

# ART AND MUSEUM LAW JOURNAL

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Volume 2

2007

Number 1

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## METAPHOR AND POLEMIC IN THE WARS OVER THE PUBLIC DOMAIN

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### I. INTRODUCTION

When we try to move the minds and hearts of our listeners and readers, despite our best attempts to choose apt figures of speech and metaphors, our selections inevitably expose our hidden presumptions and biases. We choose persuasive metaphors instinctively, and even sometimes unconsciously, but through habit and necessity we craft them to serve as weapons to fight ideological conflicts. In such circumstances, metaphor is rarely used dispassionately. By seizing ready-made figures and images from the rich traditions of our common heritage, we arm metaphor with the hyperbolic language of self-righteousness, criticism, blame, and attack. Our metaphors recast conflicts so that what might have begun as a dispute over principles or as a nominal expression of self-interest becomes a struggle for

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dominance, where the winner may be the one who wields the most efficacious and potent imagery.<sup>1</sup>

The current intellectual property war is being waged between those who want to maximize ownership rights and those who, for public benefit, wish to moderate the presumption of those rights. Although the conflict is patently economic in origin, it is being fought on battlefields where the symbolic language of metaphor gains purchase from our varied moral, ethical, religious, and mythic values. The rhetoric of the pro-copyright forces, however, has already been absorbed into the accepted vocabulary, which has set the ideological terms of the dispute in their favor. The result — answering neither to logic nor fairness — may be as good as ordained. Or is it? As will be shown further on in this article, metaphors that have been the building blocks of the pro-copyright edifice and have entered our copyright vocabulary with the full force of idiom are now in the process of being deconstructed — to what end, at this point, one cannot predict.

This article looks at the language used to establish the primacy of the status of ownership in the realm of intellectual property, in particular, at how the so-called “public domain” — that body of works (simply put) generally immune to claims of private ownership — has been shrewdly characterized as epitomizing a type of failure, which has come to be called (metaphorically) the “Tragedy of the Commons.” It also explores how the supporters of the public domain can wield their own metaphors more effectively to reclaim the commons for its true owners, the public.

## II. THE BATTLE LINES

Proponents of the public domain understand that every creator stands upon the shoulders of those who preceded him — that just about every work awarded copyright heavily depends upon the creations and

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1. Edward Rothstein, *The Mysterious Meme, a Seductive Metaphor* (Review of ROBERT AUNGER, *THE ELECTRIC MEME: A NEW THEORY OF HOW WE THINK*), N.Y. TIMES, AUGUST 3, 2002, available at <http://select.nytimes.com/search/restricted/article?res=F60B17F93F5F0C708CDDA10894DA404482> (last visited April 24, 2007). E.H. GOMBRICH, *MEDITATIONS ON A HOBBY HORSE AND OTHER ESSAYS ON THE THEORY OF ART*, 1 (1963).

ideas of others, many of which have been taken from the public domain. No work is born in a vacuum.<sup>2</sup>

Pro-copyright activists habitually fail to recognize the legitimate interests of their neighbors in the copyright cosmos; in the extreme, their worldview excludes all but themselves and their schemes to maximize the benefit of their copyrights. Copyright colonists cannot resist the urge, when they can, to escape from the bondage that permits them to exploit their popular money-making products for only a limited time, and to do that they must proactively lengthen copyright bit-by-bit until, indeed, it does last “forever less one day.”<sup>3</sup> Hence, they engineer extensions of copyright into the past and future public domain that sweep broadly and entangle both commercially viable and non-commercial creations in the same net.<sup>4</sup> Because of this entanglement, the unearthed treasures of the public domain that do not appear financially exploitable would become unavailable to scholars and others who would value and should have access to them.

When it comes to rights management, what is good for the masters of Mickey Mouse and for the copyright industries will inhibit scholarship, art, and free thought, and stymie learning for the everyday person. The pro-copyright forces disregard the imperative (paraphrased from the movie *The Postman – Il Postino*) that “Culture belongs to those who need it.” Any extension of the period of copyright assaults the boundaries of the public domain. In this regard Jessica Litman has warned us that as the duration of copyright increases and as each new work requires ever increasing numbers of clearances and royalty payments, the benefits of a strong public domain will become increasingly apparent. She says, “. . . a vigorous public domain is a crucial buttress to the copyright system; without the public domain, it might be impossible to tolerate copyright at all.”<sup>5</sup>

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2. For a legal analysis of the same phenomenon, see Jessica Litman, *The Public Domain*, 39 EMORY L. J. 965 (1990), and David Lange & Jennifer Lange Anderson, *Copyright, Fair Use and Transformative Critical Appropriation*, <http://www.law.duke.edu/pd/papers/langeand.pdf> at 143 (papers for *The Conference on the Public Domain*, Duke Law School, November 9-11, 2001), (last visited April 24, 2007).

3. See note 24 *infra* and accompanying text.

4. See note 35 *infra* and accompanying text.

5. Litman, *supra* note 2, at 977.

The key issue to confront is our willingness to abandon our unrestricted ability and our right to examine ourselves and our society in exchange for maximizing opportunities for economic gain and in favor of concentrating the power to control that economic gain into the hands of fewer and fewer copyright owners. Are we willing to forget that our tradition of self-examination through scholarship and other means is a strategy aimed at enabling and ensuring our social, political, and economic successes? This question goes to the heart of traditional American purposes: what is more important, success or self-knowledge, and is not the latter ultimately the key to the former? The decisions being made for us today are setting the stage to make these goals incompatible.

Most of us who ally ourselves to the humanities and its associated professions probably consider ourselves individual non-exclusive owners of the public domain — all of it, any of it. It is not that the public domain belongs to nobody — the legal implication of the term “being out of copyright.” On the contrary, the public domain is crucial to our lives because it is perceived as belonging to each of us, individually, and to all of us, collectively. The paradox resolves itself when we realize that what lies in the public domain is our common cultural property. “These things are the universal heritage, the public commons, from which all may freely draw sustenance and which all may use as seems most satisfactory to them.”<sup>6</sup>

Indeed, our sense of cultural intellectual property extends well beyond the boundaries of the public domain, as usually conceived. However, to honor the Constitutional “copyright bargain,” for a limited time we agree to honor the right of copyright bestowed on authors of works of both wide and narrow cultural significance.<sup>7</sup> Copyright, thus, in the Constitutional system, is an intellectual contract in which competing self-interests are balanced for the benefit of the whole — a contract every much as vital in its sphere as was the hypothetical social

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6. David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS 147 (Autumn 1981), available at [http://www.law.duke.edu/pd/papers/Lange\\_background.pdf](http://www.law.duke.edu/pd/papers/Lange_background.pdf) at 6 (last visited April 24, 2007).

7. U.S. CONST., article I, §8: “The Congress shall have Power ... [t]o 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.”

contract expounded by Rousseau in 1762, just prior to our own political emergence.<sup>8</sup> If it is expected that users must respect copyright as a limited monopoly, it must also be demanded that owners honor the passage of their works into the public domain. In the United States, copyright would seem indebted to the logic of Rousseauian balance.

In its 1966 decision in *Graham v. John Deere Co. of Kansas City*, the United States Supreme Court described the public domain as a legal constitutional construct. James Boyle describes the case as follows.

In a 1966 patent case, repeatedly citing the work of Jefferson, the Court made it clear that the public domain has a constitutional dimension:

The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.

This is a remarkable statement. It goes beyond a mere recitation of the Framers' attitude toward the dangers posed by monopoly, and makes an affirmative defense of the public domain. Notice how the limitations are stated as additive and not as mutually equivalent, or even as mere corollaries; the court does not say that 'the enlargement of the patent monopoly must promote innovation and this limits Congress's power to remove material from the public domain.' Instead it postulates an existent public domain and makes it unconstitutional under the patent clause for Congress to privatize any portion of that domain. There are echoes here of the "public trust doctrine," which restricts the state's ability to privatize public resources or waterways and turn

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8. JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT* (G. D. H. Cole trans.) (1762), available at <http://www.constitution.org/jjr/socon.htm> (last visited April 24, 2007).

them over to private parties. Notice also that the court gives the public domain both direct and indirect protection: protection from measures which formally create patent rights over portions of the public domain, but also from those which merely ‘restrict free access to materials already available.’<sup>9</sup>

Were decisions such as *Graham* adequate on their own to preserve the public domain, writing articles such as this one would not be necessary. But, as many industry propagandists and lobbyists know, wars for the mind can be won or lost by the coercion that metaphor can impose over fact, opinion, and truth. Metaphors recast potentially unacceptable formulations and make them tolerable; they translate the unfamiliar and uncertain into instruments that appear safe, known, and attractive. If metaphor stands at the root of poetry and art, it also lies close to the heart of deceit. If the imagination and the human spirit must be persuaded as well as justices and legislators, then the mere acknowledgement of the existence of a public domain, and the establishment of legal boundaries and protections for it (even by the Supreme Court) may not be adequate to fashion the vision, public empathy, judicial incentive, and momentum needed to win the minds of those in whom we have vested our trust to decide these matters.

### III. METAPHORS OF THE PRO-COPYRIGHT FORCES

#### A. *The “Property” Metaphor*

This article considers the language and metaphorical foundations used in a war often said to be about “property,” but not real estate or tangible objects, but, rather, about a kind of property called “intellectual property,” which, in its own way, is just as vital to the welfare and structure of modern society as other forms of property. The meanings of the term, “property,” or rather, its implied meanings, are crucial to the debate. The phrase “intellectual property,” as we commonly use it, masks (probably purposefully) the distinction between what is called

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9. James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP PROBS. 33, 58-59 (2003), citing *Graham v. John Deere Co.*, 383 U.S. 1, 5-6 (1966).

tangible or “corporeal property” (things) — to which one body of law traditionally applies — and “intangible property,” as applied to works of the creative mind — a distinction that is relatively new in the legal universe.<sup>10</sup>

To understand the significance of choosing “property” to identify what the creator possesses, the choice must be placed in the historical context of extensive debate over the legal status of inventions of the mind. In 18<sup>th</sup> and 19<sup>th</sup> Century England, France, and America, some argued that the products of the mind belonged to the public, while others thought of them as the property of creators. To name the creator’s rights “property” is to choose sides and ally oneself with those who contended that such intangible creations deserve to be treated the same as material — corporeal — holdings, with many of the same attributes and the same rights of ownership in perpetuity. The use of the word “property” in this sense serves as a metaphor intended to underline the identity that some theorists had forged between corporeal things and intangible matter.

In France, the distinction between “property” as applied to things, and “rights” or “privileges” when applied to literary matters, was definitively established during the late 19<sup>th</sup> century. In an 1887 decision (the so-called *Ricardi* case) the French Supreme Court ceased using the word “property” to refer to intellectual creations and holdings:

The author's rights and the monopoly they confer, usually called by the name of literary property, do not constitute, strictly speaking, a property; they only confer to the person in whom they vest the exclusive privilege of a temporary commercial exploitation.<sup>11</sup>

Enlightenment philosophers placed considerable value on the spread of knowledge, and this notion permeated the thinking that created the balanced treatment of copyright in the United States Constitution — which grants creators temporary rights to enable them to benefit from

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10. LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD*, 21 (2001).

11. Pascal Kamina, *Author's Right as Property: Old and New Theories*, 48 J. COPYRIGHT SOC'Y USA 383, 403 (2001).

their creations.<sup>12</sup> This thinking is epitomized by Thomas Jefferson's frequently-quoted manifesto on the importance of the public domain.

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it . . . . That ideas should freely spread from one to another over the globe . . . seems to have been . . . designed by nature, when she made them, . . . and like the air in which we breathe, move, and have our physical being, incapable of confinement, or exclusive appropriation.<sup>13</sup>

Thus, in the modern world when we speak of “intellectual property,” the term “property” operates as a thought-weapon intended to skew the outcome of debate and to undermine efforts to define rights attached to works of creation as merely the granting of ephemeral privileges by government for the purpose of promoting continual creation of such works.<sup>14</sup>

### *B. The Tragedy of the Commons and Other Dire Metaphors*

Garrett Hardin, a biologist, coined the phrase “Tragedy of the Commons” to describe a hypothetical commons of limited extent and productivity, where users acting with self-interest, would tend to overuse and drive the resource to ruin. Privatization, believed Hardin, would control such unbridled destructive competition. Proponents of

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12. See text accompanying notes 7–8 *supra*.

13. From an 1813 letter, available at [http://press-pubs.uchicago.edu/founders/documents/a1\\_8\\_8s12.html](http://press-pubs.uchicago.edu/founders/documents/a1_8_8s12.html) (last visited April 24, 2007). The Jeffersonian view, of course, was balanced by the temporary monopoly given to authors in the Constitution. On this history of the granting of a temporary monopoly see Tyler T. Ochoa and Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 49 J. COPYRIGHT SOC'Y USA 675, 685-695 (2002).

14. Ochoa and Rose, *id.* at 682-684.

strong copyright have adopted this notion, so-called a “tragedy,” to stigmatize the public domain, which is a kind of commons because its resources are available to all. Lawrence Lessig points out the inadequacy of Hardin’s hypothetical when used to describe the commons of creative works. Hardin’s commons contained rivalrous goods. One person’s consumption of rivalrous goods leaves less for others to consume. But the public domain contains intellectual “nonrivalrous” holdings, holdings that are no longer or never have been in private hands, and whose consumption never depletes the resource. As Lessig notes, “[t]here is . . . no tragedy for nonrivalrous goods left in the commons — no matter how many times you read a poem, there’s as much left over as there was when you started.”<sup>15</sup>

Despite Lessig’s insight into the fault that underlies Hardin’s thesis, the expressive code nearly everyone in the United States uses to identify what happens on the route that copyrighted works travel to “the public domain” betrays the extent of our cultural indoctrination and of Hardin’s influence. The language we use intuitively, conventionally, and above all, conveniently, conveys not just a change of legal status, but reveals a worldview fabricated from culturally laden terminologies. Foremost among these are those of tragedy and similar encumbrances.

While “to fall into the public domain” is a common enough expression, sensitivity to its implied meaning is now causing some proponents of the public domain to be wary of its use. One would think that the use of the word “fall” would not be so significant; after all, we say, “fall into the public domain” so instinctively that even proponents of the public domain must be on perpetual guard to avoid the phrase. However, if we examine this word, we soon realize that “fall,” when used this way, encapsulates a host of mythic and morally charged ideas and traditions that, by implication, serve to disparage the public domain, to undermine its perceived value, and thereby to certify the comparatively favorable disposition our civilization extends toward works that remain under copyright.<sup>16</sup>

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15. LESSIG, *supra* note 10, at 22, citing Garrett Hardin, *The Tragedy of the Commons*, SCIENCE 162, 1243, (1968), available at <http://dieoff.org/page95.htm> (last visited April 24, 2007).

16. On the use and history of the expression “fall into the public domain” see Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215, 228-232 (2002).

In Western culture the word “fall” comes loaded with meanings. Lest we think that the term “fall into the public domain” was favored without regard for its political effect, think for a moment of all the other words that just as easily could have been employed to convey this transition: to “mature,” “pass,” “enter,” “move,” “advance,” or “progress” into the public domain, and so on. Using the word “fall,” singularly, unlike any of the above, binds our view of the public domain to a series of primal mythic disappointments and tragedies, and therefore informs us that, as far as copyright and the public domain are concerned, a moral tragedy — a moral strategy — is at play. Thus the “fall” into the public domain implies a fall from the state of copyright grace. In English, at least, it conjures up images of the expulsion from Eden's paradise and of the consequences of sin — Eve's sin, the sin of weakness or temptation — the “ultimate” American sin, which leads to having to abandon property. For a work to “fall” is no less than an eviction from copyright paradise.<sup>17</sup>

In copyright literature the public domain is frequently defined in distinctively negative and darkly ominous terms. “No-man's-land” says one commentator, seemingly dismayed that some public domain work doesn't fit squarely into the world of copyright and that nobody can truly own it;<sup>18</sup> a “dark star” says another who sees value, but no force within capable of making a great work shine.<sup>19</sup> Whatever “tragedy” may have meant to Garrett Hardin in 1968, today it has accumulated additional metaphorical significances.

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17. Carol M. Rose reports that “Carolyn Merchant, a feminist environmental historian, has recently revisited John Locke's famous disquisition on property, and has concluded that in Locke's view, property would reintroduce humankind to a new version of Eden.” Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 130 (1998).

18. Roger Ebert, *It's a Wonderful Life*, CHICAGO SUN TIMES, January 1, 1999, available at <http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/19990101/REVIEWS08/401010376/1023/1/1/1999> (last visited April 24, 2007). See also Sam Williams, *Opposing Copyright Extension, Commentary on the Public Domain, Should Auld Copyrights Be Forgotten*, UPSIDE TODAY, OPEN SEASON, December 22, 1999, available at <http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/publicdomain/Williams12-22-99.html> (last visited April 24, 2007).

19. The public domain “amounts to a dark star in the constellation of intellectual property,” according to Lange, *supra* note 6 at 5 (pdf. version).

Thus, in our customary perception — as fashioned by metaphor — the resources of the public domain, must be of a lesser rank than those resources that individuals can control for their own exclusive benefit. In our national mythology, in our ethos, the public domain at its best represents a state of limbo for abandoned and unused works; it is where creative individuals can descend as saviors, so to speak, pulling out this and that to refashion something once valuable, but now lost, into something new, useful, and productive.

It is in this sense that Jack Valenti, speaking on behalf of the Motion Picture Association, said, “a public domain work is an orphan,” by which he meant something like a woefully lost soul.<sup>20</sup> At this point Valenti was indulging in a species of metaphor dubbed “the pathetic fallacy” — the attribution of human qualities to inanimate objects — which, according to John Ruskin, who coined the term, is a lamentable device used to obscure truth.<sup>21</sup> Works that can be rescued are orphans. Those that cannot, following in this mode of thought, have fallen into a “black hole,”<sup>22</sup> lost to those who could sustain them and give them (commercial) life, and left instead to exploiters who have no regard for the integrity of the original — as almost happened to the film *It's a Wonderful Life*. Those who scour the public domain in search of commercially promising “properties,” in this way of thinking, are vagabonds and scavengers.

Proponents of the pro-copyright agenda want us all to believe that, like “orphans,” the public domain belongs to no one — that its contents,

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20. JESSICA LITMAN, DIGITAL COPYRIGHT, 77 (2001), citing *Copyright Term Extension Act: Hearing on H.R. 989 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong. (1st sess. 1995) (testimony of Jack Valenti, Motion Picture Association of America).

21. KARL BECKSON AND ARTHUR GANZ, A READER'S GUIDE TO LITERARY TERMS, 160 (1960).

22. “The public domain is not a big black hole into which works 'fall,' never to be seen or heard again. Rather, it is the repository for all the expression that our copyright law was created to support, the expression that we are all free to use in any way we wish.” Georgia Harper, *Copyright Endurance and Change*, J. ELEC. PUB. (2000), <http://www.press.umich.edu/jep/07-01/harper.html>. In private correspondence with the author (April 22, 2002), Georgia Harper remembers that the context of her highlighting the phrases “black hole” and “to fall into the public domain” was coincident with a speech she heard delivered by then President Clinton, in which, repeating a theme often raised by Jack Valenti, he depicted the public domain as a kind of tragedy.

in this condition, are as good as lost at sea, afloat, just waiting to be liberated. In this way the public domain is made to fit into the American ethic of moral rescue — to rescue the world from unprofitable pointlessness — to rescue the world from something fundamentally un-American. To rescue such works is to win a battle against the crime of moral entropy to which unprotected, unclaimed works are condemned by default.

Those who “rescue” works from the public domain point out that their efforts in restoring and rejuvenating works justify the protection, financial compensation, and incentive of copyright. But this argument ignores those licensing protections already available for so-called rescued works repackaged in new contexts, as when public domain books are re-released in annotated versions or when movies reappear with scenes that had been cut in the original release or with expert commentary. Moreover, it ignores that a similar logic exists to justify permitting works to enter the public domain so that there will be incentive to repurpose them into new derivative works that in themselves will be copyrightable. The substance of intellectual property is so elusive and the benefit to be obtained by maintaining control of it so crucial to owners, that protecting it readily lends itself to metaphors of hyperbolic dimension. No wonder that those who believe that intellectual property is rightfully wholly the property of the creator (or the assignee) interpret any threat to their hegemony as the work of meddlers.

The rhetorical devices employed recently have been increasingly extreme, indeed, so extreme that the copyright lobby raised the metaphoric ante by claiming that nearly any effort to bypass their parochial and self-serving construction of the copyright barrier is the work of an enemy. In the post 9/11 atmosphere, librarians exercising first sale rights by allowing people to read books for free, have been compared to terrorists, and Jack Valenti, representing the Motion Picture Association, viewed his battle to gain full control of movie media as an episode in a terrorist war.<sup>23</sup>

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23. “Copyright terrorist” seems first to have been used by free speech advocates to describe the methods by which the Church of Scientology used copyright law to prevent the public airing of criticism and to prevent unauthorized distribution of its literature. See Reid Kanaley, *Scientology at Odds with Internet Critics*, PHILA. INQUIRER, April 1, 1995, at A01, available at 1995 WLNR 2200537. Jack Valenti,

### C. Examining the Myth of the Creative American

With few exceptions, our society has always favored the state of ownership — a colonial inheritance that mandates that possession should overtake that which is not yet held by anyone. We are taught that the legal status of being “under” copyright (like being “under” that protective umbrella used to sell insurance) is good and safe, and the “loss” or abandonment of copyright is unfortunate, precarious, and even to some degree, unethical or at least indicative of a moral fault or weakness within us. When copyright protection has been lost, we sometimes say that a work has been “cast” (like refuse) into the public domain.

To many people, the public domain is a tragedy because they think copyright works best when it primarily serves the interest of the individual. When copyright helps the creator receive just compensation for his goods, it gives him the motive — the financial incentive to be

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president of the Motion Picture Association of America, described the widespread “infringement” and piracies that they must quell as a “terrorist war.” Amy Harmon, *Black Hawk Download; Moving Beyond Music, Pirates Use New Tools to Turn the Net Into an Illicit Video Club*, N.Y. TIMES, Jan. 17, 2002, available at <http://query.nytimes.com/gst/fullpage.html?res=9A04E2D91138F934A25752C0A9649C8B63&sec=&spon=&pagewanted=all> (last visited April 24, 2007). The Association of American Publishers wants to find a way to charge library patrons for reading books, and it hired former Congresswoman Pat Schroder to represent it in these efforts. Linton Weeks, *Pat Schroeder’s New Chapter: The Former Congresswoman is Battling for America’s Publishers*, WASH. POST, Feb. 7, 2001. The rhetoric was escalated another notch or two when Judith Platt, speaking for the AAP, demonized librarians for wanting to allow people to read books for free, comparing them to terrorist organizations opposed to the basic principles of the American System. Lisa Bowman, *Library ‘Radicals’ Targeted in Latest Copyright Battles*, CNET News.com, July 12, 2001, available at <http://news.com.com/2009-1023-269775.html> (last visited April 24, 2007). Empowered by our digital age, rights holders have begun to remove the user from the Constitutional copyright bargain. By trying to substitute a licensing agenda for our traditional acquisition-by-purchase system, they hope to control how works are used and who uses them. Contracts for e-books prohibit users from reading the book aloud — even when the book, itself, is in the public domain. In an e-mail this author received in 1998, a writer, characterizing himself as an “independent scholar” used the term “anti-copyright terrorist” to stigmatize anybody (usually academics) who wanted to erode the rights of the author for the purpose of enlarging the public domain — as he put it.

“creative” — and serves a national purpose by encouraging private enterprise. In this way, copyright leads us by way of private profitability into a post-industrial civilization of information economics. Our inherited image of copyright instinctively responds to the traditional mercantile metaphor. As it stands, the public domain is defined as impervious to seizure by those who want to stake claims of ownership within its boundaries and therefore, from the pro-copyright perspective, defective, unless, of course, works can be prevented from ever “falling” into the public domain.

Creation, accepted as a hallmark of our evolving society where “progress is our most important product,” is founded on the myth of the individual replicating divine handiwork. But, today, “creation” is also a code word for profitability. When we talk of “success,” we cite the accomplishment of individuals. In this way, we tend to think of copyright as quintessential in our quest to enshrine the individual in his effort to form the world in his own image — seemingly, a very American enterprise.

The copyright metaphor we have absorbed ignores any reference to the Constitutional mandate that says copyright is a utilitarian device devised ultimately for the improvement of society, for learning and for knowledge. The anti-Constitutional bias must be intentional. Today's paradigm even seems to look at the Constitutional scheme as suspect — a kind of communal endeavor that our native rugged individualism (a self-enhancing myth of romantic vision) taints as representative of a now discredited communal, social, and economic agenda.

Be that as it may, neither the Constitutional purpose of useful evolution nor the economic intent of modern times serves as copyright's sole achievement; today we must acknowledge that copyright has been transformed to fulfill transcendental and even spiritual ends. Now that copyright protects works beyond the life of the author, it has begun to evolve into a national metaphor for transcending mortality; it postulates a potential for everlasting life, in which one can pass the tangible benefits of one's personal creative spirit down to both known and unknown descendants and heirs.

Representative Mary Bono wanted to alter copyright to make it last in perpetuity, but, informed by her staff that this would be unconstitutional because copyright must be of limited duration, she adopted a suggestion made by Jack Valenti that copyright should be

changed to last “forever less one day.” Her request came while lobbying before Congress for the passage of the Copyright Term Extension Act — her personal quest for a fitting monument to honor her late husband Sonny whose chair in Congress she occupied.<sup>24</sup> In asking for perpetual (read: eternal) copyright, she seems to be saying “If you can't take it with you, perhaps it can take you with it.” Of course, the memorial metaphor itself served as a smokescreen for Disney and other companies that were in line economically to benefit from the legislation. Ironically, the ulterior motive does not necessarily detract from the implicit power of the metaphor — a very useful attribute.

Copyright and other intellectual properties give shape to the metaphorical core of the American success story. One might hazard to say that they are key to America's prevailing state religion.<sup>25</sup> It is the individual creator, says this attractive conceit, who must be the recipient of all the credit for his inventions — as if the creator had learned nothing from his culture or from creators who may have preceded him. This boast may reveal our national hubris, and as in Greek tragedy may turn out to be the means of our undoing.

Today's public-domain dilemma can be attributed in part to the clash of opposing cultural, economic, and intellectual ethoi. For instance, our national cult of personality aggrandizes individuals, turns them into media stars, squeezes them into formulaic biographical molds, and in this way builds popular cultural stereotypes by injecting the personality of the one into a mold shaped for many. Here the hero as everyman is read as everyman a hero. In this projection, the very existence of the public domain exposes the contrivance, the pretension and the mythic self-delusion intrinsic to the notion of the self-made creator hero, and reports, instead, a more symbiotic or reliant model of the creative process than some of the pro-copyright forces seem equipped to acknowledge. Undoubtedly, they are uncomfortable with the chaos of the public domain, its organic, protean and random structure, its interwoven complexity, its impenetrable depth and its consequential resistance to domination and classification. In addition, its uncertainty offends and confuses the class of “copyright maximalists” (to use Paul Goldstein's term). For them, the public domain exists as a wasteland,

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24. 144 Cong. Rec. H9946-01, H9951-H9952 (1998).

25. Lange and Anderson, *supra* note 2, at 143.

there to be conquered and civilized. It is their burden — the eternally unfulfilled obligation of proprietary interests.

In this light, Valenti's use of the orphan metaphor<sup>26</sup> epitomizes his inability to comprehend the inventive potential of film in the public domain — to him it is just a pool of lost opportunities. The “orphan” metaphor personifies the works of man and asks listeners to apply the same ethical or emotional standard reserved for people to a product of human creativity — as if the creator and the creation are one. The real purpose of the metaphor is masked, and it projects a model that doesn't fit. Valenti uses metaphor to shift a complex and potentially unpopular issue into a simple, sympathetic, but deceptive parable.

The magic of this metaphor resides in the way it anthropomorphizes the work of art. Valenti invites us to enter his metaphor with him and to understand copyright as the kind of magic (to choose my own example) that will turn an unfortunate Eliza Doolittle into My Fair Lady — the same alchemy (in the public domain, of course) that George Bernard Shaw in his *Pygmalion* of 1916 used on Ms. Doolittle, and that Ovid, so much earlier, gave to his own recounting of Pygmalion and Galatea.

It is not difficult, therefore, to understand why the big copyright combines, the Disneys and other movie studios, work assiduously to maintain their hold on properties teetering on the precipice of that black hole of the public domain, properties ready to be sucked within and lost (to their exclusive use) forever. Within their value set, such rescues are economic; but to those who are invested in the common metaphor, they are also heroic and in their sphere represent moral victories.

Because we define our society by the positive acts of creation, invention, and ingenuity, because our mythologized heroes of culture and science are those who, godlike, we believe have invented something out of nothingness, we fail to recognize — indeed, we have a stake in not recognizing — the seminal role played by the public domain. There is where the fables, parables, indeed, the whole of world religion and literature, to which must be added the myriad small works of creation that once populated daily life, weave themselves into an unending fabric of art, fiction, and fact that underlies our common experience and our culture's mythic and moral foundations. We have come to call this tapestry “the public domain,” but until “copyright” was invented and

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26. See text accompanying note 20, *supra*.

invested with the attribute of temporary or permanent monopoly, there was no need for a public domain to be identified or named.<sup>27</sup>

#### IV. RESPECT FOR THE COMMONS

##### A. *Stories and Metaphors*

Considering what has been said so far, one should not be surprised that the process of redefining the public domain or reconstructing our appreciation of its significance reaches for the same kind of rhetorical tools and abstract models that have been employed to trivialize and diminish its worth, but with a difference. Those wishing to resurrect the importance of the public domain depend more upon traditional, historical, legal, and mythological systems and precedents. They fashion the public domain as the foundation and wellspring of our culture and its ideals, and place it in a hypothetical universe that does not depend upon exploitive, commercial, or transactional models for validation.

Theories favoring the public domain reach into the spiritual core of human history and knowledge systems — they explore our humanity, while those for copyright employ economic and commercial models. Proponents of the public domain are prone to saying “yes,” proponents of copyright, “no.” Curiously, metaphoric imagery created to disparage the public domain tends to be implicit and rarely explains itself, seizing on the lack of epistemological differences between metaphor and reality, while the imagery created in support of the public domain tends to stand upon stories offered through analogy and comparison, where the differences between imagery and reality are generally explicit. The public domain envisioned by the movement in support of the commons has been defined and defended by analogy to the theory of the ecosystem, by reference to the myth of childhood innocence, and to the early stories of the Golden Age of Mankind.

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27. On the theory that the public domain is the ultimate source of all creation versus the proposition that all creation is created from nothing, *see* M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 2.01[A], 2-8.1(1989); Litman, *supra* note at 1010-1012 ; and Boyle, *supra* note 9 at 17.

Thus, when Justice Brandeis in 1918 told us, “The general rule of law is, that the noblest of human productions — knowledge, truths ascertained, conceptions, and ideas — become, after voluntary communication to others, free as the air to common use,”<sup>28</sup> we can surmise that the public domain to which he refers by analogy is only partly built from his conception of the history of the public domain and its political and democratic foundation, or (for that matter) from his life-long experience breathing the atmosphere. No doubt, this passage is as compelling as it is because despite its Jeffersonian allusion<sup>29</sup> it resonates profoundly with the mythology we have built around the early childhood of Western Civilization and the story of modern man’s infancy. Speaking in psycho-historical terminology, we are told that our current values are molded by the experiences of infancy and childhood. Not born with an innate sense of property (so goes the story), children are greeted in life by a world that they accept unquestioningly as belonging to them — better put — as not belonging to anyone, but free for them to use as if they haven’t yet distinguished between the “I” and the “it” of existence — an early evolutionary step, epistemologically.

This vision of a public domain is also inspired by its foundation in Western mythology. In some ways, it resonates with Ovid’s representation of the Golden Age of human history, where food in abundance waits for the taking, where man lives in harmony with nature, and ideas of property — private as well as public — are unknown. In Ovid’s account of the world after creation, property is the invention of the last age of man, the age of hard iron, where

all evil burst forth into this age of baser vein, [when] modesty and truth and faith fled the earth and in their place came tricks and plots and snares, violence and cursed love of gain . . . and the ground, which had hitherto been a common possession like the sunlight and the air, the careful surveyor now marked out with long-drawn boundary line.<sup>30</sup>

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28. *Int’l News Svc. V. Assoc. Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., *dissenting*).

29. See note 13 *supra* and accompanying text.

30. OVID, *METAMORPHOSES*, Book 1, 11, Frank Justus Miller, trans., Harvard University Press, 1966.

In such a mythology, and in the manner in which we define the commons, the very idea of “public property,” of a “public domain,” cannot exist except as a logical consequence of the declaration that property exists, that it can be “private” and separable. Not the fact, but the notion of a public domain, itself, is an invention, the instantaneous product of the “big bang” of the created private domain.<sup>31</sup>

Brandeis's vision of creative works “free as the air to common use” echoes Ovid and is almost a manifesto. James Boyle calls it the baseline for our understanding of the public domain. It is also the point from which the trend of shrinking the realm of what belongs to the public began: “Like the environment, the public domain must be ‘invented’ before it is saved.”<sup>32</sup> What was once regarded as open and available to all is now seen by many as an inefficient place where lack of ownership is a symptom of waste and a lack of productivity — the “tragedy of the commons.” If a work has no economic value, the corollary of this theory seems to state, it has no value at all. This new theory sees the commons, such as it exists, as testimony of a failure. This is ironic and a complete reversal of the ethical basis of copyright, because, as Boyle puts it, “in a very real sense, protection of the commons was one of the fundamental goals of intellectual property law.”<sup>33</sup> Indeed, before the 1890s, explains Professor Tyler Ochoa, the term “public domain” was not used in American jurisprudence. Instead, works whose copyright terms had expired or works that did not warrant protection were variously called “public property” or “common property” and were characterized as “the property of the public.”<sup>34</sup>

By accepting no value but that bestowed by economic potential, the contemporary version of copyright is poised to exploit and take title of the public domain, which may be likened to an uncharted territory. In so doing it is ready to jettison the entire array of inherited culture, save that

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31. Boyle, *supra* note 9, at 19.

32. *Id.* at 19. He continues, “Like the environment, like ‘nature,’ the public domain turns out to be a concept that is considerably more slippery than many of us realize. And like the environment, it turns out to be useful, perhaps even necessary, nevertheless.” *Id.*

33. *Id.* at 6.

34. On the history of the use of the term “public domain” in American law, *see generally* Ochoa, *supra* note 16.

which can be turned into profit. That is not to say that works whose value lies outside of the profit system have no significance, but, rather, it implies that to show them and distribute them, they generally must find a distribution niche within the economic and administrative matrix created by and for for-profit enterprises.<sup>35</sup>

The tragedy of the “tragedy of the commons” is thus a consequence of copyright's economic model. Many works of latent significance, such as rare book illustrations, old snapshots or documentary images, which, unlike great paintings and other works that catch the popular imagination, rarely have an apparent economic value. Nevertheless, even though they may be public domain, they may be forced to fit into a brokering system created for using and distributing works under copyright. So, for them, instead of being free (as the air), as they ought to be, they are now — even when minimally priced — made functionally unavailable or economically unattractive by a confluence of unacceptable prices, the insurmountable administrative overhead of preservation costs and rights management, and by frustrating costly efforts to locate a market willing to sell them or an owner to whom to apply for permission to use them. This is an economy turned inside out, where cost is the factor that makes potentially useful things that should be free (or virtually so) appear unattractive and unwanted.

### *B. Reclaiming the Commons*

Recently, endeavors such as the Creative Commons<sup>36</sup> have attempted to resurrect the significance of the public domain, to expand its dimension, to redefine it in practice, and to place it affirmatively within the context of addressing the set of liberties and freedoms its presence guarantees to anyone who needs them. The “public domain of the intellect” is one of the public places and resources to which we refer

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35. An exception must be made to mention those public domain works brought to the public's attention by virtue of the generosity and sponsorship of non-profit foundations. Typically, however, libraries and repositories that possess and care for public domain materials will insist on being paid license or publication fees. In many cases access to rare works is granted only to those whose credentials meet the requirements of the repository. This is one way by which potential use of public domain materials is restricted.

36. [www.creativecommons.org](http://www.creativecommons.org)

under the rubric of “The Commons.” Lawrence Lessig and others have been investigating schemes, which, by reviving and extending the option to renew copyright status, will allow copyright holders to maintain their economic interest in copyright, while permitting copyrighted works of unknown ownership or negligible financial value to enter what is, in effect, a parallel public domain — thus fulfilling many of the important goals of each camp.<sup>37</sup>

The revival of interest in the “commons” is taking several forms. One of these is a series of studies of the character of the “commons” as a public and historical institution. Examples include the commons of public space and recreation, of discourse, of the marketplace, of fact, of access to the history of knowledge, thought, literature, culture, and art. Another direction investigates the nature of the public domain of intellectual and real property as a legal entity — as defined under case law and jurisdiction — as an aid to guaranteeing use of the commons. A third looks at the “commons” as the collective enterprise of communities dedicated to its principles — as cultural and creative phenomena made more important by the development of the Internet and related computing activities — the commons as a communal social enterprise — as a commonwealth of like-minded individuals. A fourth area focuses on the process and activities necessary to collect, identify, classify, expose, publish and present the public domain. It is composed of all those projects and efforts that attempt to collect and distribute works belonging to the public domain or that have been dedicated in some measure to it. In the distribution arena, many projects will be offered unencumbered by intellectual property claims; others will offer resources through purchase or through a variety of licenses.

## V. RECONSTRUCTING THE PUBLIC DOMAIN

The theory that longer periods of copyright violate the constitutional requirement of promoting the arts and sciences is not the same, say James Boyle and others, as the concern that the public domain must be

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37. Currently before the House of Representatives is the Orphan Works Act of 2006, H.R. 5439 109<sup>th</sup> Cong. (2006). Indebted to Lessig, it is intended to alleviate some of the perils of using copyrighted works for which no owner can be located. The statement from the College Art Association in support of the act can be found at [http://www.collegeart.org/pdf/caa\\_orphan\\_letter.pdf](http://www.collegeart.org/pdf/caa_orphan_letter.pdf) (last visited April 24, 2007).

strengthened.<sup>38</sup> Shorter terms of copyright do not necessarily imply that the public domain is to be recognized as an entity. To protect works because they are in the public domain requires a reassessment of the status of the public domain. We are beginning to realize that, in addition to being granted a legal warrant to exist, the public domain must also have the capacity to allow jurisdiction over its contents to be invested in some kind of trust dedicated to serving and protecting the public's interest in the public domain's intellectual and historical assets. Whatever mechanism is chosen to protect the public domain, inasmuch as its administrative structure will be entirely new, it seems obvious that some degree of experimentation will be required to determine appropriate strategies — with acknowledgement that specific situations may warrant unique solutions. Whatever means may be employed, clearly, they must give the public standing to sue to protect the public domain status of a work or to obtain access to a work in the public domain that is being held (or withheld) in the name of the public, and perhaps, even, in the name of a private entity. At minimum, the public domain must be restored as public property, more or less in the form Tyler Ochoa has demonstrated existed before the twentieth century.<sup>39</sup>

The word, “domain,” itself, has come to denote an area (be it property or extent) over which an entity (for instance, an individual or governmental agency) has the right or authority to exert its influence. Its fifteenth-century origin signifies “land belonging to a lord” so the word can imply either an area of influence or a bounded area or both. As applied in the term “public domain,” it can be used both ways. The term “public domain” can imply that the “public” has some kind of hegemony over its contents, or it can stand for the set of works that may be used freely because they are no longer in (or subject to) the domain (or rule) of copyright (or, following Litman, not ordinarily subject to

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38. “More property rights, even though they supposedly offer greater incentives, do not necessarily make for more and better production and innovation. Sometimes just the opposite is true. It may be that intellectual property rights slow down innovation, by putting multiple road-blocks, multiple necessary licenses, in the way of subsequent innovation.” Boyle, *supra* note 9, at 10.

39. See Lange, *supra* note 6, at 147; Ochoa, *supra* note 16, at 232-237; and David Bearman, *Intellectual Property Conservancies*, D-LIB MAG. (Dec. 2000), available at <http://www.dlib.org/dlib/december00/bearman/12bearman.html> (last visited April 24, 2007).

copyright). And, of course, both meanings can apply at once. Normally, we are not bothered by the subtleties of these differences; we allow the context to do the difficult work. Thus, “public domain” can merely imply that works once held in private hands are now available to the public to see (e.g. “in the public eye”), as, for instance, in the following sentence taken from a history of the Ashmolean Museum: “With the opening of its doors on 24 May 1683, the Ashmolean Museum provided a setting in which the private collection emerged into the public domain.”<sup>40</sup>

The problem comes when we try to understand how these notions might apply to the administration of the legal status of created works no longer subject to copyright. What we make of the term “public domain” may have a profound effect on the outcome of our efforts. Are we to construe “public domain” as a literal explanation of legal status (a “word of art,” as it is called), and therefore as a concept that gives us purpose to redefine law to be true to its promise; or are we to acknowledge that “public domain” is a fanciful construct without meaning other than what is implied by the loss of copyright? I prefer the former connotation; it implies that the “public” is given interest in a “domain.”

By the time “domain” became attached to the word “public,” clearly, its literal meaning had evolved into metaphor. While the original meaning of “domain” lingered on, it cast its shadow on how we interpret the meaning of “public domain” (for better or worse) as something akin to, but not quite the same as property — bearing both substance and dimension. Thus, to think of “public domain” in a literal sense may actually serve to compromise the concept — at least as we understand it today. Even so, the word “domain” in its original meaning has had an important influence on our understanding of what “public domain” signifies.

When in the late nineteenth century the terms “public property” and “common property” came to be replaced by the phrase “public domain,” the door was opened to manipulating the meaning of the distinctions between being copyrightable or not, or between being in copyright or out of it. The term “public domain” may have been more poetic and

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40. *The Historical Development of the Ashmolean*,  
<http://www.ashmolean.org/about/historyandfuture/> (last visited April 24, 2007).

romantically evocative than what was in use before; but its usage served to help unravel the public's entitlement to works not subject to copyright. Indeed, one wonders what strategy was in play that caused the use of the word "property" to decline when applied to public holdings of works not under copyright, just as the use of the word "property" was on its ascendancy to describe works subject to copyright.

To impose a new image and make it dominant will be difficult and frustrating, especially so when aimed at a cynical industry that relies on deception — even self-deception. War is a proper analogy for this endeavor; war itself is cynical; one is reminded of Sun Tzu's famous dictum, "All war is based on deception." But, is it possible to win a war intended to propagate a truth and restore fairness? As Tyler Ochoa has shown us, the use of the term "public domain" may be one of those deceptions. It focuses our attention away from the public's property interest in works no longer under copyright and invests it in an ambiguous theory. Were the original perception of "public property" or "common property" to be restored, he says,

then the entire public, not just a patent or copyright owner, [would have] an interest in preserving the work and disseminating it for future generations. A property interest gives each member of the public an equal right to adapt and transform the material in question, thus promoting creativity. Most importantly, if the public has a property interest in the public domain, any deprivation of that property would be subject to the Due Process Clauses of the U.S. Constitution.<sup>41</sup>

Until the rights of the public in the public domain are re-established and commonly accepted, we must attempt to understand the implications and significance of the language we have been taught to use to describe it. We are used to thinking of the public domain not so much as a legal entity, but, rather, as a boundless territory, virtually infinite in breadth and unfathomable in the depths of its often surprising holdings. The metaphors we use understandably seem to be spatial and territorial. They evoke a realm, an uncharted unknown expansive

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41. Ochoa, *supra* note 16, at 261-262.

resource, there for the taking. These images are analogous to, and may even derive some of their modern potency from our 19<sup>th</sup> century incursion into the Western territories. The uncertain existence and not fully formed definition of what constituted the public domain of the West helped open it up and made it susceptible to plunder and lawlessness — not altogether unrelated to the quasi-respectable but constitutionally sanctioned principle of “*eminent domain*.”

A better analogy for today — inspired, truth to say, by having to watch pieces of what should belong to the public domain being confiscated by copyright holders — comes from our revised definition of the natural environment as a precious, precarious, limited resource and habitat — of finite, if indeterminate dimensions. While any single literary item in the public domain may be “*non-rivalrous*,” the incursion of copyright extension into the public domain has taught us that as an entity, the entirety of the public domain's dimension and scope is subject to limits, to rivalry, and to absorption. Especially vulnerable are privately held works (such as art) that exist in singleton as unique objects. The fragility of the public domain, like the natural environment, itself, only becomes apparent in the face of impending loss. Without protection, the public domain could disappear as quickly as Brazilian rain forests. In the current economic atmosphere, without protection, what we expect from the public domain may not be public.<sup>42</sup>

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42. Following are a few examples of the varieties of strategies that have been employed or suggested to curtail the public's access rights to intellectual property from the public domain and elsewhere. One means is to lengthen, through legislation, the copyright term, thereby preventing copyright materials from entering the public domain in a timely manner. The Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (codified as amended in scattered sections of 17 U.S.C.) extended copyright protection an additional 20 years to life of the author plus 70 years for most newly-created works, and to a possible 95 years for older works. Another is to use licensing mechanisms to shield public domain content from unencumbered access. In furtherance of this strategy, the Digital Millennium Copyright Act, 17 U.S.C. §1201 (2000) has erected barriers to accessing public domain and other content by circumvention when digitally encoded. (*See*, <http://www.copyright.gov/legislation/dmca.pdf>.) Some businesses and institutions have attempted to employ trademark law to restrict rights to photograph and reproduce architectural content. In one famous case, the Rock and Roll Hall of Fame claimed that photographs of its famous building violated its trademark rights in the building. *Rock and Roll Hall of Fame and Museum, Inc. v. Gentile Prods.*, 71 F. Supp. 2d 755 (N.D. Ohio 1999).

## VI. CONCLUSION

It is time to ask who actually believes their own rhetoric. Do the metaphoric barricades conceal a deep cynicism, and if not, why are such lopsided representations believed? At its core, copyright warfare is akin to cultural or political warfare and takes its form and its language from all-consuming cultural conflicts of recent memory. A broad view tells us that if we are not careful our metaphors can imprison us. Siva Vaidhyanathan and others have rightly observed that metaphor becomes the weaponry of such culture wars.<sup>43</sup> Many have noted that whoever controls the most powerful metaphor controls the high ground of public opinion and shapes the conflict. The copyright cartel (admittedly, a metaphor) and their lobbyists have grafted together a morally charged vocabulary including “thief” and “pirate” and now “terrorist” with which to demonize patently illegal, unethical infringements, while simultaneously fusing this group to otherwise benign, permissible, but unlicensed uses of intellectual property. In the process they have attempted to ignore customary, court-sanctioned and statutory distinctions between the two varieties of uses. But, in reporting this, one assumes, perhaps too charitably, that their mindset admits the distinction — for instance, that it acknowledges the concept and utility of “fair use.” Refusing to be budged, their “spin-doctors” may be banking on the assumption that any nuanced position is self-defeating, and that the one-hopper approach may be the one most easily conveyed and the one that gets the most statutory mileage — setting the stage for future restrictive legislation. In this way they have created an atmosphere of intimidation intended to discourage legally permissible use of both public domain and copyrighted materials. But this kind of

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43. Siva Vaidhyanathan, Speech at the New York Public Library, NINCH Copyright Town Meeting: Copyright and How We Talk About It (Sept. 24, 2001) (summary available at <http://www.ninch.org/copyright/2001/nyplreport.html> [last visited April 24, 2007]). See also JESSICA LITMAN DIGITAL COPYRIGHT, 77 (2001), in which Litman identifies the metaphoric arguments used by the copyright industry to manipulate the popular understanding of what copyright signifies. The law, she maintains, has only a minor tug on the direction of copyright legislation. The “principles” (newly formulated to meet the needs of copyright owners) motivate the lobbyists and ultimately have proven most persuasive.

extremism, of the sort that breeds dogmatic copyright absolutists, is fueled and self-validated by an unquestioning belief in the metaphors of one's own rhetoric — always dangerous because it ultimately proves itself counter-productive.<sup>44</sup> In effect, using metaphor to achieve one's goal is like creating a fictitious reality — in a word, “spin” — which, when generally believed, substitutes a powerful lie for the nuanced truth. Once copyright owners establish an unquestionable hegemony over the domain of works still under copyright, it is a small step to lay claim to those elements of the public domain that appear susceptible to manipulation.

Edward Rothstein notes that “powerful metaphors are by nature intemperate. They can seem to take over, manipulating rather than serving their creators.”<sup>45</sup> In the end, the inability to climb out of one's metaphoric cage feeds a climate conducive to self-destruction — especially hazardous to the business of copyright management and ownership. Decisions cannot then follow from a rational appreciation of facts but instead are fed from an emotional belief in one's own propaganda. The copyright cartel, in this writer's opinion, has forgotten that its great success often relies upon the openness and freedom of the public domain (of a wide liberal public domain), which they, themselves, continually mine, and which equally depends upon the freedom that users of copyrighted materials have traditionally exercised.

The more people succeed in restricting the valid fair uses of their own properties, and extending the length of copyright so to limit the depth of the public domain, the greater will be their own difficulties as creators, the less will be the demand for their products, and the fewer will be the number of people who will want to access or use them. History tells us that excesses of domination lay the groundwork for revolution. Nature seems to thrive on balances; those who would have it any other way soon suffer the large and small consequences of relying upon overreaching monopolies. With any luck, they will realize sooner

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44. Compare Litman *id.* at 80 on the economic model of copyright that says that greater protection produces more works: “If we forget that the [economic] model is just a useful tool, and persuade ourselves that it straightforwardly describes the real world, then we're trapped in a construct in which there's no good reason why copyrights shouldn't cover everything and last forever.”

45. Rothstein, *supra* note 1.

rather than later what the opossum Pogo discovered: “We have met the enemy, and he is us.”<sup>46</sup>

Hope lies in a “newly” reconstructed public domain that is not wholly different from the public domain implied by the framers of our Constitution, and from the one theorized by Thomas Jefferson and elaborated by judges such as Justice Brandeis. A reading of the Constitution seems to make it clear, that (without actually saying the magic words “public domain,” which hadn’t yet been coined) it was well understood that absent the temporary grant of copyright that the Constitution sanctions, all works would exist without national protection of any sort. When the United States imposed a limit on the period of copyright, thereby creating a scheduled expiration of the condition of protection, it was clearly understood that the status of such works no longer under copyright was not undesirable — rather, they had matured into a rightful and fitting place, available to benefit all. The Constitution made it clear that public domain status was in the national interest. These works would fuel future creators and would provide the public unencumbered access to a repository of information and expression that a free society needs to maintain and nourish the informed and evolving citizenry requisite to ensure its continued success and survival.

Returning the public domain to the public is a big task. How does one re-educate the culture of “me and my” without undermining the spirit of invention and self-promotion that is so essential to our system? How does one counteract the relentless vilification of those who only wish to claim the rights that our system and laws have granted them? Our culture's view of the public domain now is so off-center, so one-sided and so powerless to resist manipulation that the undertaking, if it is to be done at all, must be accomplished from at least three directions simultaneously — theoretical, political, and practical. We must (1) try to understand what the public domain means for our society and what functions it serves, (2) develop a national policy on the public domain, redefining in law what the public domain means, and how it is to be identified, used, encouraged, and protected, and (3) we must press to integrate its conscious use into the daily life of education, information,

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46. On the Pogo Earth Day cartoon of 1971, *see* <http://www.nauticom.net/www/chuckm/whmte.htm> (last visited April 24, 2007).

and creation. And, one more thing, not least in importance, we should not ignore the power of metaphor to lend power to the fulfillment of these ambitions.

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