

Enclosures of the Mind: Intellectual Property from a Global Perspective

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A Confrontation with the Subject

“Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.

We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.

Governments derive their just powers from the consent of the governed. You have neither solicited nor received ours. We did not invite you. You do not know us, nor do you know our world. Cyberspace does not lie within your borders.

...

Your increasingly obsolete information industries would perpetuate themselves by proposing laws, in America and elsewhere, that claim to own speech itself throughout the world. These laws would declare ideas to be another industrial product, no more noble than pig iron. In our world, whatever the human mind may create can be reproduced and distributed infinitely at no cost. The global conveyance of thought no longer requires your factories to accomplish.

These increasingly hostile and colonial measures place us in the same position as those previous lovers of freedom and self-

determination who had to reject the authorities of distant, uninformed powers. We must declare our virtual selves immune to your sovereignty, even as we continue to consent to your rule over our bodies. We will spread ourselves across the Planet so that no one can arrest our thoughts.

We will create a civilization of the Mind in Cyberspace. May it be more humane and fair than the world your governments have made before.”

- From the Declaration of the Independence of Cyberspace, by John P. Barlow, co-founder of the Electronic Frontier Foundation.¹

1 Introduction

As this almost unearthly quote of J. Barlow suggests, cyberspace — or for many of us just the internet — is currently one of the most visible, accessible and far reaching vehicles of globalisation. Globalisation is not just happening on the internet, it is also well under way in the spheres of economy and law. In addition, with the increasing importance of innovations and information, our society is also transforming into what has been called the Information Society: in which information and other intellectual produce are becoming the primary source of wealth. This, in turn, has — together with, and against increased file-sharing and recombination of existing works on-line — made more parties interested in enclosing these riches by stricter Intellectual Property (IP) Laws, resulting in what some have called a virtual land-grab. It is at these

¹ John Perry Barlow. *A Declaration of the Independence of Cyberspace*. 1996. URL: <http://homes.eff.org/~barlow/Declaration-Final.html>, p. 1.

increasingly relevant crossroads of information technology, globalisation, and IP-law that this paper finds its subject.

The main question asked is whether IP and IP-laws can still, or no longer, be justified from a historic and global perspective. While answering this question we do not just look at the contemporary ethical issues, but take historic developments as our basis and starting-point. This because historic analysis can unearth not just the history of IP-law itself, but also — and especially relevant for our question here — how it functions in the world as the times and technology change, changing the ways and degrees to which these laws apply and function, similar to how not just modifications to a text, but also the further evolution of the language it is written in, can change its readings.

We will start with a short history of IP in early, modern, and contemporary history, to provide the necessary background. Then we will attempt to clear the conceptual muddle that is currently swamping much of the day to day debate about IP. It starts with an explication of the central concepts: property, intellectual and intellectual property. Following, all stakeholders and interests involved in IP are identified; authors, publishers, the public and society. The introductory explication of concepts ends with a listing and discussion of the most important fields of power in which these interests are opposing and balancing against each other.

Then we will go into the two main classical theories of justification for Intellectual Property: the utilitarian stimulation of creation theory and the Lockean labor desert theory. In the sixth section an outline will be given of the long term structural changes that are of relevance for our understanding of IP in relation to the two theories of justification; the rise of the information society, the second enclosures movement, globalisation, decentralized (re-)production, and creation by globally dispersed communities.

In the last part the findings will be presented. First of all it will be argued that be-

cause of the problems that IP runs into due to historical and technological developments, IP is no longer justified. Then some alternatives will be briefly discussed, such as the emergence of a second, parallel, market for virtual goods in which usage, or popularity is rewarded, not the piece-wise sale that mainly works well for physical goods. Finally we will criticise the reification that is central to the debate in the form of both talk of 'natural' rights and the blind acceptance of the need to impose artificial scarcity on works of the intellect in order to extract a fair profit from the first market. We will conclude with a short answer to the question of the justifiability of copyrights and a sketch of recent developments.

2 A Short History of Intellectual Property

We will begin with a short history of IP in chronological order, starting with the early history upto the 18th century Statute of Anne, then the modern, culminating in the Berne Convention, followed by that of the contemporary United States (US).

2.1 Early History: In Service of the King

In classical history we do not encounter the concept of IP for a long time. In the India of ancient times ideas were ascribed to peoples, not to individuals. What was said mattered more than who said it. In Greek oral tradition works were fluid, and traveling story-tellers freely adopted and adapted stories from their shared tradition. It was only hesitatingly that in 6th century BC Athens creative works began to be associated with individual authors. In the Jewish Talmud we see true attribution of ideas to authors for the first time, but this was mostly for the determination of authority, not for the assertion of rights. Then in Roman times — while writing was still mostly something for the leisured class — we find a few records of publishing-contracts. Still, in Roman Law there is no trace yet of the concept of IP, and where a living was to be made, patronage was still the most common form of

financial support for authors.²

Then again in the Middle Ages, authorship was not a popular notion. Most works were anonymous and ascribed to ones group or attributed to the glory of God.³ Obsession with the improvement of ones social-economic position was frowned upon, as was profit (via the doctrine of the 'just price'). For a long time the church was the only party concerned with anything intellectual, and they did not exploit ideas or texts in any direct way: copying of manuscripts was free, besides the monks labor required to do it. The only exception were a few Benedictine monasteries who did charge money, land, or cattle for access to their libraries (but again not for copying). Even when around the turn of the first millennium the University of Paris — and later other universities — started to offer (manual) copy-services to students, the stationers that were licensed to provide this service still had the obligation to lend out works for free to people who wanted to make the copies themselves.⁴

It is only with the advent of Mercantilism that something resembling true intellectual property appeared.⁵ In 1449 Henry VI awarded the first patent to a Flemish stained glass maker who was introducing a new technique. Not long thereafter, in 1468, a 5 year monopoly for the use of the printing-press was awarded to an investor in Venice. Eight years later the same thing happened in the UK, when a monopoly was awarded (literally 'the copyright') to Westminster Abbey.⁶ These patents and copyrights were awarded to stimulate investments, just as the monopolies granted to other mercantile operations such as

the East India Company.⁷

Besides the protection of infant industries and an expectation of loyalty, the employment of censorship also played a role when queen Mary I granted — what was to become — a 150 year monopoly on publication to the Stationers Company in 1557.⁸ This company, next to its obligation of censorship, had the right to organize book-sales, to limit the number of master-printers to 25, and to keep a public registry of which of them was allowed to publish which titles.⁹

For a long time most works published and in demand were classics. Because of the Company's monopoly, the few authors who did produce new works were in a very weak bargaining-position for royalties. It thus took more than a hundred years — until 1667 — before John Milton was the first author who received something (£8) from the Company for his book *Paradise Lost*. It was in this setting that in 1704 — when the Company's 150 year-monopoly was about to expire — Daniel Defoe made a good case for changes in his: *Essay on the Regulation of the Press*.¹⁰ Partially in response to it the Statute of Anne was erected in 1710.¹¹ It stated that the monopoly on copying was as of that moment vested in each individual author for his own titles, and

² Ronald Bettig. "Critical Perspectives on the History and Philosophy of Copyright". In: *Critical Studies in Mass Communication* (1992), p. 131, p. 134.

³ Ibid., p. 136.

⁴ Ibid., p. 137.

⁵ Caren Irr. "Literature As Proleptic Globalization, or a Prehistory of the New Intellectual Property". In: *South Atlantic Quarterly* 100 (2002), pp. 773–802, p. 779.

⁶ Carla Hesse. "The rise of intellectual property, 700 B.C. - A.D. 2000: an idea in the balance". In: *Daedalus* (2002), p. 26, p. 29; Hastings Center. "A History of Patents". In: *Hastings Center Report* (2007), S4, p. 4.

⁷ Bettig, "Critical Perspectives on the History and Philosophy of Copyright", pp. 139-140.

⁸ Bettig, "Critical Perspectives on the History and Philosophy of Copyright", pp. 138-139; Hesse, "The rise of intellectual property, 700 B.C. - A.D. 2000: an idea in the balance", p. 31.

⁹ Lawrence Lessig. *Free culture: The nature and future of creativity*. New York: Penguin, 2004, p. 85; Harry Hillman Chartrand. "Christianity, Copyright, and Censorship in English-Speaking Cultures". In: *Journal of Arts Management, Law & Society* (1992), p. 253, p. 10; Irr, "Literature As Proleptic Globalization, or a Prehistory of the New Intellectual Property", pp. 781-782.

¹⁰ Eva Hemmungs Wirtén. *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*. University of Toronto Press, 2004, p. 17.

¹¹ M. Boldrin and D. K. Levine. *Against intellectual monopoly*. Cambridge: Cambridge University Press, 2008, p. 48.

for a period of 14 years only.¹²

2.2 *The French Revolution: Universal Natural Rights*

In 1793, in the turmoil following the French Revolution, the Chénier Act was passed in France. This was the first copyright-act of France. It was named after André Marie Chénier, a revolutionary and a famous poet of the early Romantic movement. Besides the right to sell publishing rights, it also assigned to the author a number of natural rights that were considered inalienable, and that thus could not be sold. They were the right to determine the first publishing date, the right of attribution, the right to prevent modifications to one's work, and the right to withdraw it from the market.

Regardless of the talk of natural rights, copyrights were by then still a national affair. Copyrights of foreign authors were not respected, and only a few specific bilateral treaties for protection were in power. In the Netherlands and in the areas that later would become Germany, there even were no official copyrights, and copying was controlled by publishers among themselves there. It was in this climate that France in 1852 unilaterally declared that it would protect the copyrights of all foreign authors. This was not as big a sacrifice for France as it seems, because at that time much more literature was exported from France than came back from the rest of the world.¹³ It was thus in 1878 that the famous French author Victor Hugo (author of *Les Misérables*) still complained in his keynote speech at the Congrès Littéraire of the World Exhibition in Paris, that his books were illegally printed and sold in Belgium. He continued to rally for international copyrights for the rest of his life.¹⁴

¹² Lessig, *Free culture: The nature and future of creativity*, pp. 85-91; Chartrand, "Christianity, Copyright, and Censorship in English-Speaking Cultures", p. 8; Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, p. 17.

¹³ Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, pp. 21-23.

¹⁴ *Ibid.*, pp. 5-15.

In 1886, one year after Hugo's death, and at his instigation, the Berne Convention for the Protection of Literary and Artistic Works was drafted by the Association Littéraire et Artistique Internationale.¹⁵ It required signatories to apply their own copyright laws also to works from other signing nations, and it required copyright to last for 50 years after the author's death, and for it to be automatic, without requiring central registration of the work, or any other formality.¹⁶ In 1887 this convention was signed by France, Belgium, Germany, Great Britain, and four other European countries. It was preceded by 4 years by the Paris Convention for the Protection of Industrial Property of 1883, which protected patents and trademarks. The Berne Convention was revised in 1908, 1928, 1948, 1967 and 1971 to accommodate new media. With the passing of decades it was signed by over 160 countries, but only in 1989 by the United States.

2.3 *The American Century: Business and Globalisation*

In the United States the first national copyright was introduced in 1790. It was mostly a copy of the Statute of Anne, with the difference that the 14-year authors monopoly could be extended once with another 14 years at the author's request.¹⁷ It was written just three years after the American Constitution, in which a clause on intellectual property had already been included (article 1, section 8, clause 8):¹⁸

"The Congress shall have Power To . . . promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors

¹⁵ Boldrin and Levine, *Against intellectual monopoly*, p. 34; E. W. Ploman and L. C. Hamilton. *Copyright: intellectual property in the information age*. Westport: Routledge & Kegan Paul, 1980, p. 49.

¹⁶ Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, p. 36.

¹⁷ Bettig, "Critical Perspectives on the History and Philosophy of Copyright", pp. 145-147.

¹⁸ *Ibid.*, p. 148.

the exclusive Right to their respective Writings and Discoveries”

The founding fathers were concerned with the dangers of (centralized) monopolies, and they thus determined that copyrights should be limited in time and vested in individual authors only. Also their standpoint — and that of many prominent Americans — was that the United States as a newly independent country could freely print and use foreign literature. Even in 1842 a US publisher declared: “*All the riches of English literature are ours . . . Why dam the rivers of knowledge?*”.

In 1841, as a result of the Folsom vs Marsh case — which was about the publishing of president Washington's letters for use in a biography — the concept of fair use was introduced into US jurisprudence. With the Copyright Act of 1976 this right of fair use became law, and it was granted depending on: the purpose of the copying (educational or commercial), whether the work copied from was factual or fiction, the amount that was copied in relation to the totality of the work, and the effects that the copying would have on the market for the original work.¹⁹ Another important change introduced by this act was that commissioners, besides employers, were now also considered authors, stretching the limits posed by the Constitution.

By this time the United States had still not signed the Berne Convention, and foreign authors still had no rights unless they published their works in the US first. Many US-publishers however did make use of the Berne Convention for protecting their own works, by simultaneously publishing them in Canada (which did sign the Berne Convention).²⁰ Over the years, however Intellectual Property had become more profitable to the US: movie and television series exports to Europe had risen by 225% between 1984 and

1989, and worldwide exports doubled from that year until 1991 to \$2.2 billion. The export of US corporations mainly producing IP was 36 billion 1991, and it grew to 89 billion in 2001 (which is more export than sectors such as auto- and airplane-industries generate, but at the US national level traditional industries are still larger).²¹ In 1984 some of these corporations, among which Disney and Time Warner, together with IBM, General Electric and various other organizations founded the International Intellectual Property Alliance: a lobby organization that wanted, and wants, the US-government to defend their interests by pressing for more IP rights, both nationally and internationally.²²

In response to this, US Congress signed the Berne Convention in 1986. This happened just before the start of the Uruguay round of the General Agreements on Tariffs and Trade (GATT). At this round the World Trade Organisation (WTO) was created to replace the GATT treaty. Near the end of it, the US, together with most of the West, pressed for inclusion of IP regulations in the WTO's set of treaties.²³ They were successful, and the agreement on Trade-Related aspects of Intellectual Property rights (TRIPs) became a fact. It went into effect in 1995, allowing for a grace period until 2005 before developing countries needed to have implemented strict IP-regulations.²⁴ Since WTO-membership entailed accepting all WTO-treaties, many de-

²¹ B. E. A. US Department of Commerce. *Gross Output by Industry in Current Dollars*. 2008. URL: http://www.bea.gov/industry/gdpbyind_data.htm, p. 1; Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, pp. 89-91; Boldrin and Levine, *Against intellectual monopoly*, p. 109.

²² Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, pp. 90-93.

²³ S. Deng et al. “A Guide to Intellectual Property Rights in Southeast Asia and China”. In: *Business Horizons* 39 (1996), pp. 43-51, p. 46; Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, pp. 55, 92-106.

²⁴ Christopher May. “The denial of history: reification, intellectual property rights and the lessons of the past.” In: *Capital & Class* 88 (2006), pp. 33-56, pp. 34-35.

¹⁹ Irr, “Literature As Proleptic Globalization, or a Prehistory of the New Intellectual Property”, p. 789; Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, p. 69.

²⁰ Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, p. 94.

veloping nations (and other nations such as China and Russia) that never would have signed the Berne Convention, now were effectively forced to implement strict IP laws in exchange for access to the world-market.²⁵ With this the US — who in the past had liberally used British IP — now practically stated: ‘do as we say, not as we did’.²⁶

IP-protection went further in the US itself. After extensive lobbying of Disney and others the Copyright Term Extension Act (CTEA) was passed in 1998. It extended copyrights by 20 years to 70 years after the authors death, and to 95 years for corporate IP.²⁷ This act was also pejoratively named the Mickey Mouse Protection Act by Stanford Law School prof. Lawrence Lessig, as it — just in time — prevented many animation-figures of Disney from falling into the public domain.²⁸ In that same year (1998) the Digital Millennium Copyright Act (DMCA) was passed. This act made the circumvention of copy protections (DRM) illegal, even if attempted for legal ends such as fair use.²⁹

It was under this law that in 2001 Dmitry Sklyarov, a Russian programmer working for a company offering e-book decryption software, was arrested by the FBI after giving a presentation on e-book security at a conference in the United States. He was released only after significant public protests, ... and of course, because the DMCA did not apply in Russia.³⁰

3 Clarification of Concepts

In order to have a clear picture of what IP exactly is, we give an explanation of the concept of Intellectual Property here, and clarify how it is the application of the concept of property to that of the intellectual creation.

3.1 Property

Property is historically a contested concept. Especially by Marxist authors much interesting critique of property has been produced.³¹ Nevertheless, in modern, liberal societies, property is usually taken for granted, and for good, and generally well-understood reasons, such as the efficiency of markets at maximizing production and regulating the allocation of resources. Property as such is not contested here.

Property as it is normally understood, however, applies to physical, and easily delineable goods, such as houses, a car, or land. Farmland for example can be fenced off, and it is definitely physical. Land and other physical goods have two characteristics that are very relevant from an economic standpoint: they are rivalous, and exclusive. First of all land is rivalous, in that if you would farm my land, for example, I could not farm it at the same time. Only one person can use a rivalous good for a certain purpose at the same time. Secondly land is exclusive, I can keep you off my land if I want to. For exclusive goods it is easy to prevent others from using them. Rivalous-

²⁵ S. Bannerman. “Copyright and the Global Good? An Examination of ‘The Public Interest’ in International Copyright Regimes”. In: *Intellectual Property Rights and Communications in Asia: Conflicting Traditions* (2006), p. 58, p. 4; Alexandra George. *Globalization and intellectual property*. Hampshire: Ashgate, 2006, pp. XXIII-XXVII, 139-143.

²⁶ May, “The denial of history: reification, intellectual property rights and the lessons of the past.”, p. 51; Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, pp. 102-107, 138; Y. Benkler. *The wealth of networks*. New Haven: Yale University Press, 2006, p. 414.

²⁷ R. A. Spinello. “The future of intellectual property”. In: *Ethics and information technology* 5 (2003), pp. 1–16, p. 4; Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, p. 10.

²⁸ Lawrence Lessig. *The future of ideas: The fate of the commons in a connected world*. New York: Random House, 2001, p. 107; A. D. Thierer, W. Crews, and D. McCullagh. *Copy Fights: the future of intellectual property in the information age*. Washington: Cato Institute, 2002, p. XXVI.

²⁹ Spinello, “The future of intellectual property”, p. 5; Boldrin and Levine, *Against intellectual monopoly*, p. 122; Lawrence Lessig. *Code: Version 2.0*. New York: Basic Books, Inc., 2006, p. 174.

³⁰ Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, p. 141.

³¹ D. Pels. “Power or property? levy, foucault, poulantzas, and the dilemma of reduction”. In: *Sociologisch Tijdschrift* (1982), pp. 212–237, pp. 218-231.

ness and exclusivity make private ownership of physical goods both beneficial, and possible.³²

To further explain the benefits of having land in private property, one can look back at the times before the enclosures of the 15th and 16th centuries in Britain. This forms the setting for a thought-experiment by Garrett Hardin, known as the Tragedy of the Commons: There is a grazing-pasture, held in common by a village of shepherds. Each shepherd can use it for grazing his flock of sheep. Now if there are no further regulations or inhibitions, it will be in the personal interest of each shepherd to increase the size of his flock, as the reduced quality of the pasture weighs on him less, than the added benefit of an extra sheep. Therefore the pasture is going to be over-grazed, and rendered useless.³³ Thus applying private property to things such as land is not a bad idea.

3.2 Intellectual

The intellectual creation is an idea, or the formulation of an idea. It is a work of the mind, a point of view, or a fleeting thought. What could be less similar to a piece of land or a helm of grass, than the intellectual? Importantly the intellectual is non-rivalous and non-exclusive.³⁴ To quote Thomas Jefferson:³⁵

“If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea. . . . Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. . . . Inventions then cannot, in nature, be a subject of property.”

Consequently, a Tragedy of the Commons is unlikely to happen for the intellectual once it has been created. Because once created, ideas can be learned, instead of physically taken from their owners such as in the case of theft or over-grazing.³⁶ Ideas are not pastures, their quality does not diminish with sharing.³⁷

3.3 Intellectual Property

Intellectual Property is the application of the concept of property to the intellectual. There are different kinds of IP, such as: patents, which apply to applicable ideas, and are enforceable regardless of another person inventing the same thing independently; copyrights, which apply to creative expressions fixed in a medium; trade-marks, which apply to product-names and logos; and trade-secrets, such as the Coca-Cola recipe.³⁸ The focus here will be on copyrights and to a lesser extent patents. Trade-marks and trade-secrets are not being criticised here as they are funda-

³² J. B. DeLong and A. M. Froomkin. “Speculative microeconomics for tomorrow’s economy”. In: *Internet publishing and beyond: The economics of digital information and intellectual property* (2000), pp. 6–44, pp. 2–4.

³³ Gian Maria Greco and Luciano Floridi. “The tragedy of the digital commons”. In: *Ethics and Information Technology* (2004), pp. 73–81, p. 74; Dan Hunter. “Cyberspace as Place and the Tragedy of the Digital Anticommons”. In: *California Law Review* (2003), p. 439, p. 102.

³⁴ Lessig, *The future of ideas: The fate of the commons in a connected world*, pp. 21–22; Lessig, *Code: Version 2.0*, p. 181.

³⁵ John Perry Barlow. “The economy of ideas: a framework for patents and copyrights in the Digital Age (Everything you know about intellectual property is wrong)”. In: *Wired 2* (1994), p. 85, p. 1; Lessig, *The future of ideas: The fate of the commons in a connected world*, p. 94; James Boyle. “Second Enclosure Movement and the Construction of the Public Domain, The”. In: *Law and contemporary problems* 66 (2003), p. 33, p. 53.

³⁶ Lessig, *The future of ideas: The fate of the commons in a connected world*, p. 255.

³⁷ R. Ghosh and L. Soete. “Information and intellectual property: the global challenges”. In: *Industrial and Corporate Change* 15 (2006), p. 919, p. 928.

³⁸ Barlow, “The economy of ideas: a framework for patents and copyrights in the Digital Age (Everything you know about intellectual property is wrong)”, p. 12; Boldrin and Levine, *Against intellectual monopoly*, p. 8; Irr, “Literature As Proleptic Globalization, or a Prehistory of the New Intellectual Property”, p. 775; Deng et al., “A Guide to Intellectual Property Rights in Southeast Asia and China”, p. 44.

mentally different from the first two, and pose much fewer problems.

A distinct characteristic of IP is that it is orthogonal to, and thus crosses with, physical property.³⁹ For example if I buy a book, I do own the physical object (the paper), but I am not free to do with it as I please, because someone else still owns the expressions and ideas inside the book. As long as books can only be commercially printed, and this printing involves piecemeal costs, this is not so problematic. Because adding a little fee for the author is sensible under those conditions, and enforcement is easy because of the centralized nature of industrial publishing. But as copying can be done at home and becomes free, both piece-wise selling and enforcement can pose ethical problems, as we will argue. In short, the functioning of IP, and thus its justifiability depends on historic circumstances.

Importantly, intellectual creations, once created, are not endangered by a tragedy of the commons when held in common.⁴⁰ They rather are endangered when appropriated and turned into property. This happens because of what one could call a Tragedy of the Anti-commons, or more fittingly the Tragedy of the Lost Paradise.⁴¹ Imagine a small forest of trees that, once mature, produce an endless amount of fruits. Pick a pear from a branch, and immediately a new one appears, just as edible as the first. Millions could eat from a single branch. This sounds like paradise, does it not? A problem, however is that the trees do not get there by themselves. They need planting, watering, and such care before they start to bear fruit.

Now, to provide themselves with a living the gardeners of the forest — based on their experience with normal plantations — con-

struct a fence around it, making fruit scarce again, and put a fruit-store in front of it, where the fruits are sold piece-wise: a Paradise Lost. It deprives those who cannot pay for something which could, in essence, be multiplied for free.⁴² Thus physical objects and intellectual creations are different to such an extent as to make property and intellectual property two fundamentally different concepts, enabling us to hold different views on the justifiability of IP than those we hold for proper property.

4 Involved Interests

Now we will look at the various parties and interests that are involved in IP, namely authors, publishers, the public, and society as a whole, and their respective stakes and needs.

4.1 Authors

The first group we look at are the authors of the works. Over time this interest-group also came to include inventors, playwrights, actors, artists, film-makers and performers.⁴³ They are usually considered to be uniquely creative, or inventive, creating something which would have not been there without their efforts.

The idea of an author, however, has been criticized, both from non-western and post-modern perspectives. The non-western camp points to shared cultural heritage such as folk-stories, which cannot be ascribed to single authors, and which come to be through retellings, tellings in ever slightly better variations.⁴⁴ Even in medieval Europe it was very uncommon for artists to claim authorship of their works.⁴⁵ In those times God, a people,

³⁹ Thierer, Crews, and McCullagh, *Copy Fights: the future of intellectual property in the information age*, pp. XVII-XVII.

⁴⁰ Ghosh and Soete, "Information and intellectual property: the global challenges", p. 928.

⁴¹ Spinello, "The future of intellectual property", p. 3; Benkler, *The wealth of networks*, pp. 143-146; Hunter, "Cyberspace as Place and the Tragedy of the Digital Anti-commons", p. 104.

⁴² Siva Vaidhyanathan. "Copyright Jungle: Reporters seem lost in the realm of copyright, where a riot of new restrictions threaten creativity, research, and history". In: *Columbia Journalism Review* (2006), p. 42, p. 4; Lessig, *The future of ideas: The fate of the commons in a connected world*, pp. 104, 115; R. De George. "Information technology, globalization and ethics". In: *Ethics and Information Technology* 8 (2006), pp. 29-40, p. 29.

⁴³ Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, p. 107.

⁴⁴ *Ibid.*, pp. 111-124.

⁴⁵ Chartrand, "Christianity, Copyright, and Censorship in English-Speaking Cultures", p. 11.

a tradition, or a profession were identified as the source of the creativity. Post-modern critique of the concept of the author is similar in that it views texts as shaped or even produced by the discourses (conversations, other texts) in which they are embedded.⁴⁶ It sees the 'author' as an invention of 18th century Romanticism, as a '*Privileged moment of individuality*'.

While acknowledging the sensibility of this critique, it is so that, even if authors would live with illusionary identities, there still is labour involved in creation, or an efficient cause in more philosophical terms.⁴⁷ It takes time to create or transform something, and no matter how much it is reduced because of all the other texts and facilities one can draw from, there always is a cost involved in terms of time. Professional authors can thus at least be identified as a group because of their similar set of interests, namely: some form of income or pay for their work; access to the cultural heritage as input for new works; and attribution and recognition by others.⁴⁸

4.2 Publishers

Publishers are the companies who buy, contract, amass, licence and sell intellectual products. They work according to what Habermas called a factory model of culture, where culture is a finished 'product' to be sold to 'consumers', instead of something made for its own sake. Later, they also included record-labels, studios and private research and development companies. They are often referred to as authors in jurisprudence, though they have quite different, and changing interests.

For example, in the 16th century the Sta-

tioners held a monopoly on publishing, and used this strong bargaining position against authors. Later, in the 18th and 19th centuries, American publishers were opposed to copyrights while many authors were in favour of them. Also, most big movie-studios are in Hollywood now, and not along the East Coast where they started, because in 1909 they fled from New York to escape the enforcement of patents on filming-equipment.⁴⁹ While nowadays Disney, Warner-brothers and other large publishers built their business-models around IP, and lobbied for an extension of copyright-terms long beyond the lifetime of individual authors.⁵⁰

As a group, they have their own interests. First of all corporations can live for much longer than humans, thus they are expected to be interested the mentioned term-extensions. They depend on IP for their stock-value and thus their existence.⁵¹ They also need profits, just as artists need an income, but a difference is that for musical artists most of their income comes from concerts, not from CD-sales, while this is the other way around for record-labels. Most notably publishers are middle-men between the author and the public, and they naturally are interested in maintaining this position.⁵²

4.3 Public

With the public we here mean individuals in their private or cultural sphere. They are laymen, but not in the sense of being passive consumers that are only in need of easily accessible, cheap, quality content and such. Members of the public often are producers of culture too.

Many people contribute to culture in some way or an other. In the past this could have been in the form of contributions to a religious

⁴⁶ Spinello, "The future of intellectual property", pp. 2-3,7; Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, pp. 4-7, 100-109, 124; D. J. Halbert. *Intellectual property in the information age: the politics of expanding ownership rights*. Westport: Quorum Books, 1999, pp. 123-126.

⁴⁷ Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, p. 21; Spinello, "The future of intellectual property", p. 8.

⁴⁸ Hesse, "The rise of intellectual property, 700 B.C. - A.D. 2000: an idea in the balance", p. 33.

⁴⁹ Boldrin and Levine, *Against intellectual monopoly*, p. 36; Lessig, *Free culture: The nature and future of creativity*, pp. 53-54.

⁵⁰ May, "The denial of history: reification, intellectual property rights and the lessons of the past.", pp. 47-50.

⁵¹ Benkler, *The wealth of networks*, p. 25.

⁵² Ploman and Hamilton, *Copyright: intellectual property in the information age*, pp. 190-192.

festival, or playing an instrument at a wedding party, while nowadays it also can be done by playing in a local jazz-band or even in the form of creating a new level for a computer-game, or by posting an answer to a question on the web. Some of these people are experimenters with, and creators of whole new forms of culture, and some of them develop into future professional authors and artists.

An important distinction with authors and publishers, however, is that where the public participates in culture, they are foremostly intrinsically motivated. Their interests vary between education, entertainment, personal development, recognition and self-expression.⁵³ This makes them both interested in the availability of cheap, or free culture, and in being able to recombine (remix, mashup) and build upon existing cultural creations.⁵⁴

4.4 Society

The societal interest of a nation or the world in general, is the last interest discussed here. Its needs are things such as an informed public opinion for the functioning of democracies, science and research for progress, and art for general enjoyment and national prestige. These needs are of a collective nature and are more long-term than the interests of individual members of the public.⁵⁵

According to Luciano Floridi the infosphere (which is his term for data, information and knowledge) even is a moral patient (morally relevant entity) in its own right. Analogous to how environmentalist philosophers assign an intrinsic value to ecosystems, he takes information as the primary ontological category from which moral value is derived, including the value of humans as com-

plex organisms.⁵⁶ However even from an anthropocentric point of view (value begins and ends with humans) social functions of culture can be considered to be important, if only in the derived sense of their value for humans.⁵⁷

For society, it first of all is important that many creative works of good quality are produced. Still, a greater availability of existing (or even fewer and slightly inferior new works) can also be good, as it will mean greater access and therefore a further extended cultural sphere. As, for example, this would allow for a better informed and educated public. In addition, an increase in the diversity of cultural production could also be beneficial to society.⁵⁸

5 Fields of Power

We will conclude our clearing out of the conceptual muddle with a sketch of the fields of power in which the interest-groups operate: law, economy, technical architecture and social norms.

5.1 Law

The most conspicuous field of power is that of law. Intellectual Property is created by law, and IP could have been, and can be different, or even not exist at all, all depending on the law.⁵⁹ The important question for this field is whose interests will be law, that of authors,

⁵³ Richard Stallman. *Why Software Should be Free*. 1992. URL: <http://www.gnu.org/philosophy/shouldbefree.html>, p. 6.

⁵⁴ Lessig, *Code: Version 2.0*, p. 196.

⁵⁵ Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, pp. 133-134; Vaidhyathan, "Copyright Jungle: Reporters seem lost in the realm of copyright, where a riot of new restrictions threaten creativity, research, and history", pp. 2-3.

⁵⁶ Charles Ess. "Floridi's Philosophy of Information and Information Ethics". In: *The information society: an international journal* (2009), pp. 159-168, pp. 159-163.

⁵⁷ Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, p. 145; Greco and Floridi, "The tragedy of the digital commons", p. 78.

⁵⁸ Bannerman, "Copyright and the Global Good? An Examination of 'The Public Interest' in International Copyright Regimes", pp. 10-14; Hesse, "The rise of intellectual property, 700 B.C. - A.D. 2000: an idea in the balance", pp. 33-40; Boyle, "Second Enclosure Movement and the Construction of the Public Domain, The", pp. 58-62; Ploman and Hamilton, *Copyright: intellectual property in the information age*, p. 220.

⁵⁹ Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, p. 13; Lessig, *Free culture: The nature and future of creativity*, p. 84; Thierer, Crews, and McCullagh, *Copy Fights: the future of intellectual property in the information age*, pp. XIV-XVII.

publishers, the public, or society. Something which is easily forgotten, is that the law both is the subject of the disputes about IP, and — by referring to the illegality of certain acts — also used as a means in the conflicts about it.

Law is considered to be established democratically in the West, but lobbying and misinformation also play their part there. Especially internationally, force and the bundling of treaties, such as in the case of the WTOs TRIPs, which included IP clauses, are also important ways to shape the law. In addition the interpretation of existing laws provides quite some leeway for establishing jurisprudence (which then practically functions as new laws, especially in the UK and US, and other tradition-based legal systems), and thus money to hire more and better lawyers makes an important difference here too.⁶⁰

Currently IP is relatively strong, and it lasts on average at least 80 years longer than the 14 years it should to induce the creation of new works according to various estimates.⁶¹ Enforcement on the other hand, especially outside of the commercial sphere, is very weak. Both the existence of fair use exceptions (in the US), and the fact that in some countries (such as the Netherlands) downloading (not uploading / providing), and sharing files privately with friends, is legal, do allow for some leeway, though exceptions are uncertain and vary from case to case.

5.2 Economy

Another important field of power is the economy and its rules. The question here is how much wealth or use-value will be created in total, and who will get what share of it. The

market and the money earned there are both an instrument for things such as lobbying, and the object of the dispute.⁶² The rules and the 'board' that the economic game is played on, are not neutral relative to interests, nor given as they are.

The way in which the economy functions is determined both historically, and politically. Since the works of Adam Smith it took centuries to become what it is now, and it is still developing. Law, norms, and the public opinion play a role in shaping and structuring the market-place by, for example, limiting what can and cannot be sold, and under what conditions (such as in the case of the abolishing of slave trade). There even are Pirate Parties now (already having one seat in the European Parliament for Sweden) that try to reform the economy by abolishing copyrights as applied to home-copying.

Currently the market-system as it exists for physical goods is applied to intellectual creations.⁶³ In a sense it is thus structured to the wishes of the publishers. But the limited extent to which copyrights are enforceable creates a free-rider problem, as copying is most likely displacing some sales at least. Sales to students went down with \$25, from \$126 to \$101 according to one survey, though it is hard to exclude confounding factors, such as them preferring to spend their money on other things than CDs, such as mobile phones for example.⁶⁴ Thus the current IP-situation seems less than perfect even for those it favours, as music-sales in the US dropped from 14.6 to 10.1 billion between 1999 and 2008, while file-sharing grew enor-

⁶⁰ Barlow, "The economy of ideas: a framework for patents and copyrights in the Digital Age (Everything you know about intellectual property is wrong)", p. 6; Lessig, *Free culture: The nature and future of creativity*, pp. 180-191; Lessig, *Code: Version 2.0*, pp. 313-331.

⁶¹ R. Pollock. "Forever minus a day? Some theory and empirics of optimal copyright". In: *Society for Economic Research on Copyright Issues Annual Congress. Humboldt-Universität Berlin: Cambridge University*. 2007, pp. 2-30; Lessig, *Code: Version 2.0*, p. 78; Ploman and Hamilton, *Copyright: intellectual property in the information age*, pp. 175-181.

⁶² Lessig, *Code: Version 2.0*, p. 323.

⁶³ Barlow, "The economy of ideas: a framework for patents and copyrights in the Digital Age (Everything you know about intellectual property is wrong)", p. 2; Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, p. 77.

⁶⁴ R. Rob and J. Waldfoegel. "Piracy on the High C's: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students". In: *The Journal of Law and Economics* 49 (2006), pp. 29-62, p. 60; Felix Oberholzer-Gee. "The Effect of File Sharing on Record Sales". In: *The journal of political economy* (2007), pp. 1-42, p. 39.

mously during this period.

5.3 Architecture

A field of power that is often missed, is that of architecture. With this we mean physical barriers, such as walls, gates, locks and fences, and their virtual counter-parts. In the software world DRM (Digital Rights Management; encrypting the data, and allowing it only to be opened by certain programs) is the equivalent to a lock. Lawrence Lessig called this Lex Informatica, as DRM often functions as a law.⁶⁵

DRM makes very strict control possible, down to how often one can play an iTunes song or whether one can print a PDF file. Architecture is determined by private companies and there are not many possibilities for other parties to influence it, apart from the buying-decisions of consumers, who already do not seem to like DRM implementations and their limitations.⁶⁶ An other way around DRM, are cracks and DRM-free copies produced by hackers or crackers. However, this latter strategy has been made illegal in 1998 with the DMCA, which bans the breaking of DRM, even for exercising fair use rights. This means that DRM can not just act as a law, but even legally override law such as that granting fair-use.⁶⁷

On the other hand most of the current architecture is quite opposed to IP and DRM. This partially is so for the historic reason that the web was designed by academics, and thus according to the academic values of freedom and decentralization. Attempts are currently being made to change this by making the internet and computers less neutral with regard to the kind of data that is transferred, but because people copying things can also use en-

ryption, these are not likely to be very effective without banning the use of encryption and policing all network-communication.⁶⁸

5.4 Norms

The last, but not least important field of power, is that of norms. These are the norms, views and ideas that make up the public opinion. It is how people think about IP, how they act towards it, and also how they view others' behaviour towards it. Most effective laws depend on, and correspond to, widely held norms, rather than on constant policing.⁶⁹

As historians know, norms differ with time and place, and are often determined by historic factors. Specific ways in which norms can be (partially) steered are public relations campaigns, ideologies, and views expressed in movies and the press.⁷⁰ In addition, as Michel Foucault made clear, language itself — in the form of discourses — also co-determines what is considered reasonable, and what is marginalized. Important for this are the analogies used, and the way the situation is framed: whether one equates data to physical goods, and thus considers copying comparable to the stealing of a purse; or whether one calls it sharing, as in the sharing of ideas with a friend.⁷¹

In general the public opinion is divided. While almost everyone in the West sees property-rights as useful for physical goods, many doubt its effects when applied to ideas and expressions.⁷² There seems to be a generational divide as well: Contrary to those born and raised before the web, the people who

⁶⁵ Lessig, *Free culture: The nature and future of creativity*, p. 148; Lessig, *Code: Version 2.0*, pp. 1-8, 24, 78, 138, 288.

⁶⁶ Lessig, *Code: Version 2.0*, p. 37; Dan Cohen. *Kindle's DRM Rears Its Ugly Head... And it is Ugly*. 2009. URL: <http://www.geardiary.com/2009/06/19/kindles-drm-rears-its-ugly-head-and-it-is-ugly/>, p. 1.

⁶⁷ Lessig, *Free culture: The nature and future of creativity*, pp. 151-162; Lessig, *Code: Version 2.0*, pp. 174-175.

⁶⁸ Lessig, *Free culture: The nature and future of creativity*, pp. 121-125; Lessig, *Code: Version 2.0*, p. 346.

⁶⁹ Lessig, *Code: Version 2.0*, p. 11; Greco and Floridi, "The tragedy of the digital commons", p. 79.

⁷⁰ Bettig, "Critical Perspectives on the History and Philosophy of Copyright", pp. 151-152.

⁷¹ Bannerman, "Copyright and the Global Good? An Examination of 'The Public Interest' in International Copyright Regimes", p. 12.

⁷² Anders Sandberg. *Intuitive pirates: why do we accept file sharing so much?* 2009. URL: <http://www.practicaethicsnews.com/practicaethics/2009/04/intuitive-pirates-why-do-we-accept-file-sharing-so-much.html>, pp. 1-3.

grew up with it, and have a fuller understanding of the digital world (and arguably a lesser of the world of professionals), are mostly opposed to strict IP. In addition, more than 60% of internet-users, and thus more than 100 million people in the US alone, take part in file-sharing.⁷³ For youngsters (from the UK), this number is even higher, as 95% of them partakes in file-sharing. Of the music on their MP3 players, about half had been copied illegally.⁷⁴

6 Justifications

Now that we have a clear picture of IP, we will go into the two justifications for IP most commonly held, namely the labour desert theory, and the theory of stimulation.

6.1 Labour Desert

The first justification for IP is John Lockes' labour desert theory. In a nutshell: People own themselves, and derived from this they also own the fruits of their labour, as otherwise they would be slaves. Now creating or inventing things can be considered labour. Therefore works of the intellect are property, no less than the goods manufactured by a workman.⁷⁵ This justification is what philosophers would call a deontological justification, in the sense that it is a rights-based approach, that does not take the consequences of the exercise of these rights, into account.

In Lockes original description unowned waste-land is used as an example of something that can be appropriated by labouring

it. Such land could become ones property by clearing it out and farming it. Central to the original Lockean version was that one transforms something useless into something useful, that one actively uses it, takes no more than one uses (the waste prohibition), and that one leaves enough of the same for others (sufficiency provisio), so no one is worse off.⁷⁶ In more formal terms: as long as the situation at T2 is pareto optimal (no one worse off, at least one better off), compared to the situation at T1 and the prohibition and provisio are met, then one has a full property right over things produced or transformed through ones labour.

Now because expressions are not just non-rivalous in their usage, but also in the sense that there can be a practically unlimited number of possible phrasings, the theory could fit for copyrighted original works. However for more extended applications of copyright (such as to story-lines or sequels) and as applied to the input of derived works and remixes, the labour desert justifications' sufficiency provisio, and especially the requirement to be actually using it (the waste prohibition), pose a problem: Not just for works no longer in print, but also because non-rivalousness arguably makes any forgone use a waste. Furthermore, patents on anything but finished consumer products certainly do not meet the requirements, as it is common for future inventions to depend on earlier ones, and thus for new courses of innovation to be barred by patents (so called patent thickets).⁷⁷ Thus while there may still be something to be said for it, we do not consider this justification for IP binding here.

The labour desert justification is mostly held in Europe and is included in the Berne Convention. In France it is specifically en-

⁷³ John Tehranian. "Infringement Nation: Copyright Reform and the Law/Norm Gap". In: *Utah Law Review* 2007 (2007), p. 543.

⁷⁴ Katie Allen. *Home copying - burnt into teenage psyche*. 2008. URL: <http://www.guardian.co.uk/music/2008/apr/07/news.katieallen>, p. 1.

⁷⁵ Bettig, "Critical Perspectives on the History and Philosophy of Copyright", p. 141; Spinello, "The future of intellectual property", pp. 10-11; Irr, "Literature As Proleptic Globalization, or a Prehistory of the New Intellectual Property", p. 788; A. R. Chapman. "Approaching Intellectual Property as a Human Right: Obligations Related to Article 15 (1)(c)". In: *United Nations Committee on Economic, Social, and Cultural Rights. New York* 27 (2000), pp. 4-30.

⁷⁶ Spinello, "The future of intellectual property", p. 10.

⁷⁷ Lessig, *The future of ideas: The fate of the commons in a connected world*, pp. 204-206, 212-215; Thierer, Crews, and McCullagh, *Copy Fights: the future of intellectual property in the information age*, pp. 221-228; Benkler, *The wealth of networks*, p. 39; Boldrin and Levine, *Against intellectual monopoly*, pp. 51-85, 92-95, 251-265; Hunter, "Cyberspace as Place and the Tragedy of the Digital Anticommons", pp. 105-107.

coded in the so called 'droits moraux', or moral rights, that French authors have in addition to economic rights.⁷⁸ The moral rights entail things such as the right to decide whether something is to be published, the right to withdraw it from the market, and the right of attribution. They cannot be sold by the author, and are perpetual.⁷⁹ The interests that the labour desert justification centers on mostly are those of authors and publishers.⁸⁰

6.2 Stimulation

The second justification for IP is the stimulation of creation theory. It starts with the idea that authors and inventors are motivated by (the possibility of) financial gain. Then it reasons that under unregulated free market conditions people will copy and share without paying writers or inventors. To fix this, authors and inventors are given a monopoly over their creations, so they can extract money from the market. By making creation thus (more) profitable, more people will be inclined to create.⁸¹ In philosophical terms this approach is utilitarian, as it is primarily about consequences, not about rights.

Utilitarianism, as introduced by William Bentham, was a real improvement over previously held ethical theories, as by looking at the consequences things had for the general well-being, instead of for God, or society as it existed, it was the first ethical theory that put normal human beings at the center.⁸² There may be theoretical problems with utilitarianism such as how welfare is to be defined, and to what degree an increase in welfare for one person can legitimately weight up to that of another, but if kept in check by common

sense, it is quite a workable theory. It can deliver a very sensible justification for IP.

It should be noted, however, that the stimulation justification hinges on two assumptions that can be questioned. The first is whether most, or all, authors are indeed motivated by direct financial gains. Even if some are, there might still be enough intrinsically, or differently motivated authors left to provide for new cultural works (as we see in the competition between bloggers and news-paper journalists).⁸³ The second is that scarcity (a monopoly property right) is the only feasible way to extract money from the market.⁸⁴ While historically, in the age of printing, this may have been true, we will argue that while the first assumption at least partially does hold, the second is not an a-priori given, and certainly does not need to hold any more.

The influence of the stimulation of creation justification can be seen in the fact that practically everywhere copyrights are for a limited time only, to eventually benefit the cultural commons.⁸⁵ Also the use of monopolies to stimulate creation is explicitly mentioned in the American constitution: "... *securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries ... to promote the Progress of Science and useful Arts*". The interests central to the stimulation justification are those of the public and society.

7 Developments

As we are familiar with the two justifications for IP, we will now sketch the historic developments that have changed the extent to

⁷⁸ Chartrand, "Christianity, Copyright, and Censorship in English-Speaking Cultures", p. 10.

⁷⁹ Hesse, "The rise of intellectual property, 700 B.C. - A.D. 2000: an idea in the balance", p. 39; Ploman and Hamilton, *Copyright: intellectual property in the information age*, pp. 108-113.

⁸⁰ Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, p. 117.

⁸¹ Stallman, *Why Software Should be Free*, p. 7.

⁸² George, "Information technology, globalization and ethics", p. 31; Chartrand, "Christianity, Copyright, and Censorship in English-Speaking Cultures", p. 8.

⁸³ N. W. Netanel. "New Media in Old Bottles? Barron's Contextual First Amendment and Copyright in the Digital Age". In: *George Washington Law Review* 76 (2008), pp. 113-118.

⁸⁴ Lessig, *The future of ideas: The fate of the commons in a connected world*, p. 265; Lessig, *Free culture: The nature and future of creativity*, pp. 73-84; Benkler, *The wealth of networks*, p. 37.

⁸⁵ Vaidhyanathan, "Copyright Jungle: Reporters seem lost in the realm of copyright, where a riot of new restrictions threaten creativity, research, and history", p. 6.

which current IP-laws are justifiable.

7.1 *Information Society*

The first development we will describe is the rise of the Information Society. The advent of the Information Society is what makes intellectual creations and IP globally relevant. Information is namely becoming a major resource, as more and more people spend more of their productive capacity creating things that take the form of information; designs, movies, research and other digitized or easily digitizable works, instead of physical goods.

According to Alvin Toffler, with the advent of the Information Society, we are currently entering the third of three waves. The first was the agricultural revolution, in which hunter-gatherer societies were replaced by agricultural ones. Land became the most important resource, and was therefore increasingly enclosed. Then came the Industrial Revolution in which capital and the means of production became all important. It was a time of mass-production, mass-consumption, and mass-media. Now, in the third wave, information is becoming the most important resource, hence its protection with stronger IP-laws.⁸⁶ There are now even what a true Hacker Manifesto calls, not proletarians, but ‘*cogitarians*’: the wage labourers of the Information Society.⁸⁷

Still; IP is to some extent justifiable in that the increase of information production also brings, and makes sensible, a division of labour between research and production, and between various types of private research. Where in the past R&D mainly happened in-house, and in the service of the production-line, it is now becoming the core business of many companies.⁸⁸ Also from the beginning

of the 20th century onwards, a lot of professionalisation has been going on in culture: leading to the so called factory model of culture. At least for some forms of culture this has brought us many quality improvements.

So totally removing all forms of IP and market-based compensation for creation does not seem justified. Especially because in our Information Society immaterial goods will become an ever more important and bigger share of total production. In addition, leaving all private sector creation and innovation to hobbyists or factories of physical goods will be detrimental, because even if it were possible, there are many talented artists and actors that would benefit society more when they would be creative on a full-time basis.

7.2 *Second Enclosures*

The ongoing private appropriation of information has been unfavorably compared to the enclosures of the 16th century and some even called it a virtual land-grab.⁸⁹ More and more creative works, and more kinds of works (first just books, then music, now also software) are being appropriated.⁹⁰ Not just new, but also old themes that are part of our cultural heritage are being enclosed (such as ‘Pinokkio’ and ‘Snow White and the Seven Dwarfs’).⁹¹ But it does not stop there: Plant-species that have been used for generations, and even our

⁸⁹ Bettig, “Critical Perspectives on the History and Philosophy of Copyright”, p. 797; Irr, “Literature As Proleptic Globalization, or a Prehistory of the New Intellectual Property”, p. 797; Boyle, “Second Enclosure Movement and the Construction of the Public Domain, The”, pp. 33-74.

⁹⁰ Irr, “Literature As Proleptic Globalization, or a Prehistory of the New Intellectual Property”, p. 795; Bettig, “Critical Perspectives on the History and Philosophy of Copyright”, p. 149; Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, p. 108; Lessig, *Free culture: The nature and future of creativity*, pp. 135-136.

⁹¹ Lessig, *Free culture: The nature and future of creativity*, pp. 21-23; Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, pp. 7, 109, 133; Barlow, “The economy of ideas: a framework for patents and copyrights in the Digital Age (Everything you know about intellectual property is wrong)”, p. 7.

⁸⁶ Alvin Toffler. *The third wave*. New York: Morrow, 1980, pp. 35-40, 41-120, 153-187; Barlow, “The economy of ideas: a framework for patents and copyrights in the Digital Age (Everything you know about intellectual property is wrong)”, p. 18.

⁸⁷ McKenzie Wark. *A Hacker Manifesto*. Harvard University Press, 2004, pp. 24-47.

⁸⁸ Ghosh and Soete, “Information and intellectual property: the global challenges”, pp. 923-924.

very own genes, especially those related to diseases such as cancer, are being patented and locked away for profit in the US (by Myriad Genetics and Monsanto among others).⁹² The terms of copyrights are also being extended; starting at 14 years, then 28, life + 50, they now are the life of the author + 70 years, and these extensions happened retro-actively, that is for authors long dead, as if this could stimulate their creativity again.⁹³

In short: Information is being forced into the straight-jacket of the market for physical goods, and being enclosed to protect investments, in hope of similar results as for land in the 16th century. But can we reasonably expect any good from enclosures of the intellectual? Markets are good for three reasons: First of all they allow for decentralized decision-making. That is people can — each for themselves — decide what is good for them, such as which music they like. Secondly they allow for efficient investments. That is people are most often right about which investments are good ones, such as what movie productions to invest in. Thirdly, markets allow for efficient use. That is, resources and products are not being wasted, because they cost money.⁹⁴ But for digital goods this last part does not make sense, as copying can be done for free, so no resources can be wasted.⁹⁵

The issue of efficient use is also directly related to what economists call deadweight loss. Deadweight loss occurs when people who could have used a product if it were sold at

piece-wise production-cost, cannot, because its price is kept artificially high. For example if someone sells bricks at 50 cents while piece-wise production costs (including wages and management) are 20 cents, then the people to whom bricks bring a marginal benefit of between 20 and 50 cents would not be able to buy them at 50 cents. This means a loss to consumers, as they can not have the product, but also a loss to the producers, as it represents a sale they never make. Now because for virtual goods there are no marginal costs once a single copy is created, there will always be a large (theoretically an infinite) deadweight loss.⁹⁶ In the following figure (figure 1) the deadweight loss for virtual goods is the bottom-right corner⁹⁷.

In a study it was found that while for typical students their spending on CDs went down with 25\$ (from 126\$ to 101\$), their deadweight loss (as measured by how they value their downloads) went down with 45\$, for a total consumer surplus of 70\$ (25 + 45). In other words: a maximum 25\$ of sales was displaced, while the students gained 45\$ in music which they would never have bought at market-prices, and which are thus no lost sales.⁹⁸ To summarise: music is being shared that would never have been bought, and that neither replaces the buying of other CDs. This leads to a growth in welfare that is hard to criticise.

7.3 Globalisation

While the Information Society is arriving, and information is being enclosed, the world is also increasingly becoming globalized. States become ever more dependent on trade and for-

⁹² Spinello, "The future of intellectual property", pp. 1-3; Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, p. 10; Boldrin and Levine, *Against intellectual monopoly*, pp. 87-90; Boyle, "Second Enclosure Movement and the Construction of the Public Domain, The", p. 39.

⁹³ Lessig, *Free culture: The nature and future of creativity*, pp. 133-134; Boldrin and Levine, *Against intellectual monopoly*, pp. 111-113.

⁹⁴ Stallman, *Why Software Should be Free*, p. 4.

⁹⁵ May, "The denial of history: reification, intellectual property rights and the lessons of the past.", pp. 34-37; Vaidhyanathan, "Copyright Jungle: Reporters seem lost in the realm of copyright, where a riot of new restrictions threaten creativity, research, and history", p. 4; Stallman, *Why Software Should be Free*, p. 5.

⁹⁶ Rob and Waldfogel, "Piracy on the High C's: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students", p. 37.

⁹⁷ The figure is an adaptation for virtual goods of an image on Wikipedia <http://en.wikipedia.org/wiki/File:Deadweight-loss-price-ceiling.svg>

⁹⁸ Rob and Waldfogel, "Piracy on the High C's: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students", p. 60; Oberholzer-Gee, "The Effect of File Sharing on Record Sales", pp. 38-39.

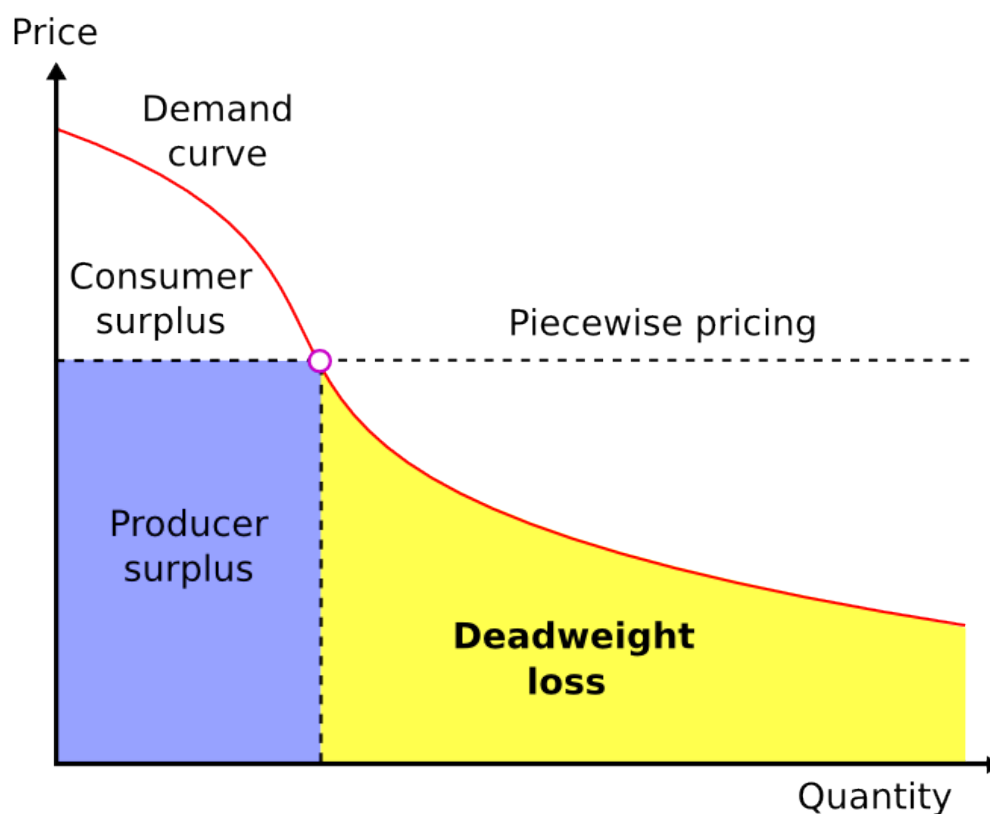


Figure 1: *The deadweight loss for virtual goods (bottom-right corner).*

eign capital. Corporations are outgrowing the economies of many small and medium-sized nations, and the WTO and its treaties, are determining the agenda for international, and national regulations to an ever greater degree, also regarding IP, with the TRIPs.⁹⁹

Parallel to this, according to Manuel Castells, what he calls the divide, has shifted over time. Historically it was the divide between north and south, between the motherlands and the colonies. Then in 19th century it became the division between the haves and have-nots. Now it is increasingly becoming the distinction between the connected and the

disconnected. This not just in terms of access to the internet, but also with regard to access to the content and knowledge that it harbours. Currently the best connected are urban, well-educated, young males.¹⁰⁰

Historically, the presence of, and strength of, IP-law was related to whether a nation exported more books than were imported. The United States for example did not sign the Berne Convention until 1986 (in response to corporate interest-groups), and at least until the 19th century, argued that as a developing nation and a former colony, it had a right to the English literature. But nowadays the former colonies are deprived even of this right, requiring them to become haves, before they can become connected in terms of access to content. Developing nations do not want or need IP-laws, but via WTO treaties they have been forced upon them in exchange for access

⁹⁹ R. Piasecki and M. Wolnicki. "The evolution of development economics and globalization". In: *International Journal of Social Economics* 31 (2004), pp. 300–314, p. 308; Manuel Castells. *The Rise of the Network Society*. Cambridge USA: Blackwell Publishers, Sept. 1996, pp. 101-162; Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, p. 77; J. Osterhammel, N. P. Petersson, and D. Geyer. *Globalization: a short history*. Princeton: Princeton University Press, 2005, pp. 108-122.

¹⁰⁰ Piasecki and Wolnicki, "The evolution of development economics and globalization", pp. 303-305; Greco and Floridi, "The tragedy of the digital commons", p. 75.

to the world market.¹⁰¹

What is the global welfare, or the interest of the global society in this context? I think certainly not millions of people dying of AIDS because the enforcement of patents on AIDS-medicines in third world countries makes them too expensive for almost everyone living there. Especially if one remembers that 2/3rd of the funding for medical research is currently paid from tax-money, not from private investors, or from profits made on medicines.¹⁰² Thus if the third world — where almost no one can attain the needed marginal benefit of enclosed IP (in terms of western currencies) — is included in ones analysis, then the deadweight loss is literally immense.

7.4 Frictionless Copying

Another important development is that of frictionless copying. That is; copying has become free and perfect. Copies can be fully equivalent to the original, and can be made without marginal costs. Never before has this been so easy. The printing press for example, still required substantial investments. Not just for its initial purchase, but also for type-setting, the paper used, and distribution of the copies.¹⁰³

The internet automates all this. It is to the press, what the press was to writing. To speak with McLuhan: The internet carries the press, as the press carried writing, and writing car-

ried speech.¹⁰⁴ Because of this, the internet has the power to make publishers obsolete as the middle men between the author and the public. This does not mean that the other roles that publishers have fulfilled, such as those of gate-keepers, editors, managers and marketers are now foregone, but that what were historically their main functions of printing and distribution, can be provided by the internet now.

In addition, with frictionless copying the deadweight loss for things such as music, movies and books has become much larger than it was in the time of the press. Copying still brings some marginal costs (about 0.10\$ dollars for a gigabyte; or one movie, 200 songs, or 3,000 books, transferred across the globe) but they are tiny, and still falling (and practically never billed to internet-users directly). Thus while everyone, including those living in third world countries, could have free access to all existing books and culture in the world, copyrights are currently preventing this. Therefore, if pareto optimality is an argument for intellectual property in the labour desert theory, then similarly it should be possible to provide such an argument for all those copies made in the deadweight loss zone.

This can be done as follows: If only copies are made that would not have been purchases, then no author is worse off (nothing physical is taken away or used up, and no sales are lost). But the copying public is definitely better off in this case. Thus we can argue that the current situation is not pareto optimal, compared to what is possible with a different copyright system, in which authors would get the same profits as they do now, but people would be allowed to copy freely. Additionally, given the non-rivalousness of virtual goods, creating deadweight losses is a case of wasting, and thus a violation of Lockes waste prohibition: Creation alone does not give a right to absolute property, similarly to how merely discovering land, or clearing it, is not

¹⁰¹ Irr, "Literature As Proleptic Globalization, or a Prehistory of the New Intellectual Property", pp. 796-797; Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, p. 106; May, "The denial of history: reification, intellectual property rights and the lessons of the past.", pp. 35-38, 50-53; Barlow, "The economy of ideas: a framework for patents and copyrights in the Digital Age (Everything you know about intellectual property is wrong)", p. 7; George, *Globalization and intellectual property*, pp. XXIII-XXVII, 139-143.

¹⁰² Benkler, *The wealth of networks*, pp. 344-353; Boldrin and Levine, *Against intellectual monopoly*, p. 257; Hesse, "The rise of intellectual property, 700 B.C. - A.D. 2000: an idea in the balance", p. 45.

¹⁰³ Lessig, *Code: Version 2.0*, pp. 300-304.

¹⁰⁴ Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, p. 67; Marshall McLuhan. *Understanding media : the extensions of man*. Cambridge USA: MIT Press, 1994, pp. 23-28.

enough. The labour desert theory importantly includes the requirement that one uses what one has appropriated, and that one does not waste it.

7.5 *Decentralized (Re)production*

Copying nowadays is not only frictionless and perfect, but the tools for copying are also widely available. Almost everyone has, or has access to, a computer or a smartphone nowadays. Each of these are capable of making digital copies as good (better) and as fast (faster) as (/than) expensive printing-presses in the past. Where printing used to be a centralized, commercial enterprise, copying is now available to all. Any digitized piece of information — once out there — becomes what has been called greased information, and can not be contained any more.¹⁰⁵

For copyrights, its reach, and its limits, this has profound consequences. Once instituted as business to business regulation, IP was relatively easy to patrol and enforce, because the number of publishers was limited.¹⁰⁶ But as copying became ubiquitous and affordable, it became personal. The fact that IP crosses private physical property is what causes it to intrude into the personal sphere. Every conversation through any digital medium (data-stream) between any two or more people (also the exchange of an USB-stick), is now a potential breach of copyrights.¹⁰⁷ Even the flipping of the page of an e-book invokes copyrights, as for every reading it is copied from disk or RAM to screen-memory. These developments have extended the reach of copyrights enormously.¹⁰⁸

If all digital conversations are to be eavesdropped upon, this will effectively eliminate not just piracy, but also privacy. Luckily

¹⁰⁵ Halbert, *Intellectual property in the information age: the politics of expanding ownership rights*, pp. 126-127.

¹⁰⁶ Lessig, *Code: Version 2.0*, p. 24; Lessig, *The future of ideas: The fate of the commons in a connected world*, pp. 8-13; Lessig, *Free culture: The nature and future of creativity*, p. 139.

¹⁰⁷ Tehranian, "Infringement Nation: Copyright Reform and the Law/Norm Gap", pp. 539-540.

¹⁰⁸ *Ibid.*, pp. 543-547.

enough, however, it is impossible to scan all conversations for technical reasons (architecture). This because just as encryption can be used in DRM, people can also encrypt their conversations. There already are peer to peer file-sharing networks that are encrypted, such as Freenet (popular with dissidents in China), and OneSwarm (much easier to use) by the University of Washington. These networks do not just hide their data-streams, but also which files are being shared, and importantly also by whom. This makes it impossible to stop file sharers without a total ban on encryption, and policing every (private) communication-stream for unlicensed copyrighted content.

Current IP-laws, with their reach extended over every form of communication, are thus unenforceable without giving up or curtailing many important civil rights, such as privacy and free speech. It is likely that enforcing IP would even necessitate giving up some aspects of globalisation, as the global internet crosses borders and thus erodes jurisdictions over IP, which would make enforcement even harder otherwise.¹⁰⁹ Thus assuming the maintenance of privacy, IP is unlikely to work even for publishers, as being unenforceable, it is not likely to continue to provide a reliable source of payment.¹¹⁰ If IP persists it either must be kept up by norms, as any effective law, or be limited again to the business-sphere.

7.6 *(Re)productive Communities*

Copying and remixing are becoming the norm. As already noted, most people who were raised with the Internet have no pressing moral intuitions against file-sharing. They, and the rest of the public, are not just consuming things for free here. There is a true revival of community-based amateur culture going on, and this time it is not happening in back-rooms or on village-squares, but on the

¹⁰⁹ Lessig, *Code: Version 2.0*, pp. 286-291.

¹¹⁰ Lessig, *Free culture: The nature and future of creativity*, p. 66; Barlow, "The economy of ideas: a framework for patents and copyrights in the Digital Age (Everything you know about intellectual property is wrong)", pp. 4-8.

global scale of the web. These creations are created both *ex nihilo*, from a blank slate, and by originally re-combining, or re-mixing existing culture and themes. In the latter case it often happens in defiance of copyrights and out of sight because fair use exceptions are so vague that, for example TV stations refuse to air films that are not cleared second by second and insured against IP lawsuits.¹¹¹

Community culture on the web started out with Free/Open Source Software (FOSS). This is software, built from the ground up (thus legal), that everyone has the freedom to use, copy, and change as one pleases, as long as one does not stop others from having the same freedoms.¹¹² It is in a so called protected commons that, to prevent private appropriation, uses copyright licenses such as the GNU General Public, or Creative Commons License (also called copy-left licenses).¹¹³ Well-known examples are Ubuntu Linux, the Apache web-server, the Firefox browser, and Open Office. Later, such licenses were applied to create the encyclopedia we all know, and most of us use: Wikipedia. With the rise of Youtube, Jamendo, Stack Overflow, and other Web2.0 (modern community-based) websites it was applied to video, music and other media as well, and has become mainstream.

Some (especially web-based) companies are turning to user-based innovation as well, asking them what new features avid users would want, and how exactly they envisage them. Even the NASA has ran a successful crowd-sourcing project, where they asked people to identify craters on Mars.¹¹⁴ To speak with Toffler again: consumers have become pro-sumers, taking over part of production, by for example: tele-banking, tracking their own

postal packages on-line, and assembling furniture from construction-kits. But now with the web, where people have all the necessary means of production in the form of easy to use editing-software, communication, and publishing-tools, communities are sometimes already capable of doing much more.¹¹⁵

It is no small movement. Firefox is used by 22% of web-surfers, 67% of the million most visited websites use FOSS on their servers, and 60% of all the content on the internet is created by amateurs.¹¹⁶ Wikipedia is the 7th most visited website in the world, and contains 2.8 million articles in English, and more than 8 million articles in 235 other languages, as opposed to the 0.7 million in the Encyclopedia Britannica¹¹⁷. The web has not just brought frictionless copying on a global scale, it has also allowed community-culture to become globalized, and thereby be much more productive.¹¹⁸ The social sphere has been enlarged by the web, similar to how free trade enlarged markets earlier on.¹¹⁹

¹¹⁵ Ghosh and Soete, "Information and intellectual property: the global challenges", pp. 924-933; Lessig, *The future of ideas: The fate of the commons in a connected world*, p. 52; Benkler, *The wealth of networks*, p. 9.

¹¹⁶ Benkler, *The wealth of networks*, p. 64; Boldrin and Levine, *Against intellectual monopoly*, p. 21; Matt Asay. *Linux jumps to 13.4 percent of the stalling server market | The Open Road - CNET News*. 2008. URL: http://news.cnet.com/8301-13505_3-10027925-16.html, p. 1; Netcraft. *May 2009 Web Server Survey*. 2009. URL: http://news.netcraft.com/archives/2009/05/27/may_2009_web_server_survey.html, p. 1.

¹¹⁷ This paper was written on Ubuntu Linux, edited with the Free Software editor VIM, type-set with the FOSS LaTeX type-setting package, the footnotes and list of literature were managed with the help of BibTex and the Firefox Zotero-plugin, it includes a figure that is a derived work from a figure on Wikipedia, and was drafted on LogiLogi at http://en.logilogi.org/History/Ethics/Intellectual_Property/Confrontation=Wybo_Wiersma_64

¹¹⁸ Benkler, *The wealth of networks*, pp. 3-16, 54, 83-126.

¹¹⁹ Nicholas Gruen. *Adam Smith 2.0: Emergent Public Goods, Intellectual Property and the Rhetoric of Remix*. 2009. URL: <http://clubtrotto.com.au/2009/05/28/adam-smith-20-emergent-public-goods-intellectual-property-and-the-rhetoric-of-remix/>, pp. 2-11.

¹¹¹ Lessig, *Code: Version 2.0*, p. 189; Lessig, *Free culture: The nature and future of creativity*, p. 98.

¹¹² Richard Stallman. *The Free Software Definition - GNU Project - Free Software Foundation (FSF)*. 1996. URL: <http://www.gnu.org/philosophy/free-sw.html>, p. 1.

¹¹³ Ghosh and Soete, "Information and intellectual property: the global challenges", pp. 929-930.

¹¹⁴ Benkler, *The wealth of networks*, pp. 69-70.

8 Findings

We will now present our findings, and conclude that IP is no longer justified. There are good alternatives for it, even if they are currently being overlooked because of reification.

8.1 *No Longer Justified*

As shown in the previous chapter copyright-laws as they are now have become harder to, or even impossible to, justify. On the other hand, completely abolishing any form of direct profit from creation, can neither be justified. There are, however, reasonable alternatives for IP which still allow for direct profit, and which are much less problematic, as will be explained next, so the reader is asked to momentarily suspend doubts about practical problems. So far we have argued, first of all, that physical property and intellectual property are really different: IP is non-exclusive, and especially non-rivalous, contrary to physical property, making copying and stealing really different from each other. Thus having different views about physical property (being for it) and IP (criticising it) is both possible and sensible.

Secondly, the increasing ease at which copying can be performed with modern devices, compared to the times of the press, has enormously increased the deadweight loss: resulting in empirically proven loss, both losses in usage, and a lost sales. This loss especially is huge if we take into account that frictionless copying is not only possible between friends living in the same street, but also globally, crossing the colonial north-south divide, and bridging the gap between haves and have-nots. Instead of perpetuating these divides into the Information Age, they could, at least partially, be overcome thanks to the non-rivalousness of virtual goods. At minimum those situations in which a downloaded song would not have been bought anyway, and does not replace the sale of another CD, are hard to criticise. Such instances of sharing are pareto-optimal, compared to a sit-

uation in which copyright-laws, as they currently exist, are enforced globally.

In addition, the wide distribution of copying devices such as computers, e-book readers and mp3-players, has enormously expanded the range of situations to which IP applies. A minor law that regulated the business of publishers, now applies to almost anything related to information, and importantly also to the private sphere. This is a case of historic changes, slowly but drastically, changing the law, even if nothing had changed in the wording of the law itself.¹²⁰ Currently DRM, 'trusted computing', and various legal exceptions are giving IP-organisations the right to search personal computers and to 'tap' private internet-communications, bringing us to the brink of abolishing privacy and other important civil rights.¹²¹ While at the same time it is becoming ever harder and harder to enforce copyrights, and eventually it will become impossible, as those who share files turn to encryption. Thus with the current approach to IP, in the end everyone — even those who currently benefit from copyright-enforcement — will lose out.

Additionally, the public is not just consuming culture, but also producing and remixing it thanks to the internet. With the enlargement of the social sphere that the web has brought, and the cheap, or free, editing-tools that have become available, people are again taking control of their own culture. If set free to use and remix all existing culture, story-lines, and themes, all of these art-forms can come out of the shadows of illegal uncertainty, and bloom. Because, while professionally produced culture has its place and brings us many benefits, the public should, and now can, have as much freedom as possible to shape and transform their own culture. This because sounds, images, film and digital media have become almost as central to free expression as writing and the alphabet.¹²²

¹²⁰ Lessig, *Code: Version 2.0*, pp. 189, 214.

¹²¹ *Ibid.*, p. 140.

¹²² Irr, "Literature As Proleptic Globalization, or a Prehistory of the New Intellectual Property", p. 793.

8.2 Two Markets

There are many alternatives to current IP-laws that do not bring with them all, or any, of the problems that have now come to be because of the historic and technological changes since their introduction. Things that have been proposed are: shortening copyright terms to 14 years again, requiring renewals every few years, and even abolishing copyright (enforcement) in the private and/or non-commercial spheres all-together.¹²³ Additionally, copyleft licenses have been used to stake out commons under the current copyright regime. Nevertheless, all of these solutions have one or both of the following two major drawbacks: they either do not provide a real solution to the artificial scarcity problem, and/or they do not provide any form of direct compensation for virtual creations intended for the public: for home users.

However William W. Fisher, and others, have proposed an alternative that does not have these limitations.¹²⁴ It is a levy-based system, or what we would rather call: a system of two markets. For the second market — the one for virtual goods and ideas —

¹²³ Lessig, *The future of ideas: The fate of the commons in a connected world*, pp. 252-253; Lessig, *Code: Version 2.0*, pp. 221, 277; Spinello, "The future of intellectual property", p. 6; Barlow, "The economy of ideas: a framework for patents and copyrights in the Digital Age (Everything you know about intellectual property is wrong)", pp. 15, 20; Stallman, *Why Software Should be Free*, p. 8; Thierer, Crews, and McCullagh, *Copy Fights: the future of intellectual property in the information age*, p. XXII; J. Litman. "Revising copyright law for the information age". In: *Oregon Law Review* 75 (1996), p. 19, pp. 125-145; Boldrin and Levine, *Against intellectual monopoly*, pp. 135-142.

¹²⁴ W. W. Fisher. *Promises to keep: technology, law, and the future of entertainment*. Palo Alto: Stanford University Press, 2004, pp. 199-258; Boldrin and Levine, *Against intellectual monopoly*, pp. 279-296; D. Baker. "The artistic freedom voucher: Internet age alternative to copyrights". In: *CEPR paper*, at <http://www.cepr.net/publications/AFV.htm>, accessed 1 (2004), pp. 1-8; Electronic Frontier Foundation. *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*. 2008. URL: <http://www.eff.org/wp/better-way-forward-voluntary-collective-licensing-music-file-sharing>, p. 1.

an organisation (whether the state or otherwise) collects fixed fees from the public (such as \$10 a month), which are then distributed among creators and possibly inventors, based on the popularity of their work. In exchange for this, copying and usage are free. Important here is that the dividends to creators should be determined by the decisions of many independent people, such as in a free market, and not by the whims of a small clique as is the case for most existing compulsory licensing and levy-systems. Thus one can have decentralized decisions and efficient investments in both markets, but they will differ in what constitutes efficient use. In the first market it constitutes limited use, which makes sense there to account for the natural marginal costs of physical goods. But in the second it means as much use as possible, as copying and sharing are free, and thus should not be barred.

For determining what popularity entails there are many options such as page- or download-ranks, counting the number of products ideas are used in, or the number of patients taking medicines based on medical patents, surveys of use (such as the Nelson families for TV), or about perceived value, and even vouchers representing a share of ones fees. Many alternatives and combinations are possible, but one advantage of surveys and vouchers is that they are harder to game and can provide privacy to those who value it. Naturally it will take some time until the second market has been perfected, just as it took centuries for the first market to become what it is today. However some of the problems are less big than they seem. For example derived works can simply be compensated to their last creator, as the transparency of the internet can easily lead people to the original source, and when it is liked less, then apparently there is a greater demand for recombinations of existing works than for original ones, and thus the recombination is rightfully rewarded. The technology that created 'the problem' also can provide many of the solutions.

In cases of fraud the legal system can of

course still step in, just as it regularly does in the first market. For example the occasional robbery, or the collapse of a few market bubbles, are no reasons either to give up on the first free market. In addition, it is to be expected that in the Information Society, with information and research becoming an ever more important part of production, the creation of a second market is justified, and increasingly worth the effort. Especially as with the advent of fablabs and 3D printers which allow one to 'print' physical goods in plastic (just plastic for now, but nano-technology promises much more) communities and individuals will soon not only be able to share and create software, but also to invent and (re-)design consumer-products. Thus, if we want to ensure freedom and fair profit in the upcoming Information Society, then it is important to have not just one, but two free markets.

8.3 *Minds Being Enclosed*

Given the possible alternatives, copyright-laws that restrict copying and invade privacy are no longer justified. They are becoming counter-productive. People nevertheless still believe in their need. They assume that the one market they currently know is somehow naturally given, instead of a historic phenomenon that is well-adapted to a reality of physical goods, but is hopelessly unsuitable for virtual ones. It is thus that — under the stimulation of creativity justification — the need for artificial scarcity (so a profit can be extracted from the first market), is being reified (thing-ified, assumed to be given).¹²⁵ In turn this enables publishers to call copying stealing, instead of sharing. But sharing is only stealing (and then only in the sense of free-riding) when both the first market is assumed, and the sharing happens outside of the deadweight loss zone: Quite some assumptions that need to be met before the use of the

harsh terminology of theft is justified. File-sharing can just as easily can be called civil disobedience, or even doing the right thing.¹²⁶

Here one can see the power of discourse at play: by using harsh language, hiding implicit assumptions, and by conveniently ignoring the historicity of the first market, the debate is framed to serve the interests of the publishers. I say here publishers, not authors, as another strategy regularly applied by those defending copyrights is lumping record companies/publishers and artists/authors into one group, and then telling the tale of the starving artist as the inevitable end-result of the increased violation of copyrights.¹²⁷ Seeing them as a combined group is not only historically incorrect, but also results in a more convincing story than that of the record-company manager that has to get creative himself, or find a different job, because the distribution of cultural products can now be done on-line, directly from the artist to public (especially in a levy- or two-market system).

Similarly, in the labour desert justification, talk of natural rights is a reification, and a mystification of the historicity of ethics, and their dependence on the kind of world that historical and technological changes have created, and made possible.¹²⁸ The international history of copyrights shows a nice example of this, and of the role that power plays in such affairs: France, in the 19th century, mainly started respecting the copyrights of foreign authors to invite others to do the same. Hardly any living foreign author was being read in France at that time. The US used the reasoning of a developing nation in order not to have to respect the copyrights of British authors. But only until their own IP lobby and IP interests had grown. Then — not until 1986 — they signed the Berne Convention, and started pushing for international copyrights through

¹²⁵ Bettig, "Critical Perspectives on the History and Philosophy of Copyright", p. 146; Lessig, *Code: Version 2.0*, p. 183; May, "The denial of history: reification, intellectual property rights and the lessons of the past.", pp. 35, 39-45.

¹²⁶ George, "Information technology, globalization and ethics", pp. 34-35.

¹²⁷ Brock Read. "Piracy and Copyright: an Ethics Lesson". In: *Chronicle of Higher Education* (2006), p. 46, pp. 1-5.

¹²⁸ Thierer, Crews, and McCullagh, *Copy Fights: the future of intellectual property in the information age*, p. XIV.

the WTO TRIPs treaty. Thereby not allowing the developing nations of our times, to do as they did themselves.¹²⁹

For now, the market as a field of power seems to be controlled by the publishers. They have a strong position in the law as well. This happened both for historic reasons and because of the laws slow pace of change. Laws which have been increasingly interpreted in their favour, because they have been able to enlist the best lawyers. The law is currently tailored to their vision of an information society dominated by digital locks and paywalls.¹³⁰ In practice, nevertheless, they are having a hard time in the field of architecture, where the possibility of encryption makes both camps more powerful, but with the slight advantage for the file-sharers that in order to release a piece of information onto the web its DRM has to be cracked only once, while every encrypted private communication in which it is shared is a new challenge for those holding on to IP. In the sphere of norms, those opposing IP laws seem to be winning out as well. Both at the theoretical level — as this paper argues — but also in practice, as can be confirmed by looking at the hundreds of millions of (otherwise) perfectly decent citizens who are also file sharers.¹³¹ Thus the balance is undecided, though the influence of power in the first two (or even three) fields is a worrying one.

9 Conclusion

As copyright-enforcement is breaking down, the witch-hunt continues. A few thousand unsuspecting file-sharing fathers, mothers and children have already been financially ruined

in the US.¹³² The last victim was Jammie Thomas-Rasset, who, on the 18th of June 2009, was fined with 1.9 million dollars for the downloading of just 24 songs.¹³³ While this procedure surely is slightly more civilized and profitable than the burning of witches at the stake, it is not likely to be any more effective at putting an end to the publishers' misfortunes, than the latter was for preventing medieval natural disasters. The publishers are up against the magical properties of the internet, progress, and a 'paradise of plenty', not dark magic: so far convicted 4,280, and more than a hundred million to go. One wonders what they have in mind.

As argued, from a global, historic perspective, current IP-laws are no longer justified. IP first of all is fundamentally different from physical property and it even crosses it, and invades it. While IP made sense as business-to-business regulation in the past, when presses were expensive and large, and were owned and operated by a few easily identifiable companies, it no longer does. With the rise of the internet and the ubiquitous availability of computers, copying has become something everyone can do in the private sphere of their home. Thus copying can no longer be policed without abolishing privacy. Add to this the ever growing global deadweight loss caused by the tragedy of the Lost Paradise, the promise of the crossing of global divides in a free Information Society, and an undisturbed rebirth of community-produced culture, and it is clear that current copyright laws have become an anachronism, and need to be replaced.

It is to be hoped that we will soon enter a free Information Society driven by not just one, but two free markets. So that, when

¹²⁹ Wirten, *No Trespassing: Authorship, intellectual property rights, and the boundaries of globalization*, pp. 56, 137-138, 146-147; Hesse, "The rise of intellectual property, 700 B.C. - A.D. 2000: an idea in the balance", pp. 40-41.

¹³⁰ Barlow, "The economy of ideas: a framework for patents and copyrights in the Digital Age (Everything you know about intellectual property is wrong)", p. 8.

¹³¹ Tehranian, "Infringement Nation: Copyright Reform and the Law/Norm Gap", p. 543.

¹³² Tommy O'Reardon. *Copyfutures: The Problem(s) with Voluntary Collective Licensing*. 2004. URL: http://lsolum.typepad.com/copyfutures/2004/09/the_problems_wi.html, p. 1.

¹³³ Friend Elianne. *Woman illegally downloads 24 songs, fined to tune of \$1.9 million*. 2009. URL: <http://edition.cnn.com/2009/CRIME/06/18/minnesota.music.download.fine/index.html>, p. 1.

the current copyright-system crumbles, and the record-companies, movie-houses and publishers have given up their roles as distributors and manufacturers of physical data-carriers (such as CDs and blue-ray disks), they will be able, and willing, to continue with their new core-businesses as music-recording studios, movie-studios, -producers, and editors, so they, and the artists, actors and authors they employ — or that hire them instead —, can make a living again, and receive the fair profits they deserve.

The Isle of Man is already planning to introduce a levy-based system, and as a recent article in *Wired* suggests, the music industry is turning their ears to the opportunities that a levy-system — what we here call a two-markets system — can offer them.¹³⁴ It remains to be seen to what extent global interests will really be represented by the system they might come up with. For this it is important that everyone's interests are heard and taken into account, and that there will be as much freedom as possible for the public to recombine popular works; so everyone can speak freely in the language of media-culture.

Previously nations were at least somewhat inclined to support society and cultural commons. Even if this happened for reasons that might not always be noble, such as competition with other nations for cultural prestige, it still had positive effects. While now, with the weakening of states, this source of support is dwindling, and things look bleak for the interests of our increasingly globalized civil society.

We live in times that ask for vigilance: As technology changes our world, our language, and our reality, latent ambiguities in laws are emerging, and changing the laws reach and the way in which they apply. This happens not just to laws — the fossils of ethics, hard-

ened out for practical use, and a stable grip. Ethics, the living thought scrutinizing good and bad, justice and injustice, is also facing the rapid emergence of numerous ambiguities. For now, they are mostly related to cases which involve information-technology, such as the issue under discussion. But sooner or later they will affect questions related to the risks posed by nano-technology, the impact of genetic engineering on social inequality, and what newborn humans should be like. As progress and science make our world more malleable, and a greater diversity of alternatives become practically realizable, human decisions will eventually be about the shape of reality itself. If that happens, then ethical considerations will be the only guideline we have left.

Hence, questions about changes in justifiability brought about by historical and technological developments are of great relevance; for historians, but also for the future of humanity as such.

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