

\$12 billion of auto industry revenue has been lost to intellectual-property theft, \$46 billion lost for the pharmaceutical industry and \$53 billion for software firms [...] innovative and creative industries account for more than \$5 trillion of the US domestic product and employ more than 18 million workers.⁷⁵

⁷² S. Ilias and I. F. Ferguson, *Intellectual property rights and international trade* (Washington DC: Congressional Research Service, 2009), unpag. summary.

⁷³ Public Knowledge, Electronic Frontier Foundation, *In the matter of 2010 Special 301 Review: identification of countries under Section 182 of the Trade Act of 1974: comments* (n.p., 2010), p.2 (Docket no.USTR-2010-0003), available at <http://js.docstoc.com/docs/26785789/pk-eff-special301-20100218>, accessed 5 May 2010.

⁷⁴ Public Knowledge, Electronic Frontier Foundation, *In the matter of 2010 Special 301 Review*, p.1.

⁷⁵ 'NBC VP: US needs intellectual-property rights protection plan,' *Wall Street Journal* (18 February 2010), available at <http://online.wsj.com/article/BT-CO-20100218-714295.html>, accessed 20 February 2010.

As usual, it is hard to determine whether these new numbers have been conjured out of thin air or have been produced from some reliable statistical process. The GIPC also began to employ militaristic rhetoric at about the same time, calling— in words that consciously echoed US military terminology in Iraq—for a ‘surge in IP enforcement activity’ as part of a package that was to include legislative reform and increased surveillance by customs agencies. The GIPC also dismissed, rather than engaging with, any criticism of the IP system, simply asserting that ‘IP enables access’.⁷⁶

It seems highly unlikely that the US policy of aggressively protecting corporate IPRs domestically and internationally through trade agreements, legislation and propaganda will change in the immediate future. Indeed, in a speech to the Export-Import Bank Annual Conference in Washington DC on 11 March 2010, President Obama had this to say:

*[...] we're going to aggressively protect our intellectual property. Our single greatest asset is the innovation and the ingenuity and creativity of the American people. It is essential to our prosperity and it will only become more so in this century. But it's only a competitive advantage if our companies know that someone else can't just steal that idea and duplicate it with cheaper inputs and labor. There's nothing wrong with other people using our technologies, we welcome it — we just want to make sure that it's licensed, and that American businesses are getting paid appropriately. That's why USTR is using the full arsenal of tools available to crack down on practices that blatantly harm our businesses, and that includes negotiating proper protections and enforcing our existing agreements, and moving forward on new agreements, including the proposed Anti-Counterfeiting Trade Agreement.*⁷⁷

As well as being aggressive, the governments of the global North have also become increasingly opaque about their plans to protect corporate profits through IPRs. In March 2010 the European parliament rebuked EU negotiators who had been involved in secret negotiations with the US, Japan and Canada over a proposed Anti-Counterfeiting Trade Agreement (ACTA). At the time, no documentation about the content of these negotiations had been released, despite pressure from public interest groups.⁷⁸

⁷⁶ W. New, ‘US business calls for IP enforcement “surge”, seeks new legislation this year,’ *Intellectual Property Watch* (18 February 2010), available at <http://www.ipwatch.org/2010/02/18/us-business-calls-for-ip-enforcement-%E2%80%9Csurge%E2%80%9Dseeks-new-legislation-this-year/>, accessed 5 May 2010.

⁷⁷ ‘Remarks by the President at the Export-Import Bank’s Annual Conference’ (11 March 2010) <http://www.whitehouse.gov/the-press-office/remarks-president-export-import-banks-annualconference>, accessed 5 May 2010.

⁷⁸ D. McCullagh, ‘European parliament slams digital copyright treaty,’ *ZDNet Asia* (11 March 2010), available at <http://www.zdnetasia.com/european-parliament-slams-digital-copyrighttreaty-62061799.htm>, accessed 5 May 2010.

Conclusion: Emulate Descartes, Doubt Everything

The conjurers 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. But there are sufficient doubts around methodology, data collection and definitions for Cartesian scepticism to hold sway. The copyright and IP system has slowly 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 claims about its true nature with a very beady eye indeed.

When financier's copyright meets congressional abdication and trade policy, global taxpayers shoulder the burden of insuring national copyright industries. Lowi calls this the 'state of permanent receivership'.⁷⁹ 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'.⁸⁰ 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 its own mistakes, from environmental changes or indeed from 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.

The Rio Papers are available at <http://copysouth.org/portal/theriopapers>.

⁷⁹ Lowi, *The end of liberalism*, p.279-289.

⁸⁰ Lowi, *The end of liberalism*, p.279-280.