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Creativity and the public domain

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The Intellectual Property Rights (IPR) elements of the DIME Network currently focus on research in the area of patents, copyrights and related rights. DIME's IPR research is at the forefront as it addresses and debates current political and controversial IPR issues that affect businesses, nations and societies today. These issues challenge state of the art thinking and the existing analytical frameworks that dominate theoretical IPR literature in the fields of economics, management, politics, law and regulation- theory.

CREATIVITY AND THE PUBLIC DOMAIN

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Introduction

Intellectual property scholarship has become deeply involved in a discourse about the relationship of intellectual property with the public domain. This has been an important debate driven by serious concerns about the imperialistic tendencies of intellectual property, as it extends its boundaries horizontally to include new types of intellectual activity and vertically to confer wider powers of control on the relevant rights' holders. The frequent tendency of the debate is to create some sort of binary opposition,¹ so that we divide the whole of intellectual space between that which is propertised and that which is in the public domain.² It is not just that the public domain is other than intellectual property and vice versa, the two are envisaged as butting up against one another so that, if we were to conceive of this in physical terms, each fits snugly against the shape of the other. The implication of this is that, if the two also take up the whole of intellectual space, altering the contours of intellectual property will alter those of the public domain (and vice versa).

Of course, the dangers of analogies between intellectual property and physical property are considerable. It is not unknown for advocates of strong intellectual property rights to draw comparisons between the theft of physical property and that of intellectual property, nor is it uncommon to encounter the use of emotive metaphors that have somehow abandoned their metaphorical nature and acquired a life of their own within the lexicon of intellectual property.³ The cognoscenti of intellectual property know only too well that the non-rivalrous and non-wasteable nature of intellectual property mean that its "theft" is of an entirely different order than that of physical property. Like taking someone's physical property, taking someone's intellectual property may be ethically questionable but this is not because taking it deprives the owner or anyone else of its further use. However, on the whole, we are much less careful about the limits of the analogy when we refer to the relationship between intellectual property and the public domain. Sometimes that carelessness can

¹ E Hemmungs Wirtén, "Out of Sight & Out of Mind: On the Cultural Hegemony of Intellectual Property (Critique)" (2005) *Cultural Studies*

² This is the underlying assumption of my own work: see, eg, "Public Interest & the Public Domain in an Era of Corporate Dominance" in B Andersen (ed), *Intellectual Property Rights: Innovation, Governance & the Institutional Environment* (Cheltenham, Edward Elgar, 2005).

³ The classic example of this is the use of the word "piracy" for systematic copyright infringements, despite the absence of unconstrained violence that is the hallmark of high-seas piracy.

be productive. For instance, the concept of the whole of intellectual space is no more knowable than is the concept of the whole of physical space. In order to give some sort of purchase to the concept of physical space, we tend to assume boundaries that are constructed by our collective limitations rather than any actual limitations of physical space.⁴ We need to apply the same sort of reasoning in order to bound our concept of intellectual space, despite our understanding of the inherent malleability of its borders. However, on undertaking an analysis of the space within those borders it is necessary to be wary of the limitations of the analogy between physical and intellectual property. The following attempt at such an analysis is, accordingly, wary.

Relationship between Intellectual Property and the Public Domain

The idea of the public domain in intellectual space is heavily dependent on Roman law concepts governing physical space, which recognised various dimensions of nonexclusive – but not necessarily public - property.⁵ The most well-used of these so far as intellectual property/public domain debate are concerned are *res communes* and *res publicae*. The former referring to things incapable by their nature of being exclusively owned, while the latter referring to things open to the public by operation of law. These seem to have translated into the modern day debate about property in intellectual space in the specific form of the concepts of the commons and the public domain. The fact that these expressions are often used interchangeably is probably not much of a surprise given that the Romans had a similar problem with *res communes* and *res publicae*,⁶ which reflected the modern day tendency “to mix up normative arguments for ‘publicness’ with naturalistic arguments about the impossibility of owning certain resources”.⁷ This confusion between the commons and the public domain, *res communes* and *res publicae*, has done nothing to simplify the epistemological basis of the dichotomy between intellectual property and intellectual public space.⁸ More than this, it has tended to conceal the fact that, traced back to their Roman law origins, neither of these concepts seems to provide a particularly strong basis for a vibrant public or non-exclusive intellectual space in today’s world.

So far as *res communes* is concerned, one might be forgiven for thinking that because of the non-rivalrous and non-wasteable nature of things in intellectual space they are all incapable by their nature of being exclusively owned or appropriated.⁹ Intellectual property law has, with its useful distinction between exclusive possession/use and ownership, put paid to that idea. As is well-known, there has been a tendency for law governing physical space, particularly environmental law, to foreclose or regulate the use of the physical commons. At least in some cases, this has been a benevolent response to the famous “tragedy of the commons”,¹⁰ according to which resources

⁴ Hence the notion of the physical frontier.

⁵ See C M Rose, “Romans, Roads and Romantic Creators: Traditions of Public Property in the Information Age” (2003) 66 *Law & Contemporary Problems* 89.

⁶ Rose, n 5 *supra*, 96, citing A Borkowski, *Textbook on Roman Law* (London, Blackstone, 1994), 144.

⁷ Rose, n 5 *supra*, 96.

⁸ See also Hemmungs Wirtén, n 1 *supra*, who suggests that it is time for “some good old epistemological soul-searching”.

⁹ Except, and for so long as, they are kept secret: Rose, n 5 *supra*, 95.

¹⁰ See G Hardin, “The Tragedy of the Commons” (1968) 162 *Science* 1243, 1244.

held commonly are plundered, degraded and eventually exhausted.¹¹ The non-rivalrous and non-wasteable nature of things in intellectual space tends to suggest that this is not a reason for the foreclosure of common intellectual space, but intellectual property law has done it anyway. At least, this is what intellectual property law has tried to do. It may be that there are certain things that not even the might of intellectual property law can convert into property capable of exclusive ownership in any meaningful sense. For example, the ease of copying works available in digital form allied with the difficulty in identifying and proceeding against unauthorised copiers, may be an indication that this part of intellectual space is incapable of the type of exclusive ownership enjoyed in relation to other types of intangible works. On the other hand, the combined effect of technology and law may render even this part of intellectual space appropriable.

Intellectual property law has not, of course, sought to foreclose all of the intellectual commons. As a body of law, it has declared that certain things are incapable of being owned. Patent law, for example, rejects the concept of ownership over a range of innovations, including discoveries, scientific theories, and methods for doing business.¹² However, its imperialising tendency means that it is constantly pushing at the boundaries of these exclusions so that more and more of that intellectual space concerned with inventions and technical innovations is subject to patent rights.¹³ Copyright law, famously, rejects the ownership of ideas, embracing the tenuous distinction between the unprotected idea and the protected expression,¹⁴ although this concept seems to be unevenly applied¹⁵ and subject to much erosion.¹⁶ More generally, creative acts that do not fall within the realm of copyright law are not appropriated.¹⁷ However, copyright (along with intellectual property rights related to it) has been distinguished by a tendency to extend its reach over more and more creative or innovative acts in intellectual space.¹⁸ However, to the extent that intellectual property laws continue to exclude certain parts of intellectual space from

¹¹ See further, eg, Hardin, n 10 *supra*; & E Ostrom, *Governing the Commons: The Evolution of Institutions or Collective Action* (Cambridge & New York, Cambridge University Press, 1990), esp ch 1, in which the tragedy of the commons is contrasted with other models of the commons.

¹² See, eg, the UK Patents Act 1977, s 1(2).

¹³ In relation to discoveries, see eg *Genentech v Wellcome Foundation* [1989] RPC 147; see also S Crespi, "Patents on Genes: Can the Issues be Clarified?" [1999/2000] *Bioscience Law Review* 200. In relation to business methods, see eg *State Street Bank & Trust Co v Signature Financial Group Inc*, 149 F 3d 1368 (Fed Cir(US)).

¹⁴ See, eg, *Donoghue v Allied Newspapers* [1938] Ch 106; *Fraser v Thames Television* [1983] 2 All ER 101; *Green v Broadcasting Corporation of New Zealand* [1989] RPC 469 & 700.

¹⁵ Eg, the two dimensional/three dimensional infringement rule in relation to artistic works in, eg, the UK Copyright Designs and Patents Act 1988, s 17(3), arguably breaches the idea/expression rule: see further F Macmillan, "Artistic Practice & the Integrity of Copyright Law" in M Rosenmeier & S Teilmann (eds), *Art & Law: The Debate over Copyright* (Copenhagen, DJØF, 2005). See also, eg, the provisions on the protection of preparatory design material for computer programmes in the UK Copyright, Designs & Patents Act 1988, s 3(1)(c).

¹⁶ See, eg, *Krisarts v Briarfine* [1977] FSR 577; *Ravenscroft v Herbert* [1980] RPC 193; *Designer Guild Ltd v Russell Williams (Textiles) Limited* [2000] UKHL 58.

¹⁷ See, eg, *Merchandising v Harpbond* [1983] FSR 32; *Komesaroff v Mickle* [1988] RPC 204; *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 445; *Norowzian v Arks Ltd (No 2)* [2000] FSR 363 (CA).

¹⁸ Eg, the inclusion of computer programmes and preparatory design work for them within the definition of protected "literary works" (see, eg, Directive 91/250/EEC on the legal protection of computer programmes & the UK, Copyright, Designs & Patents Act 1988, s 3(1)) and the database right established under Directive 96/9/EC on the legal protection of databases.

the propertised domain, it is far from clear whether their exclusion is because they are, by their legal nature, incapable of being owned, and therefore part of the commons, or because they should not be brought into the private domain of intellectual property but should be kept in the public domain. Arguably, because things in intellectual space are all incapable of ownership in the sense that things in physical space may be owned, but are all – or nearly all – quite capable of being appropriated in another way by force of law, the concept of the commons or *res communes* is a difficult one to apply to intellectual space. At least, it is difficult once we concede any concept of ownership in intellectual space, unless by referring to the commons we merely mean to be descriptive and refer to those things that, as a matter of fact, have not been subsumed into the intellectual property regime. The concept of the *res publicae*, where there is the scope for what Rose describes as “normative arguments for ‘publicness’”,¹⁹ seems to offer far greater promise. In relation to *res publicae*, however, we move from the wilderness of the commons to the park,²⁰ that is, from the unregulated to the regulated domain. The primary reason for this, at least in relation to physical space, is that being *res publicae* implies appropriability, if not actual appropriation. Unlike the concept of *res communes*, *res publicae* in physical space does not reject the notion of private property. According to Rose, *res publicae* is always open to the possibility of ownership “subject to the requirements of reasonable public access”.²¹ One consequence of this is that it is necessary for something or someone to defend *res publicae*.

In physical space, *res publicae* is regarded as normatively justified by the need to ensure productive synergistic interactions that would otherwise be obstructed by denying public access.²² The irony in the application of this concept to intellectual space is that precisely because things in intellectual space are non-rivalrous and non-wasteable there are not many reasons why productive synergistic interactions should not take place.²³ That is, there are not many reasons apart from intellectual property law. By regarding things in intellectual space as capable of appropriation and not therefore *res communes*, intellectual property law has created a system of obstructions to synergistic interactions. Then, in response to these obstructions, it has created its own mechanisms to defend *res publicae*. Arguably, this sounds slightly more ridiculous than it actually is. One of the reasons that productive synergistic interactions might not take place in unfettered intellectual space is because, in the absence of reward, appropriate investment and effort might not be made. Even accepting this argument and accepting that the most appropriate form of “reward” is the creation of intellectual property rights,²⁴ it seems reasonably clear that to achieve productive synergistic interactions there needs to be a carefully calibrated balance between property rights in intellectual space and rights that preserve *res publicae*. In

¹⁹ Note 7 *supra* & accompanying text.

²⁰ Paraphrasing Rose, n 5 *supra*, 99.

²¹ Rose, n 5 *supra*, 99. On the attributes of *res publicae* see, Rose, *ibid.*, 96-100.

²² Rose, n 5 *supra*, 96-98.

²³ See also Rose, n 5 *supra*, 102-103.

²⁴ A point that is not universally accepted: see, eg, J Smiers, “The Abolition of Copyrights: Better for Artists, Third World Countries & the Public Domain” in R Towse (ed), *Copyright & the Cultural Industries* (Cheltenham, Edward Elgar, 2002), 120; & M van Schijndel & J Smiers, “Imagining a World Without Copyright: The Market & Temporary Protection a Better Alternative for Artists & the Public Domain” in H Porsdam (ed), *Copyright & Other Fairy Tales* (Cheltenham, Edward Elgar, 2005).

intellectual property law, this is generally achieved through three mechanisms: disclosure requirements, limits on duration and exceptions to the exercise of the exclusive rights. With respect to the first two mechanisms, the provisions of the law automatically defend the *res publicae*, whereas in relation to the last those seeking to use the exceptions must make a case. Despite the existence of these mechanisms, it would be straining credulity to suggest that the balance between property rights and rights that preserve *res publicae* in intellectual space is carefully calibrated. The history of intellectual property law has marked a progressive extension of the duration of intellectual property rights and the contraction of their respective exceptions and defences.

The law of copyright provides a particularly good example of movement along this trajectory. Its duration has expanded from the initial maximum period of fourteen years²⁵ to the current high-water mark of seventy years after the death of the author.²⁶ The vitality of its fair dealing exceptions, which are essential to permitting the sort of access that allows productive synergistic interactions, has been sapped by a combination of restrictive judicial interpretation,²⁷ technological innovations, and new legal devices that interact with that technology.²⁸ Added to all this, copyright law does not require disclosure through publication. It might be argued that the existence of copyright encourages publication, which provides greater access to things in intellectual space. However, passive access and use are not quite the same things when it comes to productive synergistic interactions in intellectual space. (This is another one of those places where the analogy between physical space and intellectual space is problematic, since access to physical space implies some sort of use even if it does not embrace all sorts of uses.) Moreover, in intellectual space access to property in the name of *res publicae* is not always free or even reasonable. At the same time as the Internet has opened up an apparent panoply of apparently free artefacts in intellectual space, other forms of digital technology are being used to restrict access to highly sought after information.²⁹ Patent law is hardly in a better state. Its so-called “research” exception,³⁰ which is one of the few devices it has to ensure that patent rights do not obstruct scientific innovations, is very limited in scope.³¹ Unlike copyright law, patent law has fulsome disclosure and working

²⁵ Statute of Anne 1709, s

²⁶ Thanks, in particular to Directive 93/98/EEC on harmonising the term of protection of copyright & certain related rights, & the Bono Copyright Term Extension Act 1998, the constitutional validity of which was upheld in *Eldred v Ashcroft*, 123 S Ct 769 (2003).

²⁷ See, eg, *Rogers v Koons*, 751 F Supp 474 (SDNY 1990), *aff'd*, 960 F 2d 301 (2d Cir), *cert denied*, 113 S Ct 365 (1992), in which it was held that the fair use right only applied where the infringing work has used a copyright work for the purpose of criticising that work, rather than for the purpose of criticising society in general. On the significance of this case, see further F Macmillan, “Corporate Power & Copyright” in Towse, n 24 *supra*; & Macmillan, n 2 *supra*.

²⁸ The particular device in question is the anti-circumvention right. For a case that illustrates the dangers of this right, see *Universal City Studios, Inc v Corley*, 273 F 3d 429 (US Ct of Apps (2d Cir), 2001). See further, Macmillan, n 2 *supra*.

²⁹ A classic example of this is the dispute over access to electronic journals.

³⁰ See, eg, UK Patents Act 1977, s 60(5)(b); & WTO Agreement on Trade Related Aspects of Intellectual Property Rights, Art 30.

³¹ Because, at least in the UK version, it contains a *Rogers v Koons* type limitation to experimental uses only in relation to the subject matter of the patented invention: see *Auchinloss v Agriculture & Veterinary Supplies* [1997] RPC 397. For a more worrying case, see *Madey v Duke University*, 307 F 3d 1351 (Fed Cir 2002). See further, P Loughlan, “Intellectual Property, Research Workers & Universities” [1996] 6 *European Intellectual Property Review* 351; & J M Mueller, “No ‘Dilettante

requirements,³² but the caveat above concerning the difference between access to information and its use still holds. It may be true to say that under the patent regime the contraction of *res publicae* is not as dramatic as it has been in relation to copyright law. However, that is hardly much to boast about since the regime is so unbalanced in favour of rights' holders. One of the things that accentuates the lack of balance in both copyright and patent regimes is the fact that the application of the exceptions is open to considerable legal disputation, which frequently means that the deep pockets of large corporate rights' holders are pitted against those of more limited means. Patent law, perhaps in acknowledgement of the strength of the rights that it confers, makes some attempt to constrain bullying in the form of the action for groundless threats of infringement proceedings,³³ but this does not compensate for the gross inequalities of the legal system in which it operates.

If *res communes* and *res publicae* were the only concepts to inform our notion of the public domain as it relates to intellectual property in intellectual space, then the notion of the public domain would be somewhat impoverished. There are, however, two further Roman law concepts that may be employed to flesh out the public domain in intellectual space. One of these is *res divini juris*, referring to things that cannot be owned because of their sacred or religious nature.³⁴ In the physical realm, ownership of things such as temples and icons was offensive to the gods. One can only speculate that offence to the gods would have been caused by general presumptuousness and by the fact that the ownership of such property would confer the type of power that might rival their own. At first blush, the application of this category in the context of the current debate might not be obvious. These days we are not necessarily so sensitive about the feelings of divine beings, however we still recognise the cultural power of the iconic (whether of traditional religious significance or not). Like the Roman gods, if for slightly different reasons, we should be anxious about the idea that such power can be exclusively appropriated in intellectual space. To some extent, intellectual property law has eschewed exclusive rights in categories of the iconic. Rose suggests, for example, that in intellectual space this category might include "the canon, the classics, the ancient works whose long life has contributed to their status as rare, extraordinary".³⁵ Fortunately, the period of copyright duration has not yet become so long that we have to worry about the inclusion of these sorts of things in propertised intellectual space. However, Rose goes on to argue:

[L]est we forget that all things godlike may be accompanied by lesser gods (or even false ones) and their representations, we might wish to include here too the iconography of modern commercial culture, the Miceys and Minnies and Scarletts ... though the point is controversial, the category of *res divini juris* could well embrace this iconography and dedicate it at least in some measure to the public, as in copyright law's exception for parody.³⁶

Affair': Rethinking the Experimental Use Exception to Patent Infringement for Biomedical Research Tools" (2001) 76 *Washington Law Review* 1.

³² On disclosure requirements, see eg UK Patents Act 1977, ss 14, 16 & 32; see further Oppenheim, "The Information Function of Patents" (1979) *European Intellectual Property Review* 344. On working requirements, see eg UK Patents Act 1977, ss 48-50 governing the grant of compulsory licences.

³³ See eg UK Patents Act 1977, s 70.

³⁴ Rose, n 5 *supra*, 108-110.

³⁵ Rose, n 5 *supra*, 109.

³⁶ Rose, n 5 *supra*, 109.

Copyright law certainly could do this, but there is little evidence currently that it would. Indeed, Mickey and Minnie have been able to rely on intellectual property law to protect them and their cultural baggage from parody.³⁷ The exception for parody is not well-defined³⁸ and, to the extent that it must rely on the fair dealing defences, is comprised by their shrinkage. It should be added that it is far from clear that the insights about the public domain offered by *res divini juris* are confined to things in intellectual space that fall within the copyright stable. This concept appears to impose limits on what should be regarded as patentable. For instance the patenting of “life” or of biotechnological inventions might be regarded as propertising, if not the iconic, the sacred. Anxieties about the “morality” of such developments, and the extent to which they fall into the relevant exceptions to patenting,³⁹ may perhaps reflect the internalisation of a modern day equivalent of *res divini juris*. This may also be true of attempts to stem the tide, such as the EU Directive on the protection of biotechnological inventions.⁴⁰

The final category of non-exclusive property under Roman law that has some resonance in the context of the colonising of intellectual space by intellectual property is *res universitatis*.⁴¹ In modern parlance, this refers to a regime that is bounded by property rights, but creates a type of limited public domain (or commons) within its boundaries.⁴² In physical space, this merges the advantages of productive synergistic interaction with the need to avoid the tragedy of the commons. In intellectual space, as discussed above, there is no need to avoid the tragedy of the commons, so the utility of *res universitatis*, or the bounded commons, must be to preserve productive synergies while maintaining the incentive to produce such synergies through the exercise of rights against outsiders. As the name suggests, this type of bounded community is commonly reflected in the activities of academic and scholarly groupings.⁴³ It may also describe the way in which members of traditional and indigenous communities produce innovations, knowledge and other types of creative expressions. As this example serves to remind us, intellectual property law has some difficulties in recognising these types of creative or innovative communities.⁴⁴ The primary reason for this is that intellectual property is always anxious to identify the

³⁷ See *Walt Disney Prods v Air Pirates*, 581 F 2d 751 (US Ct of Apps (9th Cir), 1978), *cert denied*, 439 US 1132 (1979). For further discussion of this case, see J Waldron, “From Authors to Copiers: Individual Rights & Social Values in Intellectual Property” (1993) 69 *Chicago-Kent Law Review* 841; & Macmillan, n 2 *supra*. See also M Chon, “Postmodern ‘Progress’: Reconsidering the Copyright & Patent Power” (1993) 43 *DePaul Law Review* 97; & D M Koenig, “Joe Camel & the First Amendment: The Dark Side of Copyrighted & Trademark-Protected Icons” (1994) 11 *Thomas M Cooley Law Review* 803.

³⁸ See, eg, *Joy Music v Sunday Pictorial Newspapers* [1960] 2 WLR 615; *Williamson Music v Pearson Partnership* [1987] FSR 97.

³⁹ See L Bently, “Invitations to Immorality: The Oncomouse Decision” (1992) 3 *Kings College Law Journal*; P Drahos, “Biotechnology, Patents, Markets and Morality” [1999] *European Intellectual Property Review* 441.

⁴⁰ Directive 98/44/EC.

⁴¹ For a description of *res universitatis*, see Rose, n 5 *supra*, 105-108.

⁴² For an example of the application of this concept in physical space, see Ostrom, n 10 *supra*.

⁴³ See Rose, n 5 *supra*, 107-08; R P Merges, “Property Rights Theory & the Commons: The Case of Scientific Research” (1996) 13 *Social Philosophy and Policy* 145.

⁴⁴ In relation to traditional & indigenous communities, see M Blakeney, “Protecting Expressions of Australian Aboriginal Folklore under Copyright Law” [1995] 9 *European Intellectual Property Review* 442; & M Blakeney, “The Protection of Traditional Knowledge under Intellectual Property Law” [2000] 6 *European Intellectual Property Review* 251.

owner of the relevant right, be it copyright's author or patent law's inventor. In doing this, it is likely to disregard many contributions from the relevant community and to muddle up concepts of origination, ownership and use.⁴⁵ Intellectual property does enjoy a very limited ability to recognise the concept of the bounded creative or innovative community through the devices of joint authorship and joint invention, which it transforms into joint ownership. However, these concepts are so limited in law that they can rarely do justice to the dynamic relations of a creative or innovative community.⁴⁶ In any case, the successful use of these concepts to nourish a vibrant creative or innovative community depends upon an unrealistic degree of goodwill, if not goodness, on the part of all the members of the relevant community.⁴⁷ Creative or innovative communities bounded by intellectual property rights may also be created by cross-licensing or open-licensing devices, which are dependent on prior identification of rights and a partial or conditional waiver of them. The so-called "creative commons movement" has, for example, come up with a way of using intellectual property law and contract law in this way to create what looks very much like the bounded community of *res universitatis*. Intellectual property rights are not eschewed, but a blanket licence is given by rights holders for the use of all or some of the exclusive rights attaching to the relevant intellectual property. The end result is a creative community that is bounded by intellectual property rights, but within which there is considerable freedom to pursue productive synergistic interactions.

Why does the public domain matter?

The importance of the various dimensions of the public domain that may be analogised to *res communes*, *res publicae*, *res divini juris* and *res universitatis* lies in the extent to which they are capable of rising to the role that the public domain needs to play in today's world. The reason that the public domain has come to matter so much in the debate about intellectual space and its creeping propertisation is not just some intuitively appealing ideas about the importance of balance between it and the propertised domain, it is rather the dangers posed by the power of those few who hold so much of the really bankable property in intellectual space.⁴⁸ Intellectual space is no longer divided between a public domain and a propertised zone in which a rich diversity of author-originators and inventor-originators each wield exclusive rights over a small plot. To be sure, these people still exist as owners of intellectual property rights, but the commodifiable nature of intellectual property rights means that vast tracts of prime intellectual space have been bought up by powerful multinational corporate interests.⁴⁹ Here, the analogy with physical space similarly held is alarming - and rightly so. This power, which resides to a considerable degree

⁴⁵ See further, eg, M Chon, "New Wine Bursting From Old Bottles: Collaborative Internet Art, Joint Works, & Entrepreneurship" (1996) 75 *Oregon Law Review* 257.

⁴⁶ Chon, n 45 *supra*, 270-272; C M Rose, "The Several Futures of Property: Of Cyberspace & Folk Tales, Emission Trades & Ecosystems" (1998) 83 *Minnesota Law Review* 129, 158ff.

⁴⁷ See also Rose, n 5 *supra*, 107, who observes in relation to creative or innovative communities within universities: "Here too there are opportunists, charlatans & zealots - & to some degree commercial users - who can disrupt the process".

⁴⁸ For a full exposition of this argument in relation to the copyright industries, see Macmillan, n 2 *supra*.

⁴⁹ For accounts of this process, see eg R V Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property* (Boulder, Westview Press, 1996); Macmillan, n 2 *supra*; D Bollier, *Brand-name Bullies: The Quest to Own & Control Culture* (Hoboken, John Wiley, 2005).

in the hands of concentrated corporate sectors, means that its members are able to exert undue control over the direction of significant areas of cultural and technical development.⁵⁰ Even more seriously, the power that has been acquired by the corporate players, partly although not exclusively on the back of intellectual property rights, means that they are able to exert more and more control over the shape of intellectual property law itself.⁵¹

The public domain is the only place in intellectual space in which the power of the corporate giants can be challenged and resisted. One of the reasons why the power of the concentrated corporate sectors over intellectual property law is a matter of such concern is that intellectual property has a symbiotic relationship with the public domain. That is, it shapes the public domain, which might be conceived of alternatively as its progeny, rather than being in a binary opposition to it. In this lies the tragedy of the modern public domain in intellectual space. If the formation of intellectual property law is subject to the power of those who dominate the propertised part of intellectual space, then it seems likely that this part will expand and the public domain will contract. As the discussion above has attempted to demonstrate, this is exactly what has happened. *Res communes* may be weakly analogised to that part of the public domain that intellectual property law deems incapable (for now) of appropriation. However, intellectual property law has shown a tendency to deem more and more of what we might have considered *res communes* as capable, after all, of appropriation. The concept of *res publicae* in intellectual space, which is justified by the importance of productive synergistic interactions, is defended (or not) by the variable and constantly changing rules on duration and a progressively weakening range of defences and exceptions. What is perhaps of equal concern to the contraction of these aspects of the public domain in intellectual space is that the public domain that has been created by intellectual property law seems to have been a rather thin concept compared to the multilayered idea of the public domain in Roman law. The bounded community envisaged by *res universitatis* is poorly catered for in intellectual property, although licensing devices may be used to create something that looks rather like the bounded creative or innovative community. Such communities are capable of indirectly tilting against the power of the corporate giants by developing an alternative space for creativity and innovation, although their ability to form the basis of a direct attack on the monolith of corporate power is open to question. More capable of mounting such a direct attack is the concept of *res divini juris*, which is grounded in the idea that the potency of some symbols gives too much power to those who might seek to appropriate them. This idea does not seem to have gained much influence in intellectual property law's construction of the public domain, although it does have some atrophying tools that might be used for this purpose.

⁵⁰ See Macmillan, n 2 *supra*; S Vaidhyathan, *Copyrights & Copywrongs: The Rise of Intellectual Property & How it Threatens Creativity* (New York, New York University Press, 2001) ; L Lessig, *Free Culture: How Big Media Uses Technology & the Law to Lock Down Culture & Control Creativity* (New York, Penguin Press, 2004).

⁵¹ The classic example of this is the negotiation & conclusion of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights: see S K Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge, Cambridge University Press, 2003).

Is that all there is?

A key aspect of the public domain in both intellectual and physical space is that in order to have vitality it needs to be defended and nurtured. It has been argued above that in intellectual space, intellectual property law inadequately provides the means for the defence of the public domain. But, intellectual property law is not all the law there is to perform this defensive task. There is a range of other laws that regulate and order activity in intellectual space. These laws include, for instance, censorship, obscenity and blasphemy laws, defamation, laws governing national security, and laws protecting human rights, including the right to free speech. It seems that at least some of these laws have the effect of altering the boundary between the public domain and the propertised zone. For example, there is some evidence that courts will refuse to enforce intellectual property rights in material that is regarded as obscene,⁵² or has been produced contrary to national security obligations.⁵³ In these sorts of cases it is arguable that artefacts in intellectual space are being forced out of the propertised zone and into the public domain, where they will become subject to other forms of regulation designed to ensure that the public domain remains an orderly and productive one. Of course, it might be argued that intellectual property law has attempted to internalise considerations of morality⁵⁴ and public policy⁵⁵ with the result that it has pushed material that transgresses certain norms into the public domain where it may be regulated by areas of law more suited to the purpose. The distinction between exactly what is pushed out by intellectual property law and what is pulled out by other areas of law is, however, rather obscure in many cases. And it is not necessarily clear that what intellectual property law pushes out into the public domain has a significant degree of identity with that which other areas of the law might seek to pull into it.

The relationship between human rights law and intellectual property law is the clearest (if anything here is clear) example of an uncertain tussle at the borders of propertised intellectual space and the public domain. Human rights law, or at least norms driven by this area of law, seems to knock at the door of the propertised domain in intellectual space requesting the release of certain material for limited times and purposes. The classic example of this in relation to patented material has been the demands in the name of human rights for the release or waiver of some of the rights attaching to patents in order to allow the manufacture of generic anti-AIDs medications for supply to those who are unable to afford the purchase of patented medication.⁵⁶ It is tempting to argue that patent law, itself, has no mechanisms with which to recognise these types of claims. However, that would be to disregard the utility of the compulsory licence. There may be doubt about whether the contracted notion of the compulsory licence under the WTO Agreement on Trade-Related

⁵² Eg *Glyn v Weston Feature Fims* [1916] 1 Ch 261.

⁵³ Eg *AG v The Guardian Newspapers (No 2)* [1988] 3 All ER 542; & see also F Patfield, "The House of Lords Decision in the Spycatcher Litigation" [1989] 1 *European Intellectual Property Review* 27.

⁵⁴ See, eg, UK Patents Act 1977, s 1(3).

⁵⁵ See, eg, UK Patents Act 1977, s 1(3); & UK Copyright, Designs and Patents Act 1988, s 171(3).

⁵⁶ See UN Commission on Human Rights, *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights* (Report of the High Commissioner, E/CN.4/Sub.2/2001/13, 27 June 2001; & D Weissbrodt & K Schoff, "The Sub-Commission's Initiative on Human Rights & Intellectual Property" (2004) 22 *Netherlands Quarterly of Human Rights* 181.

Intellectual Property Rights⁵⁷ would be sufficient to support a compulsory licence in the circumstances of the HIV-AIDs crisis facing many parts of the world. But this is not to say that a compulsory licensing scheme could never do this job. Presumably patent law could also rise to the task of mitigating other types of human rights concerns with which it has been associated. This might be true, for example, in relation to the abuse of the rights of indigenous peoples that has occurred as a result of ill-gotten gains from bioprospecting⁵⁸ or from concerns about food security that have been raised by the acquisition and exercise of rights over biotechnological inventions.⁵⁹ Both of these might be addressed by a combination of limitations on patentable subject-matter, alterations to the concept of “inventor”, improvements in compulsory licensing, and/or a more extensive regime of exceptions. The question is whether or not internalising human rights concerns into patent law and allowing patent law, then, to be the sole arbiter of the line between the propertised domain and the public domain is an optimal solution.

This same question arises in relation to copyright law, although it is far from clear that copyright law actually has the tools to respond to the human rights issues that it raises. The primary human rights concern in relation to copyright law has arisen in relation to freedom of speech issues.⁶⁰ In essence, the tension is between the control that the copyright owner has over the copyright work and the argument that the work should, for certain purposes, subsist in the public domain. Despite the fact that copyright law grounds a system that might be argued to constitute extensive private control over speech, it has shown little concern with freedom of speech issues. The key to copyright law’s comparative inattention to countervailing concepts of free speech appears to be threefold. First, the role of copyright in stimulating expressive diversity is often considered to outweigh or nullify any negative effects on freedom of speech.⁶¹ It is accepted that a certain degree of copyright protection is necessary for the maintenance of free speech, perhaps because it is likely to encourage expressive autonomy and diversity, but at least because it is likely to encourage the widespread dissemination of such expressive autonomy and diversity. These are, in turn, prerequisites for the sort of vigorous public domain that is essential to maintaining a democratic political and social environment, which is the main utilitarian concern of free speech principles.⁶² This does not, however, mean that we should be blind to the possibility that under certain conditions the way that copyright law restricts activities

⁵⁷ See WTO TRIPs Agreement, art 31.

⁵⁸ See K Aoki, “Neocolonialism, Anticommons Property, & Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection” (1998) 6 *Indiana Journal of Global Legal Studies* 11; & M Blakeney, “Biodiversity Rights & Traditional Resource Rights of Indigenous Peoples” (1998) 2 *Bioscience Law Review* 52.

⁵⁹ See M Blakeney, “Protection of Plant Varieties & Farmers’ Rights” (2002) 24 *European Intellectual Property Review* 9; & P Drahos, “Intellectual Property & Human Rights” (1999) 3 *Intellectual Property Quarterly* 349.

⁶⁰ For a comprehensive overview of the relationship between copyright & free speech, see J Griffiths & U Suthersanen (eds), *Copyright & Free Speech: Comparative & International Analyses* (Oxford & New York, Oxford University Press, 2005).

⁶¹ See, eg, P Goldstein, *Copyright’s Highway: From Gutenberg to the Celestial Jukebox* (1994), 228ff, esp 236. For a more nuanced approach to this proposition, see see N W Netanel, ‘Copyright and a Democratic Civil Society’ (1996) 106 *Yale Law Journal* 283, esp 347-364.

⁶² See E Barendt, *Freedom of Speech* (Oxford, Oxford University Press, 1987), ch 1; Netanel, n 61 *supra*; & F Macmillan, “Commodification & Cultural Ownership” in Griffiths & Suthersanen, n 60 *supra*, 35.

that might otherwise take place in the public domain raises serious freedom of speech concerns.⁶³ The second reason why copyright has paid little attention to free speech concerns is that there is a prevailing belief that copyright has internal mechanisms that are capable of dealing with freedom of speech issues, if they arise. Particular emphasis in this respect is placed on the idea/expression dichotomy and the fair dealing defences. There is no doubt that the idea/expression dichotomy is of considerable importance here because it prevents the monopolisation of information and ideas that are capable of being expressed differently to the way in which they are expressed in the material subject to copyright protection. However, the utility of the dichotomy in relation to non-literary copyright material is dubious.⁶⁴ Where the idea/expression dichotomy cannot do the job, the fair dealing defences may provide a partial back-up. But it is only partial: despite the potential usefulness of the fair dealing defence for criticism and review, the defences are unable to take into much account the most critical factor in relation to securing free speech.

The critical factor in securing free speech in a vibrant public domain is not so much the question of the extent to which material is subject to property rights, it is rather the nature of the rights' holder and, specifically, the degree of power wielded generally by that rights' holder in intellectual space. This is linked, in a negative way, to the third key to copyright's inattention to free speech principles, which is that the very fact that copyright enables the exercise of private, rather than governmental, control over speech means that the risks that copyright poses to free speech are underestimated or ignored. This is despite the fact that a vigorous public domain is as much threatened by the concentration in private hands of copyright ownership over cultural products as it would be if such ownership was concentrated in the hands of the state. In fact, an argument might even be made that concentration of such ownership in private hands is all the more dangerous because at least the state is accountable for the way it wields power both through the electoral process and through the tools of administrative law. The private sector is, of course, accountable through market mechanisms. Some questions might be raised about the effectiveness of these mechanisms in the case of the media and entertainment corporations, which have vast and valuable property rights in intellectual space and hold overwhelming power in the market for cultural products. Once these corporations have acquired the ability to shape taste and demand through selective release and other devices for cultural filtering and the ability to suppress critical speech about the process of taste-shaping,⁶⁵ then the market mechanism may work rather imperfectly.

Re-Drawing the Boundaries

As the foregoing discussion has attempted to demonstrate, while there is a range of other laws that regulate intellectual space, only intellectual property has a symbiotic

⁶³ See further, Macmillan, n 62 *supra*.

⁶⁴ See further M Nimmer, *Freedom of Speech* (1984), 2:05[C], 2-73, concerning photographs of the My Lai massacre; Waldron, n 37 *supra*, 858n, concerning the video film of two white Los Angeles policemen beating Rodney King, a black motorist; F Macmillan Patfield, 'Towards a Reconciliation of Free Speech and Copyright' in E M Barendt et al, *The Yearbook of Media and Entertainment Law 1996* (1996) 199, 216-219; Macmillan, n 62 *supra*, 57-58.

⁶⁵ See further Macmillan, n 24 *supra*; F Macmillan, "The Cruel ©: Copyright & Film" [2002] *European Intellectual Property Review* 483; Macmillan, n 2 *supra*.

relationship with the public domain. That is, the rights attaching to intellectual property shrink and expand conversely with the alterations in the contours of the public domain. Moreover, intellectual property law is largely responsible for drawing the boundary between what is subject to property rights, when and how, and what is not. Some (shrinking) parts of intellectual space have been ignored or excluded by intellectual property law. Effectively, in Roman law terms they are for the time being something akin to *res communes*, legally incapable of appropriation. Doubtless, there are also vast swathes of intellectual space that might currently be analogised to the Roman law concept of *res nullius*, the space in which things belong to no-one because no appropriation recognised by law has yet taken place. However, much of intellectual space has been colonised by intellectual property. Within that space, intellectual property law itself has declared some things to be in the public domain, either for certain limited purposes or by effluxion of time. Most of what is in the public domain for these purposes might be analogised to the concept of *res publicae*, although the current limits to this aspect of the public domain seem to be depriving it of much vitality. Other Roman law concepts of the public domain in physical space, such as *res divini juris* and *res universitatis*, seem to have had little impact on the way in which intellectual property law creates the public domain in intellectual space.

If intellectual property law, not only has a symbiotic relationship with the public domain in intellectual space, but also is largely responsible for determining the boundary between it and the exercise of exclusive property rights, then an obvious way in which to give the public domain more vitality is to alter those aspects of intellectual property law that have been identified in this chapter as impacting on the shape of the public domain. Most obviously, this would involve reversing the current trend whereby more and more of intellectual space is sucked into the propertised domain. For copyright law, for example, this would involve limiting if not reversing its tendency to spread horizontally to cover new forms of activity in intellectual space, along with a renewed commitment to distinguishing between ideas and expressions and keeping the former in the intellectual *res communes*. For patent law a wider reading of the classes of innovations that are deemed not to be inventions would do much to curb horizontal spread. It might also be the case that the hurdles of novelty, inventive step and industrial applicability⁶⁶ need to be set a little higher. Due to doubts about whether the concept of *res communes* can have any meaningful existence in intellectual space, it may be that these are really arguments about *res publicae* in intellectual space. The line between these two concepts, if it exists in intellectual space, is not easy to apply. What is clearer, however, is that the protection of the *res publicae* in intellectual space requires more than just a re-appraisal of the horizontal scope of intellectual property laws.

In order to safeguard the vitality of the *res publicae* in intellectual space, a critical re-appraisal of the duration rules is needed, particularly with respect to copyright.⁶⁷ In the early life of English copyright law, much of the justification for increases in the duration of copyright appear to be a manifestation of the influence of romantic

⁶⁶ See, eg, UK Patents Act 1977, ss 1(1), 2 (novelty), 3 (inventive step), & 4 (industrial applicability).

⁶⁷ On reforming the duration rules, see further Netanel, n 61 *supra*, 366-371.

conceptions of the author and the author's right to control the work.⁶⁸ Given that the process of commodification divorces the author from his or her work⁶⁹ so that the author has become a somewhat marginalised figure in copyright law, extensions of the copyright interest based upon the figure of the author seem to have little justification. A similar lack of justification affects the contraction of the defences to copyright infringement, especially the fair dealing defences, which are the other important aspect of copyright law that needs to be considered if we are to increase the protection of *res publicae*.⁷⁰ Early on in the history of copyright, as a result of the focus on the now marginalised figure of the author, there was a transition in the application of the fair dealing defences from a focus on what the defendant had added to what the defendant had taken.⁷¹ The contraction of the right has moved forwards in leaps and bounds in recent times. Optimists may argue that subsequent decisions on both sides of the Atlantic in cases like *Campbell v Acuff-Rose Music, Inc*⁷² and *Time Warner Entertainments Company LP v Channel 4 Television Corporation plc*⁷³ repair or mitigate some of the damage that *Rogers v Koons*⁷⁴ has done to the vitality of the fair dealing/fair use defence as a weapon for securing the intellectual commons. However, the more likely result of this mish-mash of case law is to create confusion about the scope of the defence. In comparison, the one thing that might be said in favour of the various defences and exceptions that protect *res publicae* under patent law is that they are so limited that the scope for confusion is considerably less. Of course, this is not to say much. In order to preserve an intellectual space for productive synergistic interactions, serious attention needs to be given to the scope of the research exception.

So far as those parts of the public domain analogous to the concepts of *res divini juris* and *res universitatis*, as has been argued above, they hardly rate any current recognition in the current organization of intellectual space. There is potential for productive synergies in *res universitatis*, but in the current climate of corporate domination too much valuable intellectual space has already been acquired by interests hostile to the type of closed creative or innovative communities that it envisages. A modern version of *res divini juris* might very well take its place alongside a re-invigorated *res publicae* in order to ensure that the power that might otherwise flow from concentrations of ownership in intellectual space do not give rise to at least some types of unacceptable abuses or limitations on the rights of others. However, even if all the different aspects of the public domain could be catered for using expanded versions of the devices that intellectual property currently uses, the question of the adequacy of these devices would remain. Other ways of drawing

⁶⁸ See L Bently, 'Copyright and the Death of the Author in Literature and Law' (1994) 57 *Modern Law Review* 973, 979 & 979n, in which reference is made to Wordsworth's support for Sergeant Talfourd's famous campaign to extend the duration of copyright. See also Vaidhyanathan, n 49 *supra*, ch 2.

⁶⁹ See, eg, J Gaines, *Contested Culture: The Image, the Voice and the Law* (Chapel Hill & London, University of North Carolina Press, 1991), 10.

⁷⁰ On reform of the fair dealing defences, see further Netanel, n 61 *supra*, 376-382; on the need for strong fair dealing defences in the digital environment, see W van Caenegem, "Copyright, Communication & New Technologies" (1995) 23 *Federal Law Review* 322.

⁷¹ Bently, n 68 *supra*, 979n, cites *Sayre v Moore* (1785) in *Cary v Longman* (1801) 1 East 358, 359n, 102 ER 138, 139n; *West v Francis* 5 B & Ald 737, 106 ER 1361; & *Bramwell v Halcomb* (1836) 2 My & Cr 737, 40 ER 1110, as examples of this transition.

⁷² 114 S Ct 1164 (1994).

⁷³ [1994] EMLR 1.

⁷⁴ Note 27 *supra*.

material out into the public domain of intellectual space may also be needed. At present the most obvious tools for this lie within the realms of human rights law. This area of law does not yet seem to have adapted itself for this purpose, although its adaptation remains a viable option. What is arguably important in any future development of this kind is that the relevant aspects of human rights law are not subsumed into intellectual property law. The inevitable result of such subsumption will be the subjugation of human rights to the essentialism of the property paradigm. Human rights will then go the way of all the other exceptions to intellectual property law designed to maintain the public domain. Rather, to be effective in manipulating the border of propertised zone and the public domain in intellectual space, human rights law needs to maintain its own integrity as an area of law in potential normative clash with intellectual property law.

The fate of the public interest defence is a classic example of subsumption to the essentialism of the property paradigm. This has perhaps been most marked in common law jurisdictions in relation to attempts to use it to restrict the exercise of interests attaching to copyright material. In Australia, for example, doubts about the existence of this right as a defence to an action for copyright infringement are relatively longstanding.⁷⁵ The decision of the US Supreme Court in *Eldred v Ashcroft*⁷⁶ is eloquent testament to the fact that public interest will rarely, if ever, trump the proprietary interests of the copyright holder. In the United Kingdom, even before the decision of the English Court of Appeal in *Hyde Park v Yelland*,⁷⁷ which appeared to have killed off the right in the United Kingdom, there was considerable evidence that the courts were unwilling to engage with the question of the relationship between copyright and the public interest.⁷⁸ However, the subsequent decision of the Court of Appeal in *Ashdown v Telegraph Group*⁷⁹ shows that the public interest right may yet have a spark of life in the United Kingdom, although it is unclear whether this decision will have much, if any, application apart from preserving the right to speak freely in the overtly party political arena. Despite this rather sorry catalogue, perhaps it is time for an attempt to reinvigorate the notion of a public interest right as an independent vehicle to defend the public domain in the circumstances where the exceptions and defences created by intellectual property law are unable to do the job. Given the flexibility of the public interest concept and the fact that its clash with intellectual property rights is not unexplored legal territory, perhaps it might be a sufficiently capacious vehicle to carry and deploy the human rights concerns that are increasingly implicated in the propertisation of intellectual space. More might even be said for it in an ideal world where it could carry part of the burden of ensuring public accountability for the exercise of private power. In any case, there is a good argument that we need to find some bulwark against the domination of intellectual space by private corporate interests that have now acquired so much power that they

⁷⁵ See Gummow J in *Corrs Pavey Whiting & Byrne v Collector of Customs for the State of Victoria* (1987) 10 *Intellectual Property Reports* 53, 70-77 and *Smith, Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services & Health* (1990) 17 *Intellectual Property Reports* 545, 583.

⁷⁶ Note 26 *supra*.

⁷⁷ [2001] Ch 143, CA.

⁷⁸ See, eg, *Secretary of State for the Home Department v Central Broadcasting* [1993] EMLR 253 & *Beggars Banquet Records Ltd v Carlton Television* [1993] EMLR 349. See also, Macmillan Patfield, n 64 *supra*, 223-225.

⁷⁹ [2002] Ch 149, CA.

are able to shape intellectual property law, and its range of exceptions and defences, for their own benefit.