James Boyle, from Shamans, Software, & Spleens. Cambridge: Harvard UP, 1996.

CHAPTER 13

Proposals and Objections

In the last two chapters, I tried to show that the author-vision can obscure disturbing political, economic, and moral consequences, and that it is presently doing just that on an international scale. For one thing, if one conclusively presumes a romantic vision of originality, one is more likely to neglect the importance of the public domain. This neglect means that property rights for "authors" can actually *restrict* debate and slow down innovation—by limiting the availability of the public domain to future users and speakers. The Gay Olympics case, the patenting of software, the *Kinko's* case, and the story of the rosy periwinkle show that this is not merely a possibility but a fact. Our current definitional denial of these consequences merely makes them all the more likely. The table on page 156 provides a summary of my analysis.

In this chapter I deal with some of the more likely objections to my analysis, and then offer some proposals for change, both political and legal. In most legal scholarship, the detailed proposals for reform are the capstone of the piece, but there are three reasons why I shy away from that position here. First, I am attempting to construct a social theory of the information society. To concentrate only on the specific policy proposals is to lose sight of the larger project. Even if that project is a failure, it is a *large* failure rather than a small one. Durkheim wasn't writing a book about the best height for bridge parapets.

Tensions in an Intellectual Property System

I have arranged these tensions in two vertical sets. Each set is not a list of corollaries; indeed, they are sometimes internally contradictory. Thinking of the subject of intellectual property as "information" rather than "invention" does not commit one to Northrop Frye's view that artistic works can only be created from other artistic works. In fact, any particular portion of an information regime is likely to "mix and match," like a restaurant patron picking four dishes from column B and one from column A. *Nevertheless*, the entries in each column are most likely to be found in popular and scholarly discourse when linked to their vertical neighbors. Under the guise of resolving these problems, the effect of the author-vision is to make the items in the middle column either disappear or recede in importance.

Subject Matter	Information	Innovation
Economic Perspective	Efficiency	Incentives
Paradigmatic Conception of Problems	Transaction Cost Problems: barriers to the free flow of information lead to the inhibition of innovation / inadequate circulation of information	Public Goods Problems: inadequate incentives for future production lead to the inhibition of innovation / inadequate circulation of information
Reward (If Any) for . . .	Effort / Investment / Risk	Originality / Transformation
View of the Public Domain	Finite Resources for Future Creators	Infinite Resources for Future Creators
Vision of the Productive Process	Development Based on Existing Material: "Poetry can only be made out of other poems; novels out of other novels. All of this was much clearer before the assimilation of literature to private enterprise."[a]	Creation *ex Nihilo:* "Copyright is about sustaining the conditions of creativity that enable an individual to craft *out of thin air* an *Appalachian Spring*, a *Sun Also Rises*, a *Citizen Kane*."[b]
Normative Starting Point	Free Speech / Free Circulation of Ideas and Information	Property Rights: the creator's "natural" right, the reward for past creation, the incentive to produce again

a. Northrop Frye, *Anatomy of Criticism*, 96–97 (1957).

b. Paul Goldstein, "Copyright," 38 *Journal of the Copyright Society of the U.S.A.* 109, 110 (1991) (emphasis added).

Second, there is the danger that I would replicate the very deterministic and technocratic errors I criticize. The structure of thought I have described here is wildly overdeterministic in the way it equates the abstract need for some set of incentives with the actual current arrangement of intellectual property rights. My analysis pointed out that undervaluation of the public domain is reflexively produced when one builds an intellectual property system around an expanded idea of originality. Thus mine is at least a two-sided, rather than a one-sided, account. Still, to claim that my analysis could—without further empirical evidence—set the correct level of incentives, or dictate the appropriate duration of copyright, would be ridiculous. (Though not quite as ridiculous as the claims of the proponents of the current system, who say they can do exactly that from an even weaker theoretical basis.) Third, if we are truly living in an information economy, it is particularly vital that the intellectual property system be opened up to democratic oversight and control. Like most property systems, intellectual property is a system designed by elites. But to a greater extent than with other property systems spurious claims to the "technical" and "scientific" status of the subject matter have curtailed the possibility of democratic dialogue. Thus the more detailed suggestions I make here are *examples* of the direction in which the intellectual property system should move, rather than the imperious dictates of "correct" analysis. My goal is to diminish the number of spuriously scientific and determinist prognostications about the intellectual property system, rather than to add to it.

Objections

Apart from the arguments already dealt with, the most common objections I have encountered deal with my focus on ideology and the social construction of knowledge. Rather than taking my points piecemeal, these responses seek to dismiss the importance of the author vision *tout court.* I have encountered three basic versions: "It's just words." "It has to be this way." "And anyway it's good."

"It's Just Words": The Rhetorician

> It is true that the regulation of information entails a lot of "author talk," but you are mistaken in thinking anyone believes it. The idea of

an "original" author or inventor is just a conventional figure of speech, a convenient rhetoric to justify an intellectual land grab.

If it were true that the authorial vision was only used as a rhetorical device, used hypocritically *by* disbelievers *to* disbelievers, I should still think it worthy of study. "Hypocrisy is the homage that vice pays to virtue."[1] By studying a society's sanctimonious rhetoric we can understand its normative orthodoxy. I would certainly be willing to admit that the image of the romantic author is *sometimes* used consciously as rhetoric; when Time Warner enlists Byron, Proust, or even D. W. Griffiths as the champion for their flow of royalties, we may be a little suspicious of the message. But, attractively cynical though it is, I simply do not accept the assertion that the author vision I describe is *only* rhetoric.

First, authorship is not merely a handy argument; it is a premise, the major premise, of our intellectual property system. We could have an intellectual property system that merely tried to provide adequate returns on investment in information production—one that is just as happy ensuring payment to the person who invests time and labor in collecting names and numbers for a telephone directory as the person who, after much work, invents something new. Instead, originality is our touchstone—not just our rhetoric. Second, those who speak so cynically of mere "rhetoric" portray themselves as being entirely above the society that consumes this rhetoric, free from its cultural assumptions and untouched by its deepest beliefs. I find myself unconvinced by both the specific assertion and the general attitude. The idea of the original, transformative creator is coded deep into our speechways and our patterns of thought. Not only is it a legitimately attractive idea, an iconic vision of human potential, but it forms the baseline against which we judge other accounts of art, science, and information production in general.

"It Has to Be This Way," Response 1: The Resigned Cynic

> You may be right in saying that the language of authorship is a central one, but that is just because it serves the interests of the most economically powerful actors. Microsoft, Pfizer, and Time Warner want a certain kind of intellectual property regime and that is the one they get. The system expresses the interests of the most powerful, always has and always will. Consequently, while your project may be very nice as an academic exercise, it is of no conceivable importance to anyone.

This argument takes the position that ideology is of no importance and that legal regimes are based merely on economic self-interest. In most versions, it adds a relatively crude determinism—that "the big companies" have a single set of interests that they consciously pursue and get enacted into law. (Interestingly, the determinist argument is often coupled with the rhetorical argument, to produce the surprising assertion that authorial language is mere rhetoric, just froth and show, while a regime built around the author figure is historically inevitable. In this rather puzzling picture, the authorial paradigm is both irrelevant *and* inexorable.) I have heard the determinist objection from a wide range of people—a Marxist patent law scholar, a science fiction cyberpunk author, a liberal legal historian, an iconoclast computer programmer. Some Chicago School economic analysts of law express similar conclusions, but without the sigh of regret. Entitlements in a legal system go to those who are able and willing to pay the most for them—and a damn good thing too.

Obviously there is some truth to this picture, but as the *sole* explanation of the current situation, I think it substitutes cynicism for analysis. First, it is hard to identify a group of corporations with consistent interests in the intellectual property field, broadly or narrowly conceived. Take computer software as an example, and Microsoft as the hardest case for my argument. Surely at least Microsoft has a simple set of interests in intellectual property? (Namely, "More, More, More.") Yet even here, in the very worst case for my thesis of a complexity of interests, the reality turns out to be a little more complicated. Microsoft wants broad protection of operating systems—but not always too broad, because otherwise Microsoft Windows would be held to have infringed on the "look and feel" of the Apple operating system.

If we look beyond Microsoft, a company that is in the economically enviable position of having copyrighted the alphabet, we find that the complexity increases. When it comes to issues such as decompilation, the large software companies have interests both in the protection of software (their own) and in a *limitation* on the protection of software (their competitors'). More generally, in the absence of a strong ideology of authorship, we might expect attitudes toward in-

tellectual property to move in cycles as bulges of new companies enter the market. Even within this generational analysis, we would expect further variation across industries depending on the ease with which investment in research and development can be recouped without intellectual property protection. Some new market entrants may want an expansive conception of the public domain so that they can utilize the accumulated expertise of their predecessors, while others may believe that investment in a new area can only be justified by the possibility of a monopoly rent on the likely results. Differences in risk preference would presumably also play a role. Even with the long-term players, views should shift more over time as market posture shifts. As a participant in a project to break into the operating system market, IBM has a rather different attitude toward intellectual property than it did when its mainframes defined the universe of computers.

If we actually find that corporate lobbying centers on the expansion of intellectual property regimes, both domestically and internationally, does this refute my analysis of the author paradigm, or reinforce it? Given the actual diversity of interest that a more detailed economic analysis reveals, it seems possible that corporations' perception of self-interest is just as often a *result* of the author paradigm as it is a *reason* for it.[2]

Second, and more important, the author-vision produces economically irrational results. The "periwinkle effects" detailed in Chapter 11 are a prime example. Precisely because the system is built around the idea of originality, it tends to undervalue the importance of sources, of the public domain. At present it may be in the *individual* interest of the individual drug company to secure biological material and ethnobiological knowledge for free. But it is in the collective interest of the companies in the drug industry to ensure the continued existence of their raw materials. Thus we have the classic argument for state intervention to avoid free rider problems; so long as one company could "free-ride" on the preservation efforts of others, each will hold back, hoping the others will do the work. It would not be rational for any one drug company to change the way it operates, but it would actually be in the interest of all to shift to a regime in which it was mandatory to devote some proportion of profits to the maintenance of biological diversity and perhaps cultural survival. *Failure to do so may signal the uncritical acceptance of a particular ideology of information production rather than a cool-headed pragmatism about self-interest.* Again, I would argue that the corporate perception of self-interest is just as often a *result* of the author paradigm as it is a *reason* for it. Finally, even if there were *no* truth in the argument I put forward here—even if all corporations had somehow rationally converged on a monolithic position on intellectual property—we would still want to work out whether the corporate position was in the long-term interest of anyone else. Even the most fatalist of the cynics wants to know something about the reality on which his cynicism is based, if only so he can be assured that his sigh of resignation is perfectly pitched.

"It Has to Be This Way," Response 2:
The Historical Determinist

> The author paradigm you describe was an inevitable *functional* by-product of the development of widespread print technology at the end of the sixteenth century. To talk as if we had any choice among paradigms is profoundly misleading. If, indeed, the author vision is doomed it will be because it does not fit the material realities of contemporary information technology and not because we "decide" it is a bad idea. For example, within the copyright arena narrowly conceived, greater ease of copying will make the authorial paradigm obsolete, if the possibility of levying individual fees for each electronically metered "use" does not make it moot first. Consequently, the attempt to explain the negative effects of this kind of thinking to some imaginary audience is an entirely futile one. Economic and technical changes called the author figure forth and only those forces can lay it to rest.

This is a deeper, but no less enervating, determinism than that of the person who believes that "the big corporations" are the moving hand of history. On a crude level, it has become our orthodoxy that social meaning in general, and law and ideology in particular, are mere adjuncts to technological and economic change. My reaction to this argument is a complicated one. Obviously such change is important, but I fail to see the simple definite correlations between technological change and legal innovation that are so often assumed.[3]

At first sight, it seems reasonable to believe that the second thing off the Gutenberg press was the romantic author, but both history and analysis tend to clutter the artful simplicity of this thesis. Yes, it

is plausible that the greater the ease of copying, the more the need for *some* kind of "copy"-right.[4] The possibility of large-scale profit *from* books and the possibility of large-scale copying *of* books arise at the same moment. It is the ease of "copying" that makes information a potential public goods problem in the first place. But what kind of regime do we have to solve this, built around what kind of assumptions? The Stationers Company in Elizabethan England had an apparently functional system of allocating and registering the privilege to publish certain books, protected by a quasi-legal system of dispute resolution by the guild. At least within a pervasively regulated industry such as Elizabethan printing, guild allocation could have fulfilled some of the functions of copyright in guaranteeing that no one would try to horn in on anyone else's literary turf.[5] (Think of the protections against competition on allocated routes within the regulated airline system.) At the other extreme, one could imagine a comprehensive system that simply tracked the public goods problem case for case, giving monopoly property rights to all those who produce goods, one unit of which can satisfy an infinite number of users at close to zero marginal cost. This would cover many of the problems of a copyright regime, but it would also cover the "unoriginal" telephone directory produced in the *Feist* case. We have neither of those systems. Why?[6] It is unconvincing to say that the printing press *requires* the authorial–original creator model I describe here—as if technology and economic organization existed in some Tupperware container that seals out ideology, aesthetics, and the social construction of reality. We should uncouple the factitious determinacy of the *actual* legal regime and ideology we end up with from the technologically driven need to have *some* legal regime or ideology.

The determinist makes a category mistake—identifying the concrete social forms produced by the last four hundred years of our history with the abstract *idea* of functional needs. When we turn from history to prognosis, the same thing happens. Yes, developments in information technology will certainly have a huge effect on both the utility and the unintended consequences of our intellectual property regime (though the arrow of influence runs both ways—from technology to ideology *and* back again.) That is one of the premises of this book, after all. But the specific consequences of those technological developments are harder to figure out. Perhaps greater ease of copying will undermine an author-centered regime, or make it seem even more important. The latter is where I would put my money. Perhaps electronic metering of use will make copyright superfluous, or perhaps it will simply be used to enforce a copyright-based regime. Perhaps the appropriative, cut and paste technology of the Internet will make us question the very idea of originality, or perhaps the Net will remain an electronic ghetto, cut off from the "respectable" world of literary production (no modems in Proust's cork-lined room). *Perhaps* the psychic and ideological attractions of authorship will continue to manifest themselves long after aesthetic theory and information technology have supposedly left them far behind. I have explained why I think so. Whether I am right or wrong, the simple argument from technology fails to move me. The determinist imagines self-interpreting technologies "announcing" their needs to a world of rationally adaptive social institutions. That is an interesting picture, but one that belongs in 1950s science fiction rather than social theory.

"And Anyway It's Good": The Defender of Authorship

> How can you deny that there is something noble in authorship and in the larger idea of basing intellectual property rights on originality? There is a difference between originality and mere grunt work, and the former is worthier than the latter—in both Kantian and utilitarian terms. Shakespeare deserves better intellectual property protection than Grisham, let alone a telephone directory; Einstein deserves more recompense than Nintendo. What's more, if *anyone* ought to believe in property rights based on originality, it is someone who believes—as you seem to—that iconoclasm is to be valued and that the human capacity to wreak great changes in our life plans, our cultures, and our societies is one of the proudest attributes of the species.

Strange as it may seem, I *do* think that there is something noble in originality in general and authorship in particular. I don't know if anyone takes the caricatured position that it is impossible to distinguish between the cultural contributions of Shakespeare and Grisham. I certainly do not and I would be quite happy rewarding the former more than the latter, based precisely on the degree of original material they added to the public domain (although our current system doesn't, and Shakespeare didn't have any copyright protection at all). Finally, if one is going to be romantic about something, our

ability radically to transform culture, self, and society is a pretty good candidate.

The first problem is that this argument proves too much. In order to have any practical utility, the definition of originality has to be broadened so much it loses much of its romantic appeal. Earlier I quoted Holmes swooping down from the Olympian heights of art to the reality of a circus poster: "The work is the personal creation of an individual upon nature. Personality always contains something unique. *It expresses its singularity even in handwriting*, and a very modest grade of art has in it something irreducible which is one man's alone. That something he may copyright."[7]

Intellectual property covers the tax-preparation book as well as Othello, the manual for WordPerfect as well as the poetry of Elizabeth Bishop. There is nothing wrong with this; quite the contrary. In fact, it is because the definition of originality has been stretched so far that the regime is not already paralyzed by its inability to cover the kinds of "information–public goods" problems I described earlier. In those cases where the gatherer of information can be smuggled under the mantle of romantic authorship, the artifact will still be covered, though the overall pattern of coverage will be extremely unsatisfactory on any *utilitarian* ground. (For example, the person who puts together a book of "lucky lottery numbers" will get copyright protection, whereas the person who compiles a telephone directory will not. Useful alphabetical listings are not "original," unlike wholly spurious arrangements of numbers and silly text.) But whatever the accidental virtues of the system, one cannot defend it as if its definition of originality was anything but "thin."

Second, if we *really* cared about originality, we would cover a lot of things that we do not presently cover. Albert Einstein and Stephen Hawking get *no* intellectual property rights for their discoveries of "natural laws," while the inventors of the Slinky and the paper clip can really rake it in (unless their inventions were "obvious"). Suppose for a moment that our intellectual property system really *was* designed to produce an adequate amount of invention and original discovery. One would think that the paradigmatic case for protection would be the foundational discovery which produces no immediately useful product. That is the one that is least likely to be compensated in other ways, after all. Yet that is exactly the discovery we do *not* protect. Strike two against the strong defense of originality.

Third, if one truly worships Great Artists or Inventors, one is under an obligation to concede that the current system can make their lives a lot more difficult. The tendency of the current system to undervalue the importance of the public domain can deprive the truly creative among us of the raw material necessary to create their next transformative artifacts. Examples of this process abound, but the most recent to catch my eye was a letter written to the official publication of the Association for Computing Machinery, *Communications of the ACM*.[8] The letter was a protest against Clause 1.5 of the ACM's new Code of Ethics, a clause that announced a "moral imperative" for members to "honor property rights, including copyrights and patents." The letter was signed by seven prior recipients of the ACM's highest awards, including Marvin Minsky and Richard Stallman, founder of the League for Programming Freedom, which opposes software patents on the grounds that they inhibit innovation, slow down research, and convey few useful benefits for society. The fascinating thing here is that opposition to extensive intellectual property regimes is coming from precisely the people that those regimes purportedly honor and defend: the innovative geniuses and inventors. This demonstrates the fallacy in assuming that creators' interest is only in increasing intellectual property protection. It also should give one pause before concluding that all opposition to intellectual property is based on "author envy."

Proposals

A large portion—the most important portion—of this book is devoted to understanding the various ways we now think about information. It deals with the tensions within our current patterns of thought and the unintended consequences that might occur as we rely—consciously or not—on those patterns to create the legal and institutional frameworks of an information society. But my goal is prescriptive as well as descriptive. The general issues and concrete suggestions that follow are rooted in my analysis of information discourse in the market, the polity, property, and the family. They are

not, of course, *entailed* by that analysis. A more detailed set of suggestions is provided by the Bellagio Declaration (see Appendix B).

General Issues

There is, in both classical liberalism and market economics, an ironic tendency toward an egalitarian idea of information. Both the market and liberal democracy deal with hard value judgments by aggregating individual acts of choice. Should vanilla ice cream cost more than chocolate, should teachers be paid less than missile engineers? Should human growth hormone go to the rich basketball player or the poor dwarf? How do we decide the government's policies or pick society's leaders? Both systems answer that question by addition. In the market, everyone makes their rational consumer choices, "votes" with her dollars, and the self-regulating system produces prices—societal valuations—as the result. In the realm of democracy, everyone just votes. In the political or economic terrain thus constructed, each person pursues her own life plan. The system's legitimacy comes from the fact that it treats each participant's choice equally—with formal neutrality. If you have a dollar to spend, the market doesn't care how you spend it. If you have a vote and a political "voice," you may deploy them as you choose.

Criticism from the left has always focused on the "if's" in the preceding sentence. Freedom to spend one's dollar as one wishes is of little use to the person without the dollar in the first place. The promise of egalitarian democracy is somewhat undercut by the fact that both in voting and in other forms of political behavior wealth is such a significant predictor of success. The general criticism focuses on the aridity of a system that postulates as a formal matter that all are equally free to make the same choices—whatever the distribution of resources. The classic example is that both rich and poor will be punished equally for making the "choice" to sleep under the bridges in Paris. The question of disparate actual resources is not relevant.

There is an irony in these criticisms when we turn to the subject of information—a simple point of great potential significance for the information society. *Both the market and liberal democracy use the idea of rational choice as their nostrum for every normative issue, often ignoring the questions of resource distribution that would make that choice a reality. But even the most formally arid system based on rational choice requires that its participants have one actual resource—information—if the choice is to function as a normatively appealing bedrock.* On this one issue, about this one resource, both the market and democracy move from the realm of formal, negative liberty toward that of substantive positive liberty. The journey is not always completed, as my discussion of insider trading illustrated. But as that discussion also showed, the impulse is there.

The second idea of information is in some ways the opposite of the first. Issues ranging from the Bork hearings to the debate over credit records or the analysis of blackmail offered here all testify to the strength of our notion of informational privacy: the idea that there is some kind of natural right to control information about ourselves, to restrict access, (intermittently) to prohibit commodification, and to control dissemination.

One should be careful not to make too much of this. No social results flow automatically from such a picture of the world. Information too can be recharacterized as something all are presumed to have or as a resource about which the system is conclusively indifferent—"Caveat emptor" or "Ignorance of the law is no excuse," for example. When claims of privacy butt heads with the market need for accurate consumer information, privacy often loses. But even at our most carefully qualified and hedged, we would be silly not to realize that when dealing with this resource our society's languages of entitlement are less grammatically hostile to the claims of the dispossessed and the marginalized. This is not just a description of a useful rhetorical ploy; the way we think about the world sets up limits for us. It prepackages certain normative claims as potentially valid, others as marginal, and it prevents still others from even being understood as valid speech acts.

This part of my discussion does not provide a neat set of programmatic proposals. Instead, it is intended as a sort of guidebook for those who are engaging in scholarship, activism, or decision making on a specific information issue. But the moral geography of information issues I described here is important for another reason. It maps out the landscape of "public" and "private" information, the territories that abut the information property issues on which I have spent so much time.

THE PUBLIC DOMAIN

We need to show much greater concern for the public domain, both as a resource for future creators and as the raw material for the marketplace of ideas. Despite all the ballyhoo about the information highway, there has been little or no coalition politics on this issue. The reporters who were outraged by the restrictive meaning given to journalistic fair use in *The Nation* case need to form common cause with the programmers in the League for Programming Freedom. Rap musicians who wish to "sample" other recordings in their songs should see their interests tied not only to parodists and appropriationist artists but to the software companies that want the antitrust law enforced against Microsoft and to environmental activists trying to save the biologically diverse public domain of seed "land races." These groups in turn should realize that they have interests in common with developing nations that object to the patenting of life forms, and so on, and so on. At the moment, the doctrinal divisions between different areas of intellectual property are mirrored in the isolation of the individual groups who are seeking to restrict the privatization of the public domain. My analysis here suggests a philosophical, moral, and even an economic agreement, concealed by the absence of an overall picture of the struggle. In just the same way as PEN, Amnesty International, the ACLU, journalists, and teachers' unions understand apparently discrete "free speech issues" as being linked together, the coalitions that have been drawn into the fight over the public domain need to understand the connections between their diverse battles.

Preserving the public domain does not always mean getting rid of property rights. Sometimes the problem is that a property system constructed around the idea of authorship recognizes only certain kinds of contributions, and does so in such a way as to reduce the likelihood that the public domain itself will survive. The discussion of shamanic sources and periwinkle effects in Chapter 11 offers pertinent examples. In these cases, the answer will be not to have fewer intellectual property rights, but rather to have different ones. At this point, a critic might say that my analysis is contradictory. Having spent all this time saying we had too little concern for the public domain and too much intellectual property, I am now arguing for the creation of new forms of intellectual property. I have nothing against contradictions, some of my best friends are contradictions, but in this case I think I am not guilty of one. My point is not that we always need *fewer* intellectual property rights, or that we always need *more* intellectual property rights. Rather, my point is that an author-centered system has multiple blindnesses and that we should strive to rectify some of them. In general, these blindnesses result in the creation of too many intellectual property rights, because a strong author-centered system minimizes the importance of the public domain, and conceives of information issues predominantly from the incentives point of view. But these blindnesses also result in the undervaluation of nonauthorial contributions to the production process, often in a way that would curtail the possibility of future production, or in the suppression of the interests of the audience or market for the product. In an essay accompanying the Bellagio Declaration (see Appendix B), my fellow drafters and I put it this way:

> Our analysis indicates three overlapping areas of neglect in an overly author-centered vision of intellectual property: neglect of unacknowledged sources and non-authorial modes of scientific and cultural production, neglect of the interests of the "audience," and neglect of the importance of conserving the public domain for the benefit of innovators and consumers alike. Measures designed to counteract these tendencies do not fall neatly into a simple choice to have "more" or "fewer" intellectual property rights. Indeed, one of our criticisms of contemporary discourse about intellectual property is its simplistic binary format. We favor a move away from the author vision in two directions; first towards recognition of a limited number of new protections for cultural heritage, folkloric productions, and biological "know-how." Second, and in general, we favor an increased recognition and protection of the public domain by means of expansive "fair use protections," compulsory licensing, and narrower initial coverage of property rights in the first place.

DATABASES

A reconfigured intellectual property regime would be attentive to the times when the current system provided too little protection as well as too much. For example, the focus on "invention" may well provide too little incentive for the compilation of databases, or may cause socially unproductive labor to be expended in trying to arrange those

databases in an "original" way just to bring them under the mantle of intellectual property. However, there are many ways to finance such information production. The technology itself may provide a method for controlling access; the tax system might offer incentives; and so on.

The creation of expensive and useful databases may also impose indirect costs on and generate benefits for public discourse. These too should to be taken into account. At present Mead Data Central's NEXIS service allows journalists electronically to search fifteen years' worth of the big newspapers in the United States in just a few seconds. Say a state senator gives a speech attacking homosexuals. I check to see if his name was ever mentioned in any newspaper, only to find that he was himself picked up, before he entered public life, for soliciting in a public bathroom. (In this case, we might think that the privacy objection has been "waived," though it is worth noting that one of the greatest protections of privacy is the anonymity purchased through bad recordkeeping. To the extent that information technology makes information instantaneously retrievable, it has obvious costs for privacy.) But what about the more tangible costs of this excellent service, namely, the expense of paying for it? What happens if only the big news media can afford it? Do we need some form of publicly subsidized service? Or does this form of research push journalists even further toward the recitation of disconnected prurient facts, an uneasy hybrid of railway timetable and a peep show? The point is that these questions need to be addressed directly, not defined out of existence, as is often done under our current system.

SUI GENERIS SYSTEMS

In discussing information economics, I argued that there was no such thing as a generic public goods problem. Instead, there were a host of problems: underproduction, overproduction, diminution of the public domain, and so on. In addition, the different *loci* for intellectual property rights present strikingly different characteristics, yet we tend to cram them all into the same categories in a way that would have made Procrustes proud. The table at the beginning of this chapter could be used as a kind of checklist for each area. In some industries or areas of life, information production might seem as worthy of protection as innovation. Some innovations might offer high returns even in the absence of intellectual property protection, because of the ability of the innovator to trade on the knowledge of the likely effect the innovation will have on the market. Others might have such a short half-life that the ability to be first to market offers ample rewards. Still others might present us with a dilemma in which every reward for innovation has the direct effect of stifling future innovation.

Obviously, no intellectual property system could be perfectly sensitive to all these market differences, even if we could identify them in advance, or associate them with particular classes of products with a high degree of confidence. That is not the question. Any legal rule ends up covering both too much and too little. The question is not whether the system could solve all these problems, but whether—as seems likely—we could do better than the two-sizes-fit-all scheme we have at the moment. A reasonable place to start would be to study sui generis systems for particular types of information products—software is the most salient example.

INTERNATIONAL EQUITY

One central theme of this book is that many of the "human rights" and even more of the "international development" issues of the twenty-first century will be intellectual property issues. Earlier I described the regressive and inefficient operation of the current international intellectual property system. I am not under the illusion that this expression of sentiments provides an algorithm with which to resolve the world's intellectual property problems. In fact, it raises as many questions as it answers. My hope, however, is that they are better questions. What we have right now is an exponentially expanding intellectual land grab, a land grab that is not only bad but dumb, about which the progressive community is largely silent, the center overly sanguine, and the right wing short-sighted.

.....

It is certainly possible to maintain our faith in the premises of the current system while we fiddle with its effects. Patent systems could have more general transfer of technology requirements built into them; copyright regimes could have compulsory low-cost licensing for educational use in developing nations; "neighboring rights" regimes could make up for some of the current shortcomings in the treatment of sources; and so on. As the prior paragraphs suggest, I

have nothing against incremental progress. I am quite happy to make moderate, reformist suggestions about the protection of databases and the appropriate interpretation of the fair use provisions of the copyright act. Here are some examples of reforms based on the analysis I have put forward.

- Copyright should subsist only for twenty years, with a broadly defined fair use protection for journalistic, teaching, and parodic uses—provided that those uses were not judged to be in bad faith by a jury applying the "beyond a reasonable doubt" standard.
- Software should be covered not by patent law or by copyright, but by a sui generis system that would take more account of the costs of creation, the possible returns in the absence of intellectual property protection, and the extent to which an intellectual property right would concentrate market power and erect roadblocks to further development.
- Drugs derived from the ethnobotanists' pharmacopeia should be subject to a 10 percent tax and the proceeds split equally between the indigenes and a fund to promote biological diversity.
- Patents should be voidable at the instance of any party who can prove that an adequate return would have been provided merely by being first to market, with the state paying the legal fees for successful suits.
- All intellectual property right systems should be subject to periodic auditing by the General Accounting Office, an auditing to test whether—with each type of product—the intellectual property right was providing too high or too low an incentive to future production and research, and to attempt to balance that incentive against the monopolistic and anticompetitive results of intellectual property protection.

Although I give these only as examples of the kinds of reforms that should be considered, I think they are well worth pursuing. I am particularly interested in opposing the worldwide expansion of intellectual property rights, backed with trade sanctions. But my real concern lies with the general *ideology* of the intellectual property system.

The author-vision that I have described here is not merely a set of mistakes in thinking about the balance between incentives and efficiency, public domain and private right. It is the focal point of a language of entitlement, an ideology every bit as rich and important as that of wage labor and the will theory of contract. Those who are negatively affected by this language of entitlement—be they programmers, satirists, citizens of the developing world, or environmental activists—see only the impact within their narrow bailiwicks. Focusing on effects, they fail to see the structure underlying those effects. Thus they lose the possibility of both theoretical analysis and the practical recognition of common interests. This truth may not set us free, but it is a start.

13. Proposals and Objections

1. Sadly the line is François de La Rochefoucauld's and not my own.
2. One response is to say that it must be in the interest of companies to insist on strong intellectual property protection, otherwise they would not have done so. At this point, the argument has become circular.
3. Very briefly, my theoretical objections are as follows. First, functionalist arguments are often overdeterminative. They can be used to explain any outcome, and thus nothing at all. Both the repression and the encouragement of infantile sexuality, a free press, mini skirts, and anything else for that matter, can be portrayed as deeply necessary to the current stage of monopoly capitalism. Second, such arguments tend to move in circles, something like this: "The legal regime is a functional response to the problems of the time. Despite its apparent alternatives, and its apparently nonfunctional features, this *must* be the functionally appropriate system because it is the one we ended up with." Third, these arguments often ignore important historical and geographical differences of development—such as the quite different historical development of copyright in Germany, France, England, and the United States—particularly those differences which would lead us to doubt their overweening determinism. For instance, Carla Hesse has shown fascinating differences between the French and the English treatments of the public domain. Carla Hesse, *Publishing and Cultural Politics in Revolutionary Paris, 1789–1810,* 122–125 (1991). For the best general critique of these errors see Robert Gordon, "Critical Legal Histories" in *Critical Legal Studies,* 93 (James Boyle ed., 1992).
4. But even here I would want to cavil slightly at the general form of the proposition. It seems possible that, in some intellectual property fields, ease of copying might be associated with the very technological developments that made it feasible to be rewarded for innovation or for information production, simply by being "the first to market." Thus technology might make copy-right both possible and unnecessary at the same moment.
5. One answer is that the system cannot have been functional; otherwise it would not have been changed. Not only is this argument obviously circular, but it also manifestly contradicts the evidence of the significant geographical and historical differences in the actual development of European copyright regimes. See Hesse, *Publishing and Cultural Politics.*
6. One response to this kind of argument is to say that obviously there were no functional alternatives, because otherwise we would not have ended up with the system we in fact have. At this point, of course, the functionalist argument has again become circular and thus both irrefutable and meaningless.
7. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249–250 (1903) (emphasis added).
8. Marc Rotenberg, "Communications Privacy: Implications for Network Design," 36 *Communications of the ACM* 17 (1993).

Conclusion

1. In this context, the ambiguity between the two uses of the word "supposed" seems entirely appropriate.
2. This is not to say that I am arguing in favor of the labor theory of value. One of the achievements of marginalism in economics and legal realism in property law was to point out the flaws of both the Marxist labor theory of value and the conventional vision of property which it opposed.
3. This, I think, is a point that Foucault would have agreed to, even as he would have insisted (again rightly in my view) that the method that grand theory offers to *find* and criticize this "discourse" is exactly the wrong one.
4. See Jaques H. Drèze, "A Paradox in Information Theory," in Drèze, *Essays in Economic Decisions under Uncertainty,* 105 (1987).
5. I have to say that I like the irony of saying this near the end of a book whose myriad footnotes are the fruit of every electronic research service the world has to offer.

6. Cf. D. M. Lamberton, "The Emergence of Information Economics," in *Communication and Information Economics: New Perspectives*, 7–22 (M. Jussawalla and H. Ebenfield eds., 1984): "The emergence of information economics can be seen as response to the deficiencies of economic theory based on perfect knowledge, the failures of policy, or the spectacular advent of intelligent electronics with greatly enhanced capacity for communication, computation, and control. Whichever is the preferred interpretation, it remains a personal judgment whether the battle for recognition and respectability has only just been joined, is well advanced, has been won, or perhaps been lost." Id. at 7.
7. Because of the "infinite" vision of information I discussed earlier, we do not tend to see information as a good, the maximization of which is not always a good thing. A moment's reflection should confirm the fact that there are occasions when the unbridled growth of information may actually be hurtful. Some decisions become *harder* with more information. See Drèze, "A Paradox in Information." When we think of information not as a good, but as the life blood of the public sphere of debate, or the perfect information of a market model, we ignore the *constraints* produced by overproduction. To use a simple example, given a retrieval system of a limited capacity, I will prefer to have a smaller database which will give me answers 50 percent of the time rather than a larger, more complex database which theoretically would give answers 100 percent of the time but which so overwhelms my abilities to retrieve and process data that I can only find answers 40 percent of the time. In neoclassical price theory, these kinds of trade-offs are exactly the ones that market decisions make so well. Yet the double quality of information—its being both part of the model and a good to be traded under the model—may prevent the operation of economic feedback mechanisms on the level of market behavior, and make questions of microeconomic analysis undecidable on the level of scholarship. As the case of the polluting factory shows, the parallel to welfare economics operates at both levels, the practical and the theoretical.
8. Of course, as I tried to show earlier, the author ideal often does appear in that particular issue, especially when analyzed by Henry Manne.
9. I admit that these are abstractions that do not resolve concrete cases, that they frequently contradict each other, and so on, and so on.
10. Rust v. Sullivan, 500 U.S. 173 (1991).
11. "For of all sad words of tongue or pen / the saddest are these: 'It might have been!' " (John Greenleaf Whittier).

Appendix B

1. There are different ways to explain the nature and protection of authors' rights, which are based on various historical and cultural differences. We honor those differences, and we attempt to find common language to express our concerns and aspirations for the international intellectual property system.
2. The way of thinking which this exclusive idea of "authorship" supports also has consequences beyond the realm of law. To a greater or lesser extent, we tend to enact this exclusive understanding of the "author" in our practices: for example, as scholars, scientists, teachers, writers, and business people. That effect, however, is beyond the immediate scope of this declaration.