Culture War

Dan Hunter

Abstract

Over the last ten years, much of copyright and patent has come under attack from those who suggest that capture by private interests has had a pernicious influence on public policy in this field. In the related areas of telecommunication spectrum management and internet regulation there have emerged strong arguments for not allocating private property interests, and instead considering these domains as commons property. I suggest that, together, these developments form part of a culture war, a war over the means of production of creative content in our society. I argue that the best way to understand this war is to view it as a Marxist struggle. However, I suggest that copyright and patent reform—where commentators have actually been accused of Marxism—is not where the Marxist revolution is taking place. Instead I locate that revolution elsewhere, most notably in the rise of open source production and dissemination of cultural content.

Document Control

Public *Beta* Revision 1.2, Tuesday, August 10, 2004. This is a non-canonical draft. It goes without saying that you may cite to it, but this document may not represent my final view.

CULTURE WAR

DAN HUNTER*

> A spectre is haunting multinational capitalism—the spectre of free information.
>
> –Eben Moglen, *∂otCommunist Manifesto*[1]

It wasn't long ago that intellectual property law was seen as a wholly positive force in society. In those simpler times, intellectual property was thought to guarantee social progress, promote innovation, and (no doubt one day) cure baldness. But within the blink of an eye the golden period faded, and intellectual property became a mares' nest. In copyright, scholars and civil society groups lead a series of attacks on copyright term extensions, and on the diminution of the public domain. Within patent we witnessed increasing concerns about the extension of patent scope, and the grant of wildly overbroad patents: recently a number of civil society groups announced plans to challenge the grant of those patents which these see as the worst offenders. Internationally, criticism was leveled at the role of Western intellectual property policy on developing nations, in areas like plant and seed protection, drug pricing in Africa, and the development of indigenous high-technology industries. And in related areas like telecommunication spectrum allocation, and internet regulation there emerged movements seeking to protect commons property from private encroachment. At the same time, intellectual property owners decried rampant piracy, and daily foretold the deaths of their industries. Where once intellectual property was seen as good for all, we now survey a battlefield that pits private interests against the public good.

Karl Marx and Friedrich Engels' *Communist Manifesto* foretold the end of private property and the inevitable rise of a workers' paradise. Though this failed as a

---

* Robert F. Irwin IV Term Assistant Professor of Legal Studies, Wharton School, University of Pennsylvania. Email: hunterd@wharton.upenn.edu Thanks to Greg Lastowka, Larry Lessig, Polk Wagner, and Kevin Werbach for their guidance on the different battles in the culture war.

1 Available at http://emoglen.law.columbia.edu/publications/dcm.html

political movement, there are extraordinary parallels between Communist ideology and the current war over the creation of cultural content. In fact I will argue that the various battles of the culture war can best be understood as elements of a Marxist class struggle. One hundred and fifty years ago Marx began writing his fundamental works, and in doing so re-wrote history. His philosophy reacted against the concentration of power in the hands of capital that came about as a consequence of the industrial age. Now, as the information age progresses, we see the same concentration of power through the dominant property form of our era, that is, intellectual property. The *laissez-faire* capitalists of the gilded age have their direct descendants in intellectual property-based industries like media, software, pharmaceuticals, and the like. And so we shouldn't be surprised if we see a Marxist response to these developments. Equally we shouldn't be surprised if Capital, that is the owners of intellectual property, rightly see this as a profound challenge to their position. We can expect to see, and in fact do see, significant resistance on their part.

The purpose of this Essay is to describe the nature of the culture war, and to explain why viewing this war through a Marxist lens can shed light on it. In doing so, we can begin to recognize how current battles might be fought, and how future battles will emerge. Thus, in the part that follows I first look at how we came to find intellectual property holders pitted against civil society groups and scholars. I go on to suggest that copyright and patent reform—where commentators have actually been accused of Marxism—is not where the Marxist revolution is taking place. Instead I locate that revolution elsewhere, most notably in the rise of open source production and dissemination of cultural content. In charting this revolution, I also show how spectrum allocation and internet regulation follows this Marxist cultural revolution, and forms part of it.

-I-

Intellectual property has a venerable provenance, tracing its roots back to the beginning of the Eighteenth Century in copyright, and earlier in patent, but its significance has changed profoundly as we moved from the industrial era into the information age. For much of the Twentieth Century, the three fundamental grants of intellectual property interests—patent, copyright, and trademark—were relatively narrow and relatively unimportant. Patents were used by business to forestall competition in useful inventions (like chemical processes), trademarks were useful to denote one company's product from another, copyright was relevant to stop

commercial reproduction of, say, a book. But on the whole, businesses in the industrial era didn't care that much about intellectual property. They cared about the factory, the production line, and the land on which these were sited. This was the property that mattered.

As the modern era advanced the importance of industrial production waned. No longer was heavy machinery and physical plant the predominant means of production, no longer was physical inventory the most important asset to industry. At least in the developed world, control over intangibles came to dominate the business agenda, and thereby the political agenda.[2] The importance of these sorts of intangible interests is obvious in the rise of the Microsoft, and the other software and electronic commerce players. These industries rely solely on intangible products, and, since these intangibles like ideas, text, data and images can flow effortlessly around the globe without the inherent constraints of physical property, intellectual property protections are necessary to forestall others from using them. But in other fields important to developed nations—for example, semiconductors, pharmaceuticals, genetic engineering, media—control over processes, ideas, and information has become central to the expansion of these high-value, high-tech industries, and thereby has become central to the interests of western governments.[3]

In the latter part of the Twentieth Century the importance of these new property interests was obvious to business and government, and so the intellectual property system grew.[4] Thus copyright's scope, which had been limited in its infancy to maps, charts and books,[5] broadened over time to encompass musical and dramatic works,

---

2 See THOMAS P. HUGHERS, AMERICAN GENESIS: A CENTURY OF INVENTION AND TECHNOLOGICAL ENTHUSIASM, 1870-1970 (1989). For an account of the social and business role of intellectual property (especially patents) since 1970 see Wesley M. Cohen and Stephen A. Merrill, *Introduction*, in WESLEY M. COHEN AND STEPHEN A. MERRILL, EDS, PATENTS IN THE KNOWLEDGE-BASED ECONOMY 1, 1–2 (National Academies 2003).

3 The intellectual property protocol to the foundational international free trade agreement, the *General Agreement on Tariffs and Trade*, is the most compelling example of Western government reliance on intellectual property, and their efforts to entrench the system within international trade. See *Agreement on Trade-Related Aspects of Intellectual Property Rights* (Apr 15, 1994) (TRIPS), reprinted in THE LEGAL TEXTS: RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS ANNEX 1C at 321-53 (Cambridge 1994). See generally SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY (Cambridge 2003)

4 See generally William W. Fisher, *Geistiges Eigentum – ein ausufernder Rechtsbereich: Die Geschichte des Ideenschutzes in den Vereinigten Staaten*, in EIGENTUM IM INTERNATIONALEN VERGLEICH 265 (Vandenhoeck & Ruprecht, 1999) [English version, *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States*, available at http://cyber.law.harvard.edu/people/tfisher/iphistory.pdf]

5 Copyright Act of 1790, ch. 15, 1, 1 Stat. 124 (repealed 1831). The Act provided protection to the "author and authors of any map, chart, book or books," if the writings were printed in the United States and the authors were citizens or residents and had not transferred their copyright.

photographs, movies, sound recordings, software, architectural drawings, and the like.[6] Copyright terms were extended from a modest period—initially a slim 14 years, with the chance of one extension of 14 years[7]—to increasingly-extended periods each time Congress considered the matter,[8] eventually reaching a period of almost two human lifespans.[9] And the early conception that copyright covered only the literal expression of a work was abandoned in favor of expansive interpretations of the author's interests, extending to the "essence and value of [the]…composition."[10] This paved the way for the recognition of copyright in "non-literal expression," such as the structural features of a book or computer program,[11] characters drawn from films and comics,[12] and the preparation of various types of derivative works.[13]

Patent law followed the same path. Its scope widened, over time annexing new inventive territories like plants, surgical procedures, computer algorithms, and

---

6 Photographs: *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884); Sound recordings: Sound Recordings Act of 1971, Pub. L. No. 92-140, 85 Stat. 392. See generally Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900- 2000*, 88 CAL. L. REV. 2187 (explaining the connection between the expansion of intellectual property protection and the advent of new technologies).

7 Copyright Act of 1790, ch. 15, 1, 1 Stat. 124, 124 (repealed 1831).

8 Extensions to copyright terms were granted by Pub. L. No. 87-668, 76 Stat. 555 (1962); Pub. L. No. 89-142, 79 Stat. 581 (1965); Pub. L. No. 90-141, 81 Stat. 464 (1967); Pub. L. No. 90-416, 82 Stat. 397 (1968); Pub. L. No. 91-147, 83 Stat. 360 (1969); Pub. L. No. 91-555, 84 Stat. 1441 (1970); Pub. L. No. 92-170, 85 Stat. 490 (1971); Pub. L. No. 92-566, 86 Stat. 1181 (1972); Pub. L. No. 93-573, 88 Stat. 1873 (1974); Pub. L. No. 105-298, 112 Stat. 2827 (1998). See generally LAWRENCE LESSIG, FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD, 107-8 (2002) (suggesting that it's not unreasonable to say that copyright was extended each time that Mickey Mouse was due to fall into the public domain).

9 The latest extensions were introduced in the Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (1998). The copyright term has been increased from life of the author plus 50 years to life plus 70 years (15 U.S.C.A §303(a)), and for pseudonymous works and works made for hire from 75 to 95 years from publication or from 100 years to 120 years from creation. (*Id.* §302(c)).

10 Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of 'Authorship,'* 1991 DUKE L.J. 455, 478 (quoting EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES, 451-52, (1879))

11 *Whelan Associates, Inc.* v. *Jaslow Dental Laboratories, Inc.*, 797 F.2d 1222 (3d Cir. 1986) (structure, sequence and organization of a computer program held to be copyright expression); *Meredith Corp. v. Harper & Row, Publishers, Inc.*, 378 F. Supp. 686, 690 (S.D.N.Y. 1974), aff'd per curiam, 500 F.2d 1221 (2d Cir. 1974) (copying of structure and sequence of literary work justified finding of copyright infringement).

12 *Detective Comics, Inc. v. Bruns Publ'ns, Inc.* 111 F.2d 432 (2d Cir. 1940) (holding Superman character a copyrightable element of comic book); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), cert. denied, 439 U.S. 1132 (1979) (finding Mickey Mouse and Minnie Mouse characters protectable elements of copyrighted works even if placed in unrelated stories); *Anderson v. Stallone*, 11 USPQ2d 1161 (C.D. Cal. 1989) (characters from the Rocky motion picture separately protectable); *Metro-Goldwyn-Mayer v. American Honda Motor Co.*, 900 F. Supp. 1287 (C.D. Cal. 1995) (holding literary character James Bond protected under copyright);

13 See Fisher, *supra* note ___ at 268.

business methods.[14] In time even lifeforms became patentable, eventually including gene sequences of the human genome.[15] The strict early patent requirement that only the specific claims could be infringed was loosened with the introduction of the doctrine of equivalents, giving judges flexibility to determine that non-identical but equivalent methods were infringing.[16]

Trademarks too were set loose from their historical moorings. The trademark term was extended[17] and the prototypical application of a physical brand to a physical product no longer marked the limit of trademark's dominion. Not only could the hourglass shape of the Coke bottle be a trademark in itself,[18] but sounds such as the Harley-Davidson exhaust note for motorcycles,[19] a fragrance, or a distinctive color of dry cleaning pads[20] were equally protected from copying. In time wholly impressionistic elements comprising the "trade dress" of a restaurant—features such as the color scheme, layout, and roof design—came to be owned.[21]

At first these manifold expansions were ignored, not only by socially progressive commentators but also by the public. The growth of intellectual property didn't seem to involve a reduction of any interests in the common weal. Of course, the grant of a patent over a new class of inventions, or a new form of trademark, or the extension of

---

14 Plants: Plant Patent Act of 1930, codified in 35 U.S.C. secs. 161-164; Plant Variety Protection Act, 7 U.S.C. §§ 2321-2582. Surgical procedures: Ex parte Scherer, 103 U.S.P.Q. (BNA) 107 (Pat. Off. Bd. App. 1954) (approving patent for method of injecting drugs by pressure jet). Computer algorithms: *Diamond v. Diehr*, 450 U.S.175 (1981) (approving patent for software that monitored temperature inside a rubber mold). Business methods: *State Street Bank & Trust Co. v. Signature Fin. Group, Inc.*, 149 F.3d 1368 (1998) (approving patent for financial calculation business method)

15 *Diamond v. Chakrabarty*, 447 U.S. 303 (1980) (establishing patent protection for commercially valuable organism). The expressed sequence tags of the human genome was the subject of patent applications by Celera Genomics and Incyte Genomics, two companies engaged in mapping it. See Dennis Fernandez & Mary Chow, *Intellectual Property Strategy in Bioinformatics and Biochips*, 85 J. PAT. & TRADEMARK OFF. SOC'Y 465, 467 (2003)

16 Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1004 (1997).

17 Trademarks are capable of infinite term, since they may be repeatedly renewed. Trademark terms were effectively extended by the introduction of the intent-to-use standard rather than initial commercial use requirement. This allows the applicant to claim a (fictional) constructive use date and store the mark without any use for more than four years. See Trademark (Lanham) Act of 15 U.S.C.A. §1051(b) (2000).

18 See e.g. *Coca-Cola v. Gemini Rising*, 346 F. Supp. 1183 (E.D.N.Y. 1972) (a poster depicting the Coke bottle infringed the trademark in the coke bottle)

19 *Kawasaki Motors Corp. USA v. H-D Michigan Inc.*, 43 USPQD2d 1521 (TTAB 1997) (Trademark status granted for distinctive sound of Harley-Davidson exhaust note). The extension of trademark protection into sounds was first granted in relation to NBC's three chimes signal, Reg.No. 523,616 (Apr.4, 1950).

20 *Qualitex Co. v. Jacobsen Products Co.*, 115 S. Ct. 1300 (1995) (Trademark status granted for distinctive green-gold color for dry cleaning pads).

21 *Two-Pesos, Inc. v. Taco Cabana*, 505 U.S.763 (1992)

a copyright, might affect a direct competitor; but after all that's just business. Society at large just didn't care much. And this aside, the intellectual property system is as arcane as the tax code. Who, outside of specialist intellectual property lawyers, could understand let alone follow issues like why the creation of a specialized patent court has lead to an increase in patent validity rulings, and what this might mean to the public good? [22]

Thus the expansion of private interests didn't awaken the public. However there has long been the sense that the public does have some stake here. The concept of the "public domain" was first advanced in 1896, in a Supreme Court case involving the Singer sewing machine.[23] The court noted that upon the expiration of a patent the public gained the right to exploit the technology: in the court's words, the invention fell into the public domain.[24] Over the following 80 or 90 years, as intellectual property rose in importance, the concept of the public domain was either ignored, or defined in negative terms: the public domain was what remained after all the private interests had been allocated.[25] It was the carcass that was left after the intellectual property system had eaten its fill.

In the late nineteen-seventies David Lange, then a young Duke law professor, attended an entertainment law symposium to present a paper on the right of publicity, in light of two cases before the California courts asking whether the heirs of Bela Lugosi and Rudolph Valentino could control the representation of these famous actors after their death.[26] Lange thought it a technical question that might be of narrow interest to estate lawyers, and those lucky few who are strangely excited by the law of succession. He was surprised at the distress of a group of screenwriters who attended his presentation and who peppered him with fearful questions. Rather than rejoicing in greater protection, they saw the recognition of celebrity publicity rights as taking

---

22 Allison and Lemley demonstrate that the patent validity rate after the introduction of the Federal Circuit Court of Appeals during the period 1989-1996 was approximately 52%. See John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J. 185, 241 (1998). Oddi claims that prior to the creation of the Federal Circuit in 1982, the historical average for patent validity was approximately one-third, and that the validity rate is now too high. See A. Samuel Oddi, *The Tragicomedy of the Public Domain in Intellectual Property Law*, 25 HASTINGS COMM. & ENT. L.J. 1, fn9 (2003).

23 *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169 (1896)

24 *Id* at 196.

25 This conception of the public domain in negative terms has been common for some time, see e.g. *Compco Corp v Day-Brite Lighting, Inc.*, 376 US 234, 237 (1964) (striking down state unfair competition laws that altered copyright law, which would "interfere with the federal policy…of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.")

26 David Lange, *Re-Imagining the Public Domain*, 66 LAW & CONTEMP. PROBS. 463, 464-5 (2003)

something away from them. If the courts expanded publicity rights they would reduce the ability of writers to adapt, use, or re-imagine the histories of famous people. As Lange describes it, years later, "the law of publicity was dispossessing individual creators in order to benefit the interests of celebrities."[27] From this epiphany, Lange recast the public domain. Rather than the negative leftovers, he said that the public domain was a vital, affirmative entity, the publicly-accessible collection of knowledge, ideas, history, and expression on which creators draw in order to make new works.[28] It was, in short, the repository of public culture. The concern that motivated Lange, the issue that made his paper more than a doctrinally-interesting law article, was the recognition that, if private interests were to continue to expand, they would eventually overrun the public domain altogether, and thereby choke off all creativity. This would, of course, be a mordantly amusing result, since the grant of intellectual property rights is generally justified as an economic incentive to authors and inventors to encourage creativity, not to stifle it.[29]

From this beginning the movement in defense of the public domain grew slowly. It was another ten years before law professors began systematically to analyze the importance of the public domain to the intellectual property system and to society. In a series of articles beginning in the mid-eighties, Pamela Samuelson voiced concern about the expansion of intellectual property in various components of information technology, including user interfaces, computer algorithms, and information, and argued that this was dispossessing others of the opportunity to innovate.[30] Outside the specific arena of computer technology, Jessica Litman explained how the public domain permitted the copyright system to work, by leaving the raw material of authorship available for authors to use.[31] She examined the gulf between what authors really do in creating copyright work, and the way the law perceives them. As

---

27 *Id* at 465.

28 *Id* at 466.

29 See e.g. *Goldstein v. California*, 412 U.S. 546, 555 (1973) ("to encourage people to devote themselves to intellectual and artistic creation, Congress may guarantee to authors and inventors a reward"); William Landes & Richard Posner, *An Economic Analysis of Copyright Law*, 18 J. LEG. STUD. 325 (1989).

30 Pamela Samuelson, *CONTU Revisited: the Case Against Copyright Protection for Computer Programs in Machine-Readable Form*, 1984 DUKE L.J. 663 (1984); Pamela Samuelson, *Creating a New Kind of Intellectual Property: Applying the Lessons of the Chip Law to Computer Programs*, 70 MINN. L. REV. 471 (1985); Pamela Samuelson, *Allocating Ownership Rights in Computer-Generated Works*, 47 U. PITT. L. REV. 1185 (1986); Pamela Samuelson, *Modifying Copyrighted Software: Adjusting Copyright Doctrine to Accommodate a Technology*, 28 JURIMETRICS J. 179 (1988); Pamela Samuelson, *Information as Property: Do Ruckelhaus and Carpenter Signal a Changing Direction in Intellectual Property Law?* 38 CATH. U. L. REV. 365 (1989); Pamela Samuelson, *Benson Revisited: The Case Against Patent Protection for Algorithms and Other Computer Program-Related Inventions*, 39 EMORY L.J. 1025 (1990).

31 Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990).

she noted, originality is a legal fiction. Authors must reshape the prior works of others, and so a conception of authorship as original-creation-from-nothing is both flawed and misleading. A strong positive conception of the public domain is therefore necessary to protect creators from incurring liability through otherwise unavoidable copying.[32] Wendy Gordon expanded on this by suggesting that free speech interests are intimately connected to the public domain and the increasing-privatization of the public domain weakened First Amendment rights.[33] And Jamie Boyle gave a series of extraordinary accounts of private control of public domain material, including, memorably, the cells of a patient whose doctors patented a fabulously valuable cell-line from his spleen.[34]

Thus, throughout the eighties and nineties, scholars had warned of the problems of an expansionist copyright and patent system, but their concerns were ignored. Perhaps the public indifference can best be explained by an absence of compelling examples where creators were obviously disenfranchised as a result of the diminution of the public domain. It wasn't until the introduction in 1998 of two pieces of legislation that these examples became clear, and activists and theorists were galvanized. The Sonny Bono Copyright Term Extension Act[35] and the Digital Millennium Copyright Act[36] did a number of things: extended copyright terms, renewed copyrights on some works that had already fallen into the public domain, and made illegal the circumvention of digital locks on copyright works (the so-called "anti-circumvention provisions"). But more important, perhaps, these statutes motivated a number of public-interest groups in a way that had never occurred before. Up until the passing of this legislation, corporate interests lobbied for intellectual property expansion without much, if any, public comment.[37] These two statutes changed that. Not only were they widely recognized as driven entirely by corporate interests—the copyright term extensions being not-unfairly seen as motivated by Disney's fear that Mickey Mouse's first film

---

32 *Id* at 968-9.

33 Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993).

34 James Boyle, *A Theory of Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413 (1992).

35 Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827, codified at 17 USC § 302(a) (2000).

36 Digital Millenium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860, codified at 17 USC § 1201 (2000).

37 See JESSICA LITMAN, DIGITAL COPYRIGHT (2001) (detailing the legislative process of copyright, and noting how it is dominated by commercial interests played off against one another).

would soon fall into the greasy hands of the public—but their unanticipated uses, of the DMCA in particular, drew widespread attention.

By now the horror stories are well-known: a Princeton computer science professor was threatened with prosecution under the anti-circumvention provisions of the DMCA if he disclosed research that he and his lab had performed in breaking the preferred encryption system of the Recording Industry Association of America.[38] Since he had performed this study at the behest of the RIAA, this restraint on research and speech was striking. A Russian computer science student was arrested while presenting a paper at a conference that demonstrated how his software made it possible to read Adobe's digitally-encrypted electronic books.[39] He was arrested by the FBI in Las Vegas, and promptly disappeared. He turned up some time later in a jail in San Jose, presumably so that the executives from Adobe—whose corporate headquarters are located there—shouldn't have too far to travel when testifying against him.[40] Some computer scientists boycotted US computer security conferences as a result, while others were warned to stay away for fear of being jailed for discussing computer security.[41] By the time that students at Swarthmore College were threatened with an injunction against posting details of a potential election scandal with electronic voting machines,[42] the message was clear to many civil society groups. The restrictions on speech, the threat to research and enquiry, the quashing of dissent, the jailing of researchers: all of Lange's worst fears and then some were now realized. But unlike before, the public was starting to notice, and activists began attacking the intellectual property system.

The challenge to intellectual property is most evident in copyright; indeed copyright reform is the only part of the movement which is publicly recognizable outside the specialist legal literature. Most of the credit for this can be attributed to Larry Lessig's popularizing works, *The Future of Ideas* and *Free Culture*. In these he argues that we need to wind back intellectual property expansion, in order to protect the

---

38 See e.g. Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public*, 66 L. & Contemp. Probs. 173, 174 (2003); Felten v. RIAA, No. CV-01-2660 (GEB) (D.N.J. June 26, 2001) available at http://www.eff.org/IP/DMCA/Felten_v_RIAA/

39 Id at 173-4.

40 See http://www.eff.org/IP/DMCA/US_v_Elcomsoft/

41 Will Knight, "Computer Scientists boycott US over digital copyright law," New Scientist, July 23, 2001, available at http://www.newscientist.com/news/news.jsp?id=ns00001063; Alan Cox of Red Hat UK Ltd, declaration in Felten v. RIAA, Aug. 13, 2001, available at http://www.eff.org/IP/DMCA/Felten_v_RIAA/20010813_cox_decl.html; Jennifer 8 Lee, "Travel Advisory for Russian Programmers," N.Y. Times at C4, Sept.10, 2001.

42 See http://www.eff.org/legal/ISP_liability/OPG_v_Diebold/

public domain and the commons environments that allow for creative activity. Though he is widely considered the leader of the copyright reform movement, many others have joined the battle on the side of the reformers. Yochai Benkler,[43] Siva Vaidyanathan,[44] and others make the case for a significantly more circumscribed copyright system than we currently enjoy.

Outside of copyright, intellectual property reform is less well known, but no less important for its obscurity. Patent in particular has been the subject of ever-increasing scrutiny. Domestically, there has emerged a concern with overbroad patent grants, as a result of new patent categories and a perception that patents were not being appropriately scrutinized.[45] This is most evident in the flurry of commentary over the grant of business method patents that seemed self-evident. How could it be that Amazon could obtain a patent for "inventing" one-click shopping?[46] The vast increase in the number of filings of patent applications, and the sense that the system has failed to weed out unmeritorious claims has lead to civil society responses. The Public Patent Foundation was created to "represent the public's interests in the patent system," specifically to challenge wrongly issued patents against public policy.[47] More recently the Electronic Frontier Foundation announced a process to nominate the most noxiously-overbroad patents,[48] and is now challenging the ten patents which it identifies as particularly offensive. These include a patent for the transmission and receipt of digital content via the internet, a patent for telephone calls over the internet,

---

43 See e.g. Yochai Benkler, *Constitutional Bounds of Database Protection*, 15 BERKLEY TECH. L.J. 535 (2000); Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 109-113 (2001); Yochai Benkler, *Intellectual Property and the Organization of Information Production*, 22 INT'L REV. L & EC. 81 (2002); Yochai Benkler, *Coase's Penguin, or Linux and the Nature of the Firm*, 102 YALE L.J. 369 (2002).

44 SIVA VAIDYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY (New York University Press, 2001); SIVA VAIDYANATHAN, THE ANARCHIST IN THE LIBRARY (Basic Books, 2004).

45 See, e.g., Rebecca S. Eisenberg, *Analyze This: A Law and Economics Agenda for the Patent System*, 53 VAND. L. REV. 2081, 2083, 2096-98 (2000) (suggesting a better patent system would be created by better understanding of economic effects); Mark D. Janis, *Patent Abolitionism*, 17 BERKELEY TECH. L.J. 899, 900-904, 930-31, 948-52 (2002) (encouraging different form of patent reform); Arti Rai, *Addressing the Patent Gold Rush: The Role of Deference to PTO Patent Denials*, 2 WASH. U. J.L. & POL'Y 199, 202, 216, 218 (2000) (arguing for the application of the nonobviousness requirement and greater deference within the courts to USPTO denials of patents); Kurt M. Saunders, *Patent Nonuse and the Role of Public Interest as a Deterrent to Technology Suppression*, 15 HARV. J.L. & TECH. 389, 397, 451 (2002) (proposing changes in the patent system); John R. Thomas, *The Responsibility of the Rulemaker: Comparative Approaches to Patent Administration Reform*, 17 BERKELEY TECH. L.J. 727, 730, 744 (2002) (suggesting better use of the resources to patent agents to create a better domestic patent system).

46 U.S. Patent No. D431,695 (issued Oct. 3, 2000)

47 Public Patent Foundation website, http://www.pubpat.org/ Greg Ahronian's "Internet Patent News" group has been undertaking the same process for some time, though it has a private orientation and typically acts for affected competitors, see http://www.bustpatents.com/

48 See http://www.eff.org/patent/contest/

and a patent for online testing of students.[49]

Internationally there has been mounting concern over the damage that the patent system is doing in developing countries. During the 1990s, the United States engineered a coup in international intellectual property policy-making. Out went the specialized-but-impotent World Intellectual Property Organization, and in came the World Trade Organization, the 800-pound gorilla that oversees free trade policy.[50] With this brilliant administrative move the US Trade Representative gained the ability to strong-arm countries whose intellectual property systems were not aligned with US interests. If China wanted access to the insatiable US market for plastic toys and consumer electronics, then it was going to have to enforce US intellectual property interests in Shenzhen and Guangdong. But while this move lead to a huge uptake in intellectual property legislation and enforcement around the world, it also demonstrated the clear injustices in forcing the poor to dance to the rich's intellectual property tune. American pharmaceutical manufacturers were widely vilified—they were even caricatured on "The West Wing"—because they refused to provide drug therapies for HIV/AIDS in Africa for anything less than their patent-monopoly controlled price. When Indian companies volunteered to break this monopoly and manufacture generic knockoffs—thereby saving lives but thumbing their noses at US patent laws and the US pharmaceutical industry—the USTR threatened India with trade sanctions at the behest of Big Pharma. All the claims that this made economic sense, and that drug manufacturers need the monopoly so that they might have incentives to produce other important drugs—Viagra, for example—rang somewhat hollow in the ears of the untold millions of people in the developing world who were dying from AIDS. At the recent international HIV/AIDS conference, French President Jacques Chirac launched a swingeing attack against US intellectual property policy, and criticized the US for "blackmailing" developing countries into giving up their right to produce anti-AIDS drugs.[51] And US agricultural chemical manufacturers are widely reviled for their patents over feed and plant-stock in the

---

49 Ian Austen, *Claiming a Threat to Innovation, Group Seeks to Overturn 10 Patents*, N.Y.TIMES, July 5, 2004.

50 General Agreement on Tariffs and Trade (GATT), (also known as "World Trade Organization Agreement"), Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement, implemented on Dec. 8, 1994. Uruguay Round Trade Agreements, Pub. L. No. 103-465, 108 Stat. 4814 (approved and entered into force at 19 U.S.C. § 3511 [1994]).

51 Sarah Boseley, *Chirac Attacks US drug 'blackmail'*, THE GUARDIAN, July 15, 2004.

developing world.[52]

The rise of activism against intellectual property has taken many forms. Various centers have been established, with names like the "Center for the Creative Commons,"[53] "Center for the Public Domain,"[54] and the "Open Knowledge Network."[55] Political action groups like the Electronic Frontier Foundation and the ACLU, which previously had been concerned only with online privacy or censorship, have begun to take an active interest in intellectual property policy.[56] And recently we've seen the emergence of student activist groups, like the "Swarthmore Coalition for the Digital Commons." Agents-provocateurs like Larry Lessig, Yochai Benkler, and Eben Moglen pen books and articles equating freedom and autonomy of individuals with a reform of the intellectual property system. And shot through all of this is the sense that private property interests here are out of control, and the shared-commons of our culture is under attack.

This is the nature of the culture war which is currently being waged. Unlike the conflict between the left and right in US politics which is often called the "culture war,"[57] this isn't a war *between* cultures, but a war *over* our culture. Who owns it, who controls it, who can use it in future, and how much it will cost? For the first time since intellectual property began its inexorable expansion there are signs of popular discontent at just what the private interests had taken from the public.

Looking back at the movement now, this culture war is strongly reminiscent of an older struggle. A struggle that pits individual and social interests against the corporate owners of capital, where the issues cohere around who owns the means of production, and where communal ownership is preferred over private ownership. A struggle between the haves and the have-nots. This new version of the struggle even has student activists with slogans on their shirts. The culture war of intellectual property reform looks a lot like a Marxist class struggle, moved a hundred years forward, and translating the word "property" into "intellectual property".

---

52 See generally Keith Aoki, *Neocolonialism, Anticommons Property, and Bio-Piracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection*, 6 IND. J. GLOBAL LEGAL STUD. 11 (1998).

53 http://creativecommons.org/

54 http://www.centerforthepublicdomain.org/

55 http://www.openknowledge.net/

56 See e.g. http://www.eff.org/issues/copyright/; http://www.eff.org/issues/drm/; http://www.eff.org/issues/dmca/; http://www.aclu.org/Privacy/Privacy.cfm?ID=12325&c=252

57 See e.g. MORRIS P. FIORINA, CULTURE WAR? THE MYTH OF A POLARIZED AMERICA (2004).

-II-

In order to understand the relationship between Marx and intellectual property reform it's necessary to understand the ways in which the reformers are not Marxists. Indeed, they are anxious to disclaim Marx and communism in their theories. Larry Lessig, for example, emphasizes that he believes in private property as a means of ordering the allocation of scarce resources like physical property, and is at pains to reassure readers that his challenge to intellectual property is not a rejection of private property and capitalism.[58] Right-wing commentators are not convinced. Stephen Manes, a columnist for *Forbes* magazine, has launched a series of vitriolic attacks on Lessig,[59] seemingly motivated by the taint of Marxism in Lessig's ideas for reform. Manes proposes renaming Lessig's book, *Freeloader Culture: A Manifesto for Stealing Intellectual Property*.[60] The echo to Marx and Engels' *The Communist Manifesto*[61] is hard to miss. Manes contrasts Lessig's "radicalism" with "responsible creators" like Walt Disney, and he makes it clear that the sort of reform that Lessig advocates is ideologically suspect because it involves "stealing" property from those responsible creators.[62] Other commentators have been more direct and trenchant in their criticism: the Ayn Rand Institute accused Lessig of Marxism a number of years ago, suggesting that his efforts in the case of *Eldred v. Ashcroft*, in which Lessig argued for overturning one of Congress's many recent copyright extensions, were shameful and would lead to "cannibalism" of property interests.[63] Mouthpieces for high-profile intellectual property owners like Paramount Pictures also smell "whiffs of Marxism" in the reformers' distaste for corporate control of culture.[64]

It's hard to tell exactly how serious these commentators are when they pull out the

---

58 LESSIG, FUTURE OF IDEAS, *supra* note ___, at 6 ("To question assumptions about the scope of "property" is not to question property. I am fanatically pro-market, in the market's proper sphere. I don't doubt the important and valuable role played by property in most, maybe just about all, contexts."); LESSIG, FREE CULTURE, *supra* note ___, at xv-xvi.

59 Stephen Manes, *The Trouble with Larry*, FORBES MAGAZINE, 03/29/04, available at http://www.forbes.com/columnists/business/global/2004/0329/056.html; Stephen Manes, *Let's Have Less of Lessig*, FORBES MAGAZINE, 04/02/04, available at http://www.forbes.com/columnists/columnists/2004/04/02/cz_sm_0402manes.html;

60 Stephen Manes, *The Trouble with Larry*, FORBES MAGAZINE, 03/29/04, available at http://www.forbes.com/columnists/business/global/2004/0329/056.html

61 KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO (Samuel H. Beer ed., Appleton-Century-Crofts, Inc. 1955) (1848).

62 Manes, *The Trouble with Larry*, supra note ___.

63 Amy Peikoff, *Would-Be Intellectual Vandals Get Their Day in the Supreme Court*, Ayn Rand Institute, Oct 8, 2002, available at http://www.aynrand.org/medialink/copyrightlaw.shtml

64 Scott M. Martin, *The Mythology of the Public Domain: Exploring the Myths Behind Attacks on the Duration of Copyright Protection*, 36 LOY. L.A. L. REV. 253, 316 (2002).

"Marxist" libel. They know very well that this sort of accusation is a simple rhetorical cherry-bomb that makes plenty of noise and smoke, but illuminates little. The commentators aim is, of course, to paint the intellectual property reformers as both dangerous and willfully ignorant; the unstated implication is that the reformers desire a Bolshevik revolution, and probably a Stalinist purge, and moreover they are so out of touch with reality that they don't even realize that communism lost the Cold War. But this use of the "Marxist" tag doesn't assist our understanding of the intellectual property reform movement. When organizations like the Ayn Rand Institute indict the intellectual property reformers as Marxists they implicate only two features of Marxist-Leninism: the rejection of private property-ownership, and the civil uprising that Bakunin and Lenin said was necessary to move from capitalism to communism. But the kind of social reform of intellectual property discussed here—let me call it "Marxist-Lessigism"—doesn't involve either of these elements. Lessig, Benkler, and the many other reformers aren't modern-day Pierre-Joseph Proudhons: they don't claim that "Intellectual Property is Theft,"[65] nor do they suggest that revolution is necessary to undertake the suggested reforms.

In reality, Marxist-Lessigism is little more than a small set of limitations on the expansion of intellectual property. It is the intellectual property analog of New Deal social welfarism that ameliorated the worst excesses of capitalism, and rescued it from social disaster. It's the recognition that private property systems function better if some limits are placed upon property ownership and the market; otherwise the market will consume itself. Even many of the most ardent capitalists have learnt the Marxian lesson, that unrestrained free market capitalism creates a permanent underclass that is likely to revolt and overthrow the system that oppresses them. It's therefore a better idea for the wealthy to provide some kind of safety net for the *lumpenproletariat*, rather than be the first up against the wall when the Revolution comes.

The intellectual property lobby has never understood this. For the better part of three hundred years they expanded their empires, only to find that their encroachment on the public domain generated the kind of proletarian backlash from the have-notes that threatens to undermine all that they've worked for. Intellectual property industries, especially those dependent on copyright, continue to push a property-maximizing agenda. This is most obvious in the response of the movie and music industries to file-

---

65 Proudhon was a well-known anarchist and communist, and these days is most-known for his epigram "Property is theft." See HENRI DE LUBAC, THE UN-MARXIAN SOCIALIST: A STUDY OF PROUDHON, 174-5 (trans. R. E. Scantlebury; Sheed & Ward, 1948)

sharing, where they have commenced litigation against their own users,[66] introduced profoundly troubling digital rights management systems,[67] and lobbied for ever more draconic laws against copyright infringers.[68] But it is in the rhetoric of the lobbyists that one can most easily see the modern day reflection of the robber-barons of the gilded age. Jack Valenti, ur-lobbyist for copyright for innumerable years, personifies the intellectual property industries' equivalent to the "running dog of capitalism." He has consistently maintained that socially-responsive and constitutionally-mandated limitations on intellectual property are wrong. "Creative property owners must be accorded the same rights and protection resident in all other property owners in the nation…"[69] he once told Congress, ignoring not only the concept of fair use and the role of public domain, but papering over the Constitutional requirement of limited terms for intellectual property.[70] Sonny Bono's widow, Congresswoman Mary Bono is well-known for endorsing Valenti's proposal for an end-run around the Constitution:

> "Actually, Sonny wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. I invite all of you to work with me to strengthen our copyright laws in all of the ways available to us. As you know, there is also Jack Valenti's proposal for term to last forever less one day. Perhaps the Committee may look at that next Congress.[71]

---

66 See e.g. Peter K. Yu, *Music Industry Hits Wrong Note Against Piracy*, , Sept. 14, 2003, at 13A (discussing the RIAA's litigation strategy)

67 See e.g. http://www.eff.org/IP/DRM/

68 Bills currently before the 108th Congress include: Enhancing Federal Obscenity Reporting and Copyright Enforcement Act, 108 S. 1933 (2003) (proposing DOJ anti-hacking units to investigate criminal copyright infringement); Piracy Deterrence and Education Act, 108 H.R. 4077 (2004) (proposing fifteen million dollars for information sharing between the FBI and the Registrar of Copyrights for copyright infringement enforcement, the training and equipping of DOJ and AG units for copyright enforcement, an education program directed at stamping out file-sharing, and the provision of congressional condmenation of file-sharing); Protecting Intellectual Rights Against Theft and Expropriation (PIRATE) Act, 108 S. 2237 (2004) (providing that the Department of Justice and the US Attorneys Office be charged with the investigation and prosecution of civil actions against copyright infringers); Inducing Infringement of Copyright (INDUCE) Act, 108 S. 2560 (making it a crime to aid, abet, or induce copyright infringement).

69 Home Recording of Copyrighted Works: Hearings on H.R. 4783, H.R. 4794, H.R.4808, H.R.5250, H.R.5488,and H.R.5705 Before the Subcommittee on Courts ,Civil Liberties, and the Administration of Justice of the Committee on the Judiciary of the House of Representatives, 97th Cong.,2nd sess.(1982):65 (testimony of Jack Valenti).

70 "The Congress shall have Power…To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries", U.S. Constitution Art 1, §8.

71 Hearings on Sonny Bono Copyright Term Extension Act, House of Representatives, October 07, 1998, Congressional Record, Vol. 144, page H9951. A reading of her other remarks gives no indication that she is joking.

The Marxist-Lessigist movement has provided the signal benefit of identifying the problems that occur with the relentless expansion of intellectual property interests. Without muscular social welfarist protection of the public domain intellectual property industries will never voluntarily reduce their expansionary claims. As we've witnessed time and time again, intellectual property rights-holders have always sought wider property grants, longer terms, and stronger enforcement mechanisms. And these additional private interests are almost always extracted from the public.[72] We simply cannot expect those who are granted property interests to reduce their entitlements to accord with social policy. Yet without such limitations the expansion of intellectual property must eventually lead to a kind of intellectual and cultural paralysis. There was once a libertarian political theorist called Andrew Galambos, whose philosophy revolved around property, especially intellectual property.[73] He represents the logical endpoint of intellectual property expansion. Galambos thought it wrong to use anyone's ideas without permission and compensation: he believed, for example, that the inventor of the wheel was due a royalty on every automobile sold.[74] He presented lectures advocating this (and other libertarian ideas) and demanded that his listeners promise that they would never use "his" ideas without his permission. As one commentator mused, this may be why you've never heard of him.[75] Galambos failed to accept that, in order to express his ideas, he must necessarily be "impermissibly" appropriating the ideas of others. Presumably there is some uncredited "creator" of the concepts of "property," "equality" or "liberty;"[76] presumably someone should be credited with the observation that sky is blue, or that the weather is pleasant today; and so on. Galambos spent the latter part of his life persecuting those whom he thought had appropriated his ideas without

---

72 See e.g. Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 145 (2004) (noting that supra-competitive monopoly rents are not "found money", they come from consumer surplus).

73 ANDREW J. GALAMBOS, THE THEORY OF VOLITION, (Ed. Peter N. Sisco, 1999); See Harry Browne, *Andrew Galambos—The Unknown Libertarian*, LIBERTY, Nov 1997, available at http://www.harrybrowne.org/articles/Galambos.htm;

74 Harry Browne, *Andrew Galambos—The Unknown Libertarian*, LIBERTY, Nov 1997, available at http://www.harrybrowne.org/articles/Galambos.htm.

75 David Friedman, *In Defense of Private Orderings: Comments on Julie Cohen's 'Copyright and the Jurisprudence of Self-Help'*, 13 BERK. TECH. L. J. 1151, n52 (1998).

76 Galambos apparently believed that Thomas Paine invented the concept of liberty, and dropped a nickel into a box every time he used the word. See N. Stephan Kinsella, *Against Intellectual Property*, 15 J. LIBERTARIAN STUD. 1, 9 (Spring 2001). History is silent as to whether he remitted the moneys to Paine's heirs and assigns.

compensation.[77] This ridiculous position, where it is impossible to express any idea without gaining permission and paying a fee to the "inventor," is where intellectual property maximalism eventually leads. Though even other libertarians consider Galambos' views extreme,[78] his life stands as a lesson in the dangers of uncontrolled expansion of intellectual property. Marxist-Lessigism, like Marxism in the era of physical capital, is a brake on *laissez-faire* capitalism. It provides some social welfare balance to the expansion of private interests. This reform movement is, therefore, not about the destruction of private property, nor about revolutionary overthrow. At most it leads to a kind of intellectual property Scandinavia: capitalism, but with a social conscience.

However recognizing the reform movement as Marxist does expose some important features of the intellectual property system, that otherwise go unrecognized. First, it is clear that intellectual property reform is a conflict with significant class-struggle components. The Marxist "class warfare" can be recast as Marxist-Lessigist "culture warfare," since it axiomatic that there are intellectual property-haves and intellectual property-have-nots. In a world where the means of production is increasingly controlled by intellectual property, the same dynamic that lead to the Winter Revolution of 1917 could happen again. However the majority of the intellectual property have-nots are in the developing world, which is why the globalization debate so foten implicates intellectual property. Any Marxist-Lessigist revolution therefore is likely to be mediated through the *cordon sanitaire* of international trade, and the World Trade Organization. The prospect of intellectual property-induced violence, at least in the US, is unlikely. But it has happened elsewhere. In 1993, five hundred-thousand Indian farmers protested outside the offices of a private firm which had been granted a patent over derivatives of the neem seed, a staple of Indian farming.[79] The protest took place on Gandhi's birthday, and so, perhaps, it is unsurprising that the protest was peaceful. But in an era when anti-globalization demonstrations are often violent, it is unclear whether Marxist-Lessigist protests against intellectual property expansion will always pass without bloodshed.

Beyond the class struggle elements, Marxist ideology does explain some features of

---

77 Harry Browne, *Andrew Galambos—The Unknown Libertarian*, LIBERTY, Nov 1997, available at http://www.harrybrowne.org/articles/Galambos.htm;

78 See e.g. N. Stephan Kinsella, *Against Intellectual Property*, 15 J. LIBERTARIAN STUD. 1, 9 fn31 (Spring 2001) ("It is difficult to find published discussions of Galambos's idea, apparently because his own theories bizarrely restrict the ability of his supporters to disseminate them"); JEROME TUCCILLE, IT USUALLY BEGINS WITH AYN RAND, 69–71 (1971).

79 See Keith Aoki, *Neocolonialism, Anticommons Property, and Bio-Piracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection*, 6 IND. J. GLOBAL LEGAL STUD. 11, 53 (1998).

our unthinking acceptance of intellectual property interests. Perhaps even more than physical property, copyrights and patents demonstrate all the characteristics of Marxian "commodity fetishism."[80] Marx borrowed the concept of "fetishism" from anthropology, where it refers to beliefs that spiritual powers inhere in inanimate things. Marx suggested that a commodity remains simple provided it is tied to its "use-value" that is, the value we place in its use. When wood is turned into a table through labor, we can readily discern its use-value since its value in use is evident. But once the table "emerges as a commodity, it changes into a thing which transcends sensuousness."[81] Within a capitalist society we treat commodities as if value inhered in the objects themselves, rather than in the amount of real labor expended to produce the object. We thus imbue the commodity with the same sort of power as animistic religions imbue totems; hence the term "commodity fetishism." And since we live within a system that is based on free-market exchange of the commodity, the value that we place on the commodity is not its use-value but its "exchange-value." Marx objected to the privileging of the exchange-value of the object over its use-value for a number of reasons, but most importantly here, because it deleted the social-relationship that determined the creation of the object, and in doing so deleted the worker's contribution.

Commodity fetishism in copyrights and patents explains at least one feature of the intellectual property system. There is the curious way that rights-holders claim moral entitlement to the entire value of "their property." This has been derided by scholars as "if value, then right": they object to the argument that the mere presence of some excess surplus value in an intellectual property commodity is enough to provide adequate justification for extending the grant of right.[82] Of course, in the minds of those who "own" the intellectual property commodity, the fact that it eventually falls into the public domain, or the property grant might come with fair use limitations appears completely unfair.[83] It fails to accord with the expectations about property that commodity fetishism induces. The property is mine and it's mine forever.

---

80 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY. Vol. 1., 163, (Trans. Ben Fowkes, 1990).

81 *Id.*

82 See e.g. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815 (1935) ("The vicious circle inherent in this reasoning is plain. It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a sales device depends upon the extent to which it will be legally protected."); Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129 (2004) (providing economic arguments for rejecting such claims).

83 See Valenti, *supra* note ___.

The conclusion to all of this is simple: that while Marx provides some of the impetus for the intellectual property reform movement, and certainly can be used to explain features of intellectual property reform, the movement itself is not revolutionary, and is not poised to introduce intellectual property communism anytime soon. Capitalism is safe, at least as far as the basic intellectual property reform movement is concerned.

Beyond this, the expansion of intellectual property and the emergence of Marxist-Lessigism is fascinating in two ways. Not only does it guarantee that the public will have a voice in future intellectual property policy-making, but it has created a new kind of student movement that is one of the more active political movements on campuses these days. Of course this is not to say that they are particularly violent. The resistance they plan involves little bloodshed. Online sit-ins against intellectual property expansion; protests against prosecution of file-sharers. Maybe the most militant will undertake denial of service attacks on the MPAA website. It's not exactly the riots of the *soixante-huitards* or the bombing campaign of the Weathermen. But this movement promises a more socially-conscious intellectual property system, and is one that can be achieved without revolution or bloodshed.

However focusing just on Marxist-Lessigism misses the most interesting battles of the culture war. The greatest irony in this war is that the attention on the limited criticisms of the intellectual property reformers and public domain theorists masks the genuine Marxian revolution that is occurring. Marx couldn't have foreseen the internet, but, at least so far as creative endeavor is concerned, the net may yet deliver something like the workers' paradise that he envisioned.

-III-

The exploitation of the author is coded deep within the copyright system.[84] Indeed it's accurate to suggest that the creator of imaginative cultural artifacts has been dependent on the largesse of Capital for much of recorded history. Prior to the development of the printing press and the industrialization of content, this exploitation took pre-modern, typically feudal forms.[85] So it was that from Roman times through

---

84 And the patent system. For the sake of simplicity, the account here will focus on copyright, but patent law is no different. Individual inventors typically don't have the capital to exploit their invention or idea, and so sell or license their patent to the capitalist.

85 Note, *Exploitative Publishers, Untrustworthy Systems, and the Dream of a Digital Revolution for Artists*, 114 HARV. L. REV. 2438, 2439-2442 (2001).

until early in the Eighteenth Century the artist or author relied on a wealthy patron of the arts for material support. The concept of patronage was well-established in Ancient Rome,[86] migrated virtually intact into medieval and Renaissance Europe,[87] and was familiar until the commercialization of content in the Victorian era.[88] The power balance in this relationship was, of course, strongly in favor of the patron.[89] As book and movie representations are fond of reminding us, visual artists like Michaelangelo,[90] Orazio Gentileschi,[91] and Johannes Vermeer[92] all had fractious relationships with their wealthy patrons, who were wealthy private individuals or representatives of the church. And literary figures such as Samuel Johnson documented the indignities and abuses inherent in the power imbalance.[93]

The introduction in 1710 of the Statute of Anne changed the relationship, but hardly affected the relative power of the artist/author. Instead—as is true in the intellectual property system today—control was passed from the patron to the publisher or printer or bookseller. The fact that the Statute of Anne effectively granted economic control to a publishing intermediary is remarkable, for the act predates (by nearly 100 years) the development of the modern Western state and the installation of capitalism as the dominant political and economic philosophy. Yet in this first copyright act we can see the basic capitalist form of the artist-publisher relationship established: rights are nominally granted to the author but are automatically assumed by publishers through the "neutral" operation of the market. Nearly 150 years before Marx and Engels wrote *The Communist Manifesto*, the fundamental pattern was set. Authors, artists and creators were granted control over the product of their endeavors; but the

---

86 T.P. Wiseman, *Pete Nobiles Amicos: Poets and Patrons in Late Republican Rome*, in LITERARY AND ARTISTIC PATRONAGE IN ANCIENT ROME 28, 28-31 (Barbara K. Gold ed., 1982) (detailing the patronage system in Ancient Rome)

87 Paul Edward Geller, *Copyright's History and the Future: What's Culture Got To Do with It?*, 47 J. COPYRIGHT SOC'Y U.S.A. 209, 223 (2000)

88 DUSTIN GRIFFIN, LITERARY PATRONAGE IN ENGLAND 1650-1800 (1996)

89 The power balance also ensured that the cultural expectations of the aristocracy were maintained, and thereby provided an effective censorship mechanism against sedition or other transgressive publications. See Griffin, *supra* note ___ at 23.

90 See e.g. *The Agony and the Ecstacy*, (Dir: Carol Reed, 1965).

91 See e.g. *Artemesia*, (Dir: Agnès Merlet, 1997).

92 See e.g. TRACY CHEVALIER, GIRL WITH THE PEARL EARRING (2001); *Girl with the Pearl Earring* (Dir: Peter Webber, 2003).

93 The Earl of Chesterfield sought the dedication of Johnson's dictionary as it was about to be published. Johnson replied that the function of a patron is not to watch unconcerned at the drowning man, only to "encumber him with help" once he reached land. See Letter from Samuel Johnson to the Earl of Chesterfield (Feb. 1755), in JAMES BOSWELL, LIFE OF JOHNSON 184, 185 (R.W. Chapman ed., rev. ed., 1970) (1791).

reality of the capitalist marketplace and the expense of producing and disseminating these endeavors meant that effective control was almost always in the hands of the capitalist.[94] The structural contours of intellectual property conform neatly to the Marxian archetype of worker alienation from his or her work product at the hands of Capital.

This account is, of course, another way of stating the conclusion of the previous part: for all that Marxist-Lessigism appears to be challenge intellectual property interests, it does so in a remarkably circumscribed manner, that leaves the capitalist core of copyright and patent unaffected. If authors, creators and inventors operate within the copyright and patent systems—even one altered by Marxist-Lessigism—then they must accept the capitalist basis of the relationship. However there is now a social movement that bypasses the typical intellectual property system, and which rejects the philosophical basis of copyright and patent. This is the open source movement.[95] Unlike the Marxist-Lessigist copyright reform movement, the open source movement genuinely involves the transfer of the means of cultural and creative production from capital to the worker. "Open source" involves the free distribution of creative content, where others are free to use, copy, and alter the content.[96] It is commonly thought to be limited to computer software: the Linux operating system that was created by untold thousands of programmers, and which is freely distributed on the understanding that others might amend, fix, improve and extend it.[97] But while software might be the paradigmatic example of open source, the revolution it promises reaches far beyond software. The most important newspaper in South Korea is *Ohmynews*, whose motto is "Every Citizen is a Reporter."[98] *Ohmynews* hires no reporters and it relies wholly on individual contributions of news stories by its readers.

---

94 See e.g Note, *Exploitative Publishers, Untrustworthy Systems, and the Dream of a Digital Revolution for Artists*, 114 HARV. L. REV. 2438, 2442 (2001) (noting how under the Statute of Anne authors routinely traded away their rights for a pittance). Over time this dynamic hasn't changed. See e.g. Zechariah Chafee Jr, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 505 (1945) ("Often neither the author nor his family own the copyright. It belongs to the publisher… Then is not the talk of helping authors just a pretense?")

95 In referring to "open source" I will conflate a number of movements that claim to be distinct from each other, most notably "open source," "free software," and "copyleft." While each of these have differences in minutiae, these are largely irrelevant, at least for the purposes of the discussion here. For an account of the distinctions see Jonathan Zittrain, *Normative Principles for Evaluating Free and Proprietary Software*, 71 U. CHI. L. REV. 265, 268-74 (2004).

96 See e.g. GNU project, *Free Software Definition*, http://www.gnu.org/philosophy/free-sw.html; Debian Project, *Debian Free Software Guidelines*, http://www.debian.org/social_contract.html#guidelines; Open Source Initiative, *Open Source Definition*, http://www.opensource.org/docs/definition.php

97 See Linux Online, http://www.linux.org/

98 See http://www.ohmynews.com;

Another example is the *Wikipedia,* an open source, online encyclopedia which is entirely written, edited and re-written by anyone who cares to contribute to it.[99] Even though there is no control structure—there are no editors and no publishers—it rivals commercial encyclopedias in scope and quality of coverage.[100] Or consider the Distributed Proofreader's Project,[101] a group of people who volunteer to proofread and edit vast reams of scanned documents for inclusion in Project Gutenberg, which happens to be another open source initiative that puts out-of-copyright books online.[102] And then there are millions of bloggers out there, who have created an extraordinary inter-linked resource of news, commentary, op-eds, and gossip.[103] All the while ignoring the usual expectations of copyright.[104]

The expansion of open source as an alternative for creative endeavor is only meaningful because of the convergence of three technologies. As Greg Lastowka and I document elsewhere,[105] copyright has played an important social rôle because it provided incentives to intermediaries where the processes of moving content from creator to user were capital-intensive. These processes include the creation of the content, the selection of the content for commercial publication, its production and dissemination, its marketing and its eventual use. The general purpose computer—together with content-creation software for desktop publishing, music creation, film editing, and so forth—has meant that the cost of creation and production has fallen. The internet means that distribution is effectively costless for most content. And most recently the development of social software, which leads users to content they will like, has meant that the modern creator of content is no

---

99 Leander Kahney, *Citizen Reporters Make the News*, WIRED, May 17, 2003, http://www.wired.com/news/culture/0,1284,58856,00.html; Collision Detection blog entry, http://www.collisiondetection.net/mt/archives/000365.html#000365; Daniel Cooney, *Influential South Korean Internet site uses ``citizen reporters'' to cover news*, SFGATE.COM, May 13, 2003, http://www.sfgate.com/cgi-bin/article.cgi?f=/news/archive/2003/05/13/international0144EDT0417.DTL

100 Wikipedia, http://en.wikipedia.org

101 Wikipedia, "Distributed Proofreaders", http://en.wikipedia.org/wiki/Distributed_Proofreaders

102 http://www.gutenberg.net/

103 According to the Pew Research Center, 21% of Internet users have posted photographs to Web sites, 17% have posted written material on Web sites, and 2% maintain weblogs. If one estimates the total number of North American Internet users in 2004 at 200 million, this means approximately 40 million North Americans have posted writing and images on the Internet, and approximately 4 million are maintaining weblogs, see Pew Internet Project, CONTENT CREATION ONLINE, available at http://www.pewinternet.org/reports/pdfs/PIP_Content_Creation_Report.pdf

104 Dan Hunter and F. Gregory Lastowka, *Amateur-to-Amateur* ___ WM & MARY L. REV. ___ (forthcoming 2005).

105 Dan Hunter and F. Gregory Lastowka, *Amateur-to-Amateur* ___ WM & MARY L. REV. ___ (forthcoming 2005).

longer dependent on the highly-capitalized publisher, record label, or movie studio for selection and promotion of content. As a consequence we can predict a flowering of "open source" content directly from the creators to the users of the content. The highly-capitalized intermediaries are no longer necessary for the creation, production, dissemination, and use of culturally-significant content.

This represents a paradigm shift in the nature of content, and the rôle copyright plays in the production of content. Though Microsoft recognizes Linux as a threat to Windows,[106] it is easy to miss the truly revolutionary nature of this type of cultural production. But as Eben Moglen has noted, it is revolutionary because it demonstrates that if you give people the opportunity to create then they will do so, even without economic incentives.[107] The standard justification of intellectual property, the reason that it's supposed to exist at all, is that without intellectual property interests no-one would have any reason to produce cultural, creative content.[108] Any creator would undertake a rational calculus, recognize they will get nothing without property rights in their intellectual activities, and go off to become a tax attorney. But the open source movement shows that this fundamental justification simply doesn't hold: many people will produce creative content even outside what we can think of as the capitalist underpinnings of intellectual property. It's a small step to go from this to a Marxian revolution: the open source movement promises to put the means of creative production back in the hands of the people, not in the hands of those with capital. No longer will the creative worker be alienated from her work product by the control that capital exerts.

Moglen sees this clearly: he recently wrote up an open source encomium called the *dotCommunist Manifesto*, where he recast the fundamentals of the communist creed into this new, peer-to-peer era.[109] But in fact Marx needs little translation, since many of his thoughts about problems with capitalism speak to us directly today. As regards the open source movement, consider Marx's *Critique of Political Economy*:

---

106 The so-called "Halloween Memo" within Microsoft is an internal strategy memorandum on Microsoft's possible responses to the Linux/Open Source phenomenon, and discloses the degree of concern Microsoft has with the open source movement. See http://www.opensource.org/halloween/halloween1.php

107 Eben Moglen, *Anarchism Triumphant: Free Software and the Death of Copyright*, in Niva Elkin-Koren and Neil Weinstock Netanel (eds), THE COMMODIFICATION OF INFORMATION (2002), 107, 112 (arguing that it's an emergent property of connected people that they will create content without economic incentives).

108 The incentive story is the fundamental justification of the copyright system. See e.g. *Mazer v Stein*, 347 US 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare.")

109 Available at http://emoglen.law.columbia.edu/publications/dcm.html

> "At a certain stage of their development, the material forces of production in society come in conflict with the existing relations of production…From forms of development of the forces of production these relations turn into their fetters…"[110]

The development of the general purpose computer, the internet, and software-based means of communicating individual preferences means that the content industries of copyright in particular are facing a genuine Marxian revolution. Their assumptions about the role of intellectual property have turned into their fetters.

It is not an accident that the open source movement and Marxist-Lessigist IP reform have occurred at the same time; nor is it a coincidence that Lessig is one of the most prominent advocates of open source mechanisms through the Center for the Creative Commons.[111] Open source software demonstrated—for the first time on a large scale—that the incentive justification for intellectual property just wasn't true once you put the means of creative endeavor and the means of dissemination in the hands of individuals. So, when the corporate-controlled intellectual expansions came about, programmers weaned on open source code no longer bought the arguments of the corporations that these new interests were necessary for innovation and progress to continue.

This lesson has been extraordinarily profound. In fact it signaled, I think, a change in the thinking about how various resources should be allocated.[112] Within the capitalist system, property has almost always been seen to be the best way to allocate resources. Long before the efficiency justifications of economists like Coase[113] and Demsetz,[114] private property has been the default position for resource allocation. But at the same time as the open source movement provided a Marxian challenge for copyright, a number of cyberlaw domains were succumbing to arguments that private property wasn't necessarily the best way of structuring entitlements, or dealing with the regulatory challenges that follow from these entitlements. The two most obvious examples are in spectrum allocation and in regulating internet communications, both

---

110 KARL MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY 12-13 (N.I. Stone trans., Charles H. Kerr & Co. 1904) (1859).

111 http://www.creativecommons.org. See e.g. Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. ___, 14-17 (2004) (detailing the mechanism by which the Creative Commons licenses operate and the overall significance of the Creative Commons project).

112 I don't mean to suggest that the open source movement necessarily lead to, or even pre-dated, the movement to commons in telecommunication spectrum allocation or the end-to-end principle. They all developed at roughly the same time and it would be a futile exercise to try to parse out the various influences of each on the other.

113 R.H. Coase, *The Nature of the Firm* , 4 ECONOMICA 386 (1937).

114 Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347 (1967)

of which demonstrate a Marxian logic of their own.

Spectrum allocation is fundamental to communications policy because all wireless communication travels through the electromagnetic spectrum, and until recently it was assumed that use of a band of spectrum by one user precluded use by any other. Thus, it was thought that, for example commercial radio, free-to-air television, and cell phones each needed their separate bands of spectrum to operate, otherwise they would create interference for each other and destroy the signals.[115] The initial response to spectrum management was to have a system of governmental licenses to various users, to avoid the interference problem.[116] Users were entitled to use those parts of the spectrum allocated to them; but they did not own them, merely licensed them from the federal government. While this system operated tolerably well for years, it came to be seen as outdated and inefficient. The orthodox solution should come as a surprise to no-one: deal with spectrum exactly as you deal with land.[117] Privatize it. Sell off spectrum to private owners, who hold then their spectrum allocation in perpetuity, and may alienate it as they see fit, using the genius of the invisible hand to guarantee the most efficient allocation of the resource.

The orthodox solution was quickly challenged by a series of scholars,[118] including some like Larry Lessig and Yochai Benkler who are intimately involved in the open

---

115 See Kevin Werbach, *Supercommons: Towards a Unified Theory of Wireless Communications*, 82 TEX. L. REV. 863, 867-8 (2004).

116 *Id* at 868-71.

117 See e.g Arthur S. De Vany, *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study*, 21 STAN. L. REV. 1499, 1512 (1969) (first advocating the management of the spectrum by private property entitlements); HARVEY J. LEVIN, THE INVISIBLE RESOURCE USE AND REGULATION OF THE RADIO SPECTRUM 26–39 (1971) (examining the economic characteristics of spectrum); Jora R. Minasian, *Property Rights in Radiation: An Alternative Approach to Radio Frequency Allocation*, 18 J.L. & ECON. 221, 232 (1975) (detailing the necessary property rights in spectrum); Thomas W. Hazlett, *The Wireless Craze, the Unlimited Bandwidth Myth, the Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's "Big Joke": An Essay on Airwave Allocation Policy*, 14 HARV. J.L. & TECH. 335, 405 (2001) (attacking spectrum commons theories and advocating private property interests); Lawrence J. White, *"Propertyzing" the Electromagnetic Spectrum: Why It's Important, and How to Begin*, MEDIA L. & POL'Y, Fall 2000, at 19, 20 (advocating that the current system of licenses to use the spectrum be converted into a property rights system of ownership); Pablo T. Spiller & Carlo Cardilli, *Towards a Property Rights Approach to Communications Spectrum*, 16 YALE J. ON REG. 53, 82 (1999) (asserting that the government should designate spectrum as property); Thomas Hazlett, *Spectrum Flash Dance: Eli Noam's Proposal for "Open Access" to Radio Waves*, 41 J.L. & ECON. 805 (1998) (criticizing Eli Noam's approach to spectrum commons); Gerald R. Faulhaber & David Farber, *Spectrum Management: Property Rights, Markets, and the Commons*, in RETHINKING RIGHTS AND REGULATIONS: INSTITUTIONAL RESPONSES TO NEW COMMUNICATION TECHNOLOGIES 193, 194 (2003) (arguing that "a legal regime rooted in property rights…can simultaneously support both private markets and a commons").

118 See Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 HARV. J. L. & TECH. 287 (1998); Eli Noam, *Spectrum Auctions Yesterday's Heresy, Today's Orthodoxy, Tomorrow's Anachronism: Taking the Next Step to Open Spectrum Access*, 41 J.L. & ECON. 765 (1998); LESSIG, FUTURE OF IDEAS, supra note ___; NOBUO IKEDA & LIXIN YE, SPECTRUM BUYOUTS: A MECHANISM TO OPEN SPECTRUM (RIETI Discussion

source movement. They suggested that spectrum needn't be treated like physical property. The introduction of technologies like "spread spectrum" transceivers and smart radio means that individuals can use multiple parts of the spectrum without interfering with others' use of the same parts of the spectrum.[119] This means that there is no spectrum shortage that we would normally assume needed to be allocated through private property entitlements. Indeed, say these scholars, we have the opportunity to build a spectrum commons, freely available to all and unencumbered by the transactions costs, hold-outs, and challenges to democracy that ownership of the means of communication necessarily entails.

Like the Marxist-Lessigists of intellectual property reform, these theorists are quick to distance themselves from charges that they are communists.[120] They suggest, for example, that property rights do exist here, it's just that these property rights inhere in the wireless devices that transmit and receive. But these suggestions are, with all due respect, largely illusory, and seem to be advanced so as not to spook the horses of capitalism. A commons of any sort is inherently Marxian, even if other types of private property rights still operate within the commons. If I graze my sheep on a public commons, my private property rights in the sheep are not implicated in the public property rights in the commons. So while the spectrum commons scholars are not advocating a Marxian position in respect of all property, they certainly are adopting a Marxian position in respect of spectrum.

Moreover, it clear that those who criticize their positions do so in large part because of the commodity fetishism that property creates. The arguments against spectrum commons are largely based on the idea that tragedies of the spectrum commons will inevitably occur, and the only way to avoid this is to use the orthodox approach of private ownership. But the specter of the tragedy of the spectrum commons is amply refuted by the spectrum commons theorists.[121] And one of the reasons that the private spectrum scholars seem unwilling to accept this is because the prospect of property in spectrum induces commodity fetishism, and an incorrect privileging of the exchange-value that spectrum owners would possess over the use-value of having free access to the spectrum for all. Thus, the debate over spectrum allocation can, in some part at least, be framed in Marxian terms.

Paper Series 02-E-002, 2003) available at http://www.rieti.go.jp/jp/publications/dp/02e002.pdf; Kevin Werbach, Open Spectrum: The Paradise of the Commons, RELEASE 1.0, Nov. 2001, at 1; Werbach, *Supercommons: supra* note ___.

119 Werbach, *Supercommons: supra* note ___ at 865.

120 *Id* at 951-969.

121 Yochai Benkler, *Some Economics of Wireless Communications*, 16 HARV. J.L. & TECH. 25 (2002)

Finally, aside from the issues discussed above—intellectual property reform, open source opportunities, and spectrum commons—the regulation of internet communications also appears as a debate between Marx and markets. Though each of the servers, cables, wires, and other individual components of the internet are privately owned, the internet as a whole demonstrates strong commons characteristics.[122] Thus, challenges to the operation of the entire network by individual owners of the components affect the communal activity of all net users. Thus, the creation of a "cybertrespass" tort or the civil use of criminal hacking legislation—which has the potential to rope off parts of the public network and turn them private—spurs an argument about the implications of this to the commons.[123] The core of this debate is whether we need to have a conception of online public spaces, and what this might mean for our society as a whole. While this is by no means a "movement," since there are relatively few scholars involved in the argument,[124] it ties in with a broader challenge to the architecture of the internet, identified by Mark Lemley and Larry Lessig (again).[125] The net is based around a principle called "end-to-end," that is, the principle that all network traffic is handled the same, and no-one regulates the nature of the applications which can be connected to the network. End-to-end means that new programs and protocols can be invented for the network without having to go through centralized validation processes. Moreover the packets transmitted by these applications won't be discriminated against as having less value than, say, deep-pocketed television transmissions. Various interests have sought to overturn the end-to-end principle, for various reasons. But as Lessig and Lemley demonstrate, the commons that is created when one has the neutral network mechanism of end-to-end leads to extraordinary innovations like email, the worldwide web, and more.[126]

---

122 LESSIG, FUTURE OF IDEAS, supra note ___ at 26-73.

123 See Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439 (2003)

124 Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 48-49 (2000) (describing the Internet as a "commons" and criticizing trespass within this context); see also Niva Elkin-Koren, *Let the Crawlers Crawl: On Virtual Gatekeepers and the Right to Exclude Indexing*, 49 J. COPYRIGHT SOC'Y U.S.A. 165, 171 (2001) (noting problems with exclusions of webcrawlers) Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439 (2003); Mark A. Lemley, *Place and Cyberspace*, 91 CAL. L. REV. 521 (2003). Cf David McGowan, *Website Access: The Case for Consent*, 35 LOY. U. CHI. L.J. 341 (2003) (arguing against commons approaches).

125 Mark A. Lemley & Lawrence Lessig, *The End of the End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925; LESSIG, FUTURE OF IDEAS, supra note ___ at __.

126 *Id.*

The arguments in cybertrespass and the end-to-end principle are much like the arguments presented by those working in the movements identified above: that it is the absence of proprietary rights that produces the flourishing of creativity we have seen on the net. And that, if we adopt a Marxian position, one day we might see the same sort of flourishing of creativity more broadly in intellectual property, or in wireless communication, or in society in general.

-IV-

Not every feature of intellectual property or cyberlaw becomes clear when viewed through the Marxian lens. One might think, for example, that trademark and associated rights would be the subject of Marxist critique, since it is so central to the protection and perpetuation of corporate imagery. However little sustained attack has been made on trademark, or upon rights of publicity. A few commentators take aim at them from time, but one can't say that there is any kind of movement in this area.[127]

So it's not intellectual property as such that generates the Marxist backlash, but rather the particular convergence of corporate interests against public interests. This is most obvious in the battles fought over copyright and patent, in what I've characterized above as the Marxist-Lessigist challenge to intellectual property expansion. And as indicated, this is not really a Marxist argument, though it is one that motivates student activists and energizes a large number of intellectual property reformers. But away from the zeal of the student activists a real Marxian revolution is taking place, in areas like open source content creation, spectrum allocation, and internet regulation. Oddly, the revolutionaries generally don't recognize themselves as such: they're just open source programmers, "citizen journalists," bloggers, scholars. But these revolutionaries promise to upend the intellectual property system because they are creating things for the sake of curiosity, or for the approbation of their peers, or because it's fun. The open source challenge to intellectual property began with software, but is moving outwards into all types of cultural material: newspapers, magazines, commentary, music, even movies. Yochai Benkler calls this the peer

---

127 See e.g. Rosemary Coombe & Andrew Herman, *Trademarks, Property, and Propriety: The Moral Economy of Consumer Politics and Corporate Accountability on the World Wide Web*, 50 DEPAUL L. REV. 597 (2000); Anaupam Chander, *The New, New Property*, 81 TEX. L.REV 715 (2002).

production of culture.[128] This, along with commons ownership of spectrum and internet access, promises—or threatens, depending on where you sit—a Marxist revolution in creativity. Unlike Marxist revolutions before it, this won't be fought on the barricades. No students will throw pavestones at the police. This revolution will just happen, as people take up the means of production for themselves.

What is unusual is how intellectual property owners and copyright-apologists like Stephen Manes or the Ayn Rand Institute, in their rush to vilify Marxist-Lessigism, miss the importance of open source as the true creative workers' revolution that threatens the core of their industries. While copyright and patent reform might be the most visible aspect of the Marxist-Lessigist revolution, it is the least significant. Of course, corporate interests in the software industry recognize the challenge of open source to their business, and have taken one of two approaches. IBM has thrown in its lot with open source, contributing (by their reckoning) over a billion dollars to the development of Linux. They estimate their return in the multiple billions of dollars. Microsoft, on the other hand, is supporting SCO, a company running litigation against IBM, seeking to shut down Linux.[129] It is unclear which strategy has the greater likelihood of success.

We should all care about the outcome of the battle between SCO and IBM, just as we should care about the outcome of all of the battles described above. The culture war may be Marxist in some senses, but only because it is ultimately about the degree of autonomy we accord to individuals to create.[130] Though Lessig calls his latest book *Free Culture*, the culture he seeks to defend is made up of individual creators. It is not a monolithic state at the heart of the culture wars, but rather the individual creators who built the web, made Linux, seek to re-use copyright content, and so on.

Marxism isn't about society against the individual, but seeks to put the individual first, allowing him or her access to the aspects of life that make them complete. The Marxist critique of capitalism is that capital alienates the person from those things that matter. So the Marxist interpretation of the culture war is this: to what extent are we happy with corporate intellectual property owners gaining control over the mechanisms of creative activities. To what extent do we want individuals to take

---

128 Yochai Benkler, *Coase's Penguin, or Linux and the Nature of the Firm*, 102 YALE L.J. 369, 375 (2002).

129 Jim Kerstetter, *SCO's Suit: A Match Made in Redmond?* BUSINESSWEEK ONLINE, March 11, 2004, available at http://www.businessweek.com/technology/content/mar2004/tc20040311_8915_tc119.htm

130 See Benkler, *Through the Looking Glass*, *supra* note ___ at 187-95.

control of their creative lives?

In the end this is why the culture war is a Marxist war. And this is why it matters that we understand the stakes in the struggle between IBM and SCO, the struggle over the wireless and internet commons, the struggle between Mickey Mouse and the Marxist-Lessigists. The culture war isn't a battle between state-sponsored communism and individuals. It's about what level of autonomy do we allow individuals to express themselves. With so much at stake, we shouldn't be surprised if each side sees this as a war to the death.