



The New Enclosure

Erecting Gates and Tolls in the Information Age

Where what is, as a relative matter, a handful of corporations superintend, with the protection of the state, every technological process that can create wealth, where everyone who wants access to those processes must pay a toll, we have entered into a new stage of enclosure.

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[103] Marney L. Cheek, *The Limits of Informal Regulatory Cooperation in International Affairs: A Review of the Global Intellectual Property Rights Regime*, 33 *Geo. Wash. Int'l L. Rev.* 277, 288 (2001).

[104] Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 *Vand. J. Transnat'l L.* 613, 614 (1996).

[105] *Id.*

[106] Terence P. Stewart, ed., *The GATT Uruguay Round: A Negotiating History (1986-1994)* 563 (Kluwer Law International 1999).

[107] Kevin A. Carson, "Intellectual Property": A Libertarian Critique at 9.

[108] Tim Jordan, *Cyberpower: the culture and politics of cyberspace and the Internet* 35 and 84 (Routledge, 1999).

[109] Drahos and Braithwaite at *passim*.

The widely noted transition from the "old economy," based in the production of physical commodities, to the "new economy" of the information age—with its capital base concentrated not in heavy machinery and land, but in human beings and in knowledge—has been attended by a concomitant sea change in the legal framework surrounding business. Where ingress to the marketplace wrought by the Industrial Revolution required enormous investments to purchase the capital goods necessary for operating within its framework, the less tangible bases of the information economy have significantly lowered those barriers. Some of today's most successful companies, firms like Facebook, Twitter and Groupon, were started on minimal (in fact, almost negligible) outlays of capital using technology that nearly every American has at her fingertips through her personal computer. With the "capital infrastructure" necessary for success to be erected in cyberspace rather than in the physical space of the natural world, many of the totemic fixtures of the corporate economy stand to have their dominance subverted.^[1] Nevertheless, the obvious analogy, apparent since the incipency of the Internet, between cyberspace and concrete space in the "real world" has given rise to questions about how far that analogy ought to go, indeed about whether it is apposite at all. "Instead of concluding that cyberspace is outside of the physical world," wrote Mark A. Lemley back in 2003, "courts are increasingly using the cyberspace as place metaphor to justify application of traditional laws governing real property to this new medium."^[2] As Lemley rightly notes, heavy reliance on that "metaphor is leading courts to results that are nothing short of disastrous as a matter of public policy," and, I will argue, foisting onto our young, fecund information economy a new period of enclosures to rival those that stripped the peasantry of its traditional rights hundreds of years ago in, for instance, England.^[3]

Before embarking on an attempt to analogize cyberspace to real property and to show that the enclosure of the former is more egregious and unjustified than that of the latter, it will be necessary to provide an account for the radical, philosophical arguments against intellectual property law that will provide the basis for the other arguments herein. Speaking of “the thinking power called an idea,” Thomas Jefferson argued, “Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of.”[4] In observing that ideas are “incapable of confinement or exclusive appropriation,” that they are expansible over all space, without lessening their density in any point,” Jefferson was making not only a philosophical argument in the area of metaphysics, but also a distinctly economic argument.[5] The economic implications of Jefferson’s argument concern the idea of scarcity, that, within the confines of the natural world, specific objects or resources are limited, that is, not reproducible ad infinitum. As similarly articulated by University of Trier philosopher Hardy Bouillon, “ideas can be reproduced without any loss of quality and can be shared by many without creating any scarcity problems.”[6] Insofar as the potential conflicts that are the subject of legal claims in property are based in the fact that property is finite, then, intellectual property appears an anomalous, even oxymoronic, strand within the law. [7]

Private property is properly based on the idea of a negative right, an exclusionary right that precludes latecomers from use of a scarce means; though in that sense, of course, all private property rights are an embodiment of monopoly, those monopolies are philosophically tenable on the limited basis of being grounded in legitimate transfer from one party to the next or in what may be called homesteading.[8] That all of property is in the species of monopolization or exclusion is what the French anarchist Pierre-Joseph Proudhon meant, at least in part, when he famously declared, “Property is robbery,” counseling worry about the ways

[89] Benkler at passim.

[90] Groves at 129.

[91] G. Bruce Doern, *Global Change and Intellectual Property Agencies* 49-51 (Pinter 1999).

[92] Graham Dutfield, *Intellectual property rights and the life science industries: a 20th century history* 6 (Ashgate Publishing Limited 2003).

[93] Kevin A. Carson, “Intellectual Property”: A Libertarian Critique at 7.

[94] Gordon V. Smith and Russell L. Parr, *Intellectual Property: Valuation, Exploitation, and Infringement Damages* 596 (John Wiley & Sons, Inc. 2005).

[95] Id.

[96] Vaver at 15, 16.

[97] Kevin A. Carson, *Organization Theory* at 257, 258.

[98] David Hesmondhalgh and Jason Toyne, *The Media and Social Theory* 102, 103, and 107 (Routledge 2008).

[99] While intellectual property itself plays a decisive role in such disparities, other subsidies, both direct and indirect, operate to make the “free trade” agreements offloaded onto the Third World by the West anything but “free” or “fair”; many among those would make the subjects of other studies, but let it suffice to say that, in a world where multinationals could no longer force their operating costs onto taxpayers, neoliberal “free trade” as it now exists would vanish from the earth.

[100] American Bar Association Section of Antitrust Law, *Intellectual Property Misuse: Licensing and Litigation* 63 (American Bar Association 2000).

[101] Chakravarthi Raghavan, *Recolonization: GATT, the Uruguay Round & the Third World* 96 (Zed Books 1990).

[102] Robert S. Chaloupka, *International Aspects of Copyright Law*, 15 No. 4 *Int’l HR J. ART* 3 (2006).

\$10 for its plastic casing, another \$50 for the fine-ground optical glass, and the rest, about \$640, for its intellect: the microprocessors and software that drive the beast” (emphasis added).

[79] Patents enjoy the distinction of a place among Tucker’s famed “Four Monopolies,” those most egregious ways in which the state made possible the exploitation of productive people. Granting “the power to exact tribute from others for the use of . . . natural wealth,” Tucker saw patents as fencing off “laws . . . of Nature” that are natively “open to all.”

[80] Josiah Warren, *Equitable Commerce* passim (Amos E. Senter 1849).

[81] It is little remembered or remarked upon, but, as in the words of Bertrand Russell, “Marx’s theoretical economies remain very near to Manchesterism,” the classicism of Smith and Ricardo applied consistently and against the privileges of the capitalist. So while his statist prescription was ill-conceived (and ill-matched to his diagnosis), Marx never imagined that the crises inherent to capitalist over-accumulation were the result of anything even remotely resembling a “level playing field” or open competition between labor and capital.

[82] David Vaver, ed., *Intellectual Property Rights: Critical Concepts in Law* 340 (Routledge 2006).

[83] Alexander Ebner and Nikolaus Beck, eds., *The Institutions of the Market: Organizations, Social Systems, and Governance* 344 (Oxford University Press 2008).

[84] National Research Council at 6.

[85] Prabir Purkayastha, *Intellectual Property Rights (IPR) on Monopoly Super Profits, People’s Democracy* (1999) at <http://www.lalkar.org/issues/contents/mar1999/momopoly.htm>.

[86] Kevin A. Carson, “Intellectual Property”: A Libertarian Critique 5 (Center for a Stateless Society 2009).

[87] Purkayastha at passim.

[88] Peter J. Groves, *Intellectual property rights and their valuation: A handbook for bankers, companies and their advisers* 107 (Woodhead Publishing Ltd. 1997).

in which we assign or allow such a right.[9] As anarchist political economist Kevin A. Carson has noted, though, property in land is a monopoly as a matter of course insofar as “two people cannot occupy the same physical space at the same time.”[10] Generally, it is thought that exclusive licenses of use, such as are embodied in property laws, are a good idea not just because of their practical, utilitarian function of preventing and resolving conflicts over things, but also because ethically it is adjudged that people ought to be able to keep those things that have become extensions of themselves through—in the well-known Lockean formulation—the “mixing of their labor.” The problem, however, argues Lemley is that “[n]o one is ‘in’ cyberspace.”[11] Rather than as a “place,” the Internet is best understood, like the phone, telegraph, or TV, as a way of transmitting data, and no one thinks that, while watching TV, she is literally “transported” to a new place.[12]

Admittedly, many advocates of intellectual property rights have argued compellingly that those rights need not rely on the physical space analogy, and therefore are not defeated or annulled by “the non-rivalrous nature of information.”[13] Such defenses of intellectual property turn the Lockean “labor theory of ownership” on its head, asserting “non-economic grounds” and denying “the need for empirical validation demanded by the utilitarian approach.”[14] While facially persuasive, arguments that asseverate the basis of intellectual property in “natural law” underestimate the extent to which Locke’s ethical, deontological explanation of property rights was confined to its terms; that is, the extent to which it applied only to something that actually could be “individuated in some way” to “enclose it from the common” (emphasis added).[15] Similarly, philosopher David Attas describes as “baffling” the notion that one could individuate an idea, enumerating a number of practical problems with that notion including the widely-noted objection to intellectual property that two people can arrive at the same idea completely independently.[16] Arguing that “relying on . . . Locke’s

arguments to support intellectual property rights is somewhat risky,” David Lea observes that “Locke was referring to non-intellectual physical property.”[17] And while Locke himself defended copyrights, it seems likely, as a matter of historical fact, that he did so on the grounds of “market regulation,” a state-created modification of those natural property rights that precede the state, rather than as an implication of his labor-mixing theory. [18]

Further, insofar as none of these arguments claim that rightful ownership through intellectual property law ought to continue in perpetuity (and virtually all of these arguments admit of some fair use allowance), they seem to admit that intellectual property claims are based on something other than traditional Lockean rationales. While it may be that limited duration is rationalized by an analogy to abandonment doctrine in property, and that fair use is likewise rationalized by analogy to the Lockean Proviso,[19] both of these embedded rationales undercut the odd idea of these defenders of intellectual property that their arguments are somehow outside of economic considerations and independent of the real property analogy.[20] Even more fatal for the use of Lockean theory to justify intellectual property is the rebuttal of intellectual property practitioner N. Stephan Kinsella that Locke’s labor-mixing was actually a way of indicating use and occupancy—the true basis for a right in property—and not as some kind of abstract reward for the labor in and of itself.[21] The labor-focused test of Locke’s account got around (or at least provided some kind of workable answer) to the difficulty remarked on by another of Proudhon’s less-known proclamations, that “property is impossible.”[22] Part of what Proudhon meant was that even assuming, in the abstract, that a natural right to property exists, the problems of original appropriation or homesteading were, if not completely insurmountable, very nearly so. For Locke, since first occupancy was enough to create a title in land, there needed to be a way to properly and sufficiently demonstrate that

[63] J.H. Reichman and Jonathan A. Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 U. Pa. L. Rev. 875, 896 (1999).

[64] Joshua N. Mitchell, *Promoting Progress with Fair Use*, 60 Duke L.J. 1639, 1640-1641 (2011).

[65] *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

[66] *Id.*

[67] Mitchell, 60 Duke L.J. at 1641.

[68] Franz Oppenheimer, *The State: Its History and Development Viewed Sociologically passim* (The Bobbs-Merrill Company Publishers 1914).

[69] Hilaire Belloc, *The Servile State* 31 (Cosimo, Inc. 2007).

[70] Karl Marx and Frederick Engels, *Capital: A Critique of Political Economy* 792 (Charles H. Kerr & Company 1906).

[71] *Id.* at 793.

[72] Carson, *Studies in Mutualist Political Economy* at 147.

[73] Henry George, *Progress and Poverty* 344 (D. Appleton and Company 1886).

[74] Thomas Hodgskin, *The Natural and Artificial Right of Property Contrasted* 48 (B. Steil 1832).

[75] Adam Thierer and Clyde Wayne Crews Jr., eds., *Copy Fights: The Future of Intellectual Property in the Information Age* 193 (Cato Institute 2002).

[76] Rothbard at *passim*.

[77] Michele Boldrin and David K. Levine, *The Case Against Intellectual Property* 2 (Centre for Economic Policy Research 2002).

[78] To see how far intellectual property allows big business to deviate from the cost principle, a short excerpt from Tom Peters’ *The Tom Peters Seminar* is instructive: “My new Minolta 9xi is a lumpy object, but I suspect I paid about

American History, 1900-1916 passim (The Free Press 1963).

[45] *Id.* at 58.

[46] Computer Science and Telecommunications Board of the National Research Council, *Intellectual Property Issues in Software* 5 (National Academy Press 1991).

[47] *Id.* at 5 and 59.

[48] Drahos with Braithwaite at 187.

[49] Rothbard at 752.

[50] Kinsella at 22.

[51] Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* 38 (Strange Fruit 2006).

[52] Ghosh, 15 *Harv. J.L. & Tech.* at 495.

[53] Carson, *Organization Theory* at 74.

[54] National Research Council at 5.

[55] Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 *Vand. L. Rev.* 1597, 1641 (2008).

[56] National Research Council at 5.

[57] Carson, *Organization Theory* at 74.

[58] Benkler at 39.

[59] Long at passim.

[60] Kinsella at 24.

[61] *Id.*

[62] Long.

occupancy—and actually working the land (it is yet unclear how much work is required) seemed to be the best evidence. How one would go about occupying an idea, homesteading it as their own, is much less clear.[23]

Of the “historical claims made in the service of the proptertization critique,” wrote Cardozo School of Law Professor Justin Hughes, “[o]ne might reasonably ask: Why bother?”[24] But as Hughes notes, scrutiny of intellectual property’s historical as well as philosophical underpinnings can assist in important ways in bringing the legal paradigm into closer alignment with the policy goals that purportedly provide its basis.[25] Pointing out the “tainted past” of intellectual property rights, Auburn University philosopher Roderick Long describes the political origins of intellectual property as fairly wholly arbitrary grants of license from the state to entrenched economic actors.[26] “Intellectual property rights had their origin in governmental privilege and governmental protectionism, not in any zeal to protect the rights of creators to the fruits of their efforts.”[27] Long grants that, standing alone, the fact of intellectual property’s protectionist, political roots says nothing about whether or not we ought to think these rights are a good idea, but it may surprise many modern observers that, for instance, “artistic integrity” and the like were not at all considered to be important at the dawn of intellectual property.[28] In defending intellectual property, it is perhaps telling that a number of scholars have analogized it not as an application of traditional real property law principles, but to the law of taxation.[29] As noted above, such a comparison seems to be closer to what Locke had in mind in his defenses of the copyright regimes of his day, and it seems also to represent a return to Justin Hughes regards as the actual, historical bases of intellectual property as against the growing mythology that it represents a specifically property type of right.[30]

“[P]ropos[ing] that the proper analogy is to tax law,” the

University of Wisconsin Law School's Shubha Ghosh argues that the utilitarian results that the state seeks to advance through intellectual property could just as easily be accomplished through traditional tax breaks.[31] Readily comparing intellectual property monopolies to other forms of "corporate welfare," Ghosh defends these rights' monopoly rents as a "negative tax" that implements "government choices." [32] Such an account is actually quite accurate, dovetailing perfectly with the critiques of intellectual property to be presented below, but Ghosh fails to notice the obvious extra-legal problems with intellectual property as a piece of a broader, "subsidy regime." [33] While Ghosh's description is truthful enough, he quickly glosses over the fact that the public policy decisions underlying intellectual property statutes are "often influenced by lobbying," carelessly conflating "government choices" with "choices about what we as a society value" (emphasis added). [34] Ghosh, with his Pollyanna view of the state and its impetuses, would do well to recall Marx's famous admonition that "[t]he modern state is but an executive committee for administering the affairs of the whole [ruling] class." [35] Given the contours of intellectual property that we will explore later, it is impossible to be too skeptical regarding the forces that motivate it.

Expanding on the tax analogy and describing the "neoliberal revolution" of flat-world, global capitalism, Kevin A. Carson argues that "'intellectual property' plays the same protectionist role for [today's multinational corporations] that tariffs performed in the old national economies." [36] Heterodox economist Murray N. Rothbard also noted the similarities between the protective functions of patents, supposedly necessary to buffer nascent inventions, and the "'infant industry' argument for tariffs." [37] Rothbard argued that patents, like tariffs, are simply "[m]onopolistic grants" from the political class that, when carried to their logical end, would mean isolation and barbarism. [38] that have no purpose by the "injure consumers," The intellectual

[27] Id.

[28] Id.

[29] Shubha Ghosh, *The Merits of Ownership; or, How I Learned to Stop Worrying and Love Intellectual Property* Review Essay of Lawrence Lessig, the Future of Ideas, and Siva Vaidhyanathan, *Copyrights and Copywrongs*, 15 *Harv. J.L. & Tech.* 453, 481 (2002).

[30] Hughes, 79 *S. Cal. L. Rev.* at 996.

[31] Ghosh, 15 *Harv. J.L. & Tech.* at 481.

[32] Id.

[33] Id.

[34] Id.

[35] Karl Marx and Frederick Engels, *Manifesto of the Communist Party* 15 (Charles H. Kerr & Company 1906).

[36] Kevin A. Carson, *Organization Theory* 75, 76 (BookSurge 2008).

[37] Murray N. Rothbard, *Man, Economy, and State with Power and Market: Scholar's Edition* 1135 (2d ed., Ludwig von Mises Institute 2009).

[38] Id. at 1103

[39] Peter Drahos with John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* 29 (Earthscan Publication Ltd. 2002).

[40] Id.

[41] Id.

[42] Edmund Burke, *A Vindication of Natural Society* 86 (M. Cooper 1756).

[43] David D'Amato, *The Pretended Populism of Politics* (Center for a Stateless Society 2010) at <http://c4ss.org/content/4220>.

[44] Gabriel Kolko, *The Triumph of Conservatism: A Reinterpretation of*

[10] Kevin A. Carson, *Studies in Mutualist Political Economy* 225 (self-published 2004).

[11] Lemley, 91 Cal. L. Rev. at 523.

[12] *Id.*

[13] Richard A. Spinello and Maria Bottis, *A Defense of Intellectual Property Rights* 149, 150 (Edward Elgar Publishing Limited 2009).

[14] *Id.* at 150

[15] John Locke, *Two Treatises of Government and a Letter Concerning Toleration* 81 (Digireads.com Publishing 2005).

[16] Daniel Attas, *Lockean Justifications of Intellectual Property* 50-51 (Palgrave Macmillan 2008).

[17] David Lea, *Property Rights, Indigenous People and the Developing World* 223 (Koninklijke Brill NV 2008).

[18] Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. Cal. L. Rev. 993, 996 (2006).

[19] John Locke at 81.

[20] Spinello and Bottis at 150.

[21] Kinsella at 39, 40.

[22] Proudhon at 217.

[23] Attas, *passim*.

[24] Hughes, 79 S. Cal. L. Rev. at 996.

[25] *Id.*

[26] Roderick T. Long, *The Libertarian Case Against Intellectual Property Rights*, *Formulations* magazine (Free Nation Foundation 1995).

property legal regimes of the present day are therefore quite consistent with intellectual property's historical status—contrary to contemporary fairy tales these rights inhere in creators and innovators—as a thing apart from individuals, something of the political class, by the political class, and for the political class. As Peter Drahos and John Braithwaite wrote in *Information Feudalism*, “Intellectual property rights began life as tools of censorship and monopoly privileges doled out by the king to fund wars and other pursuits.”[39] In the mid-sixteenth century, copyright was born out of the need of a favored printing guild, the Stationers, to preclude competition and wrench monopoly profits out of consumers.[40] In those days, there was no pretense (and need not be any) to cover the fact that the Stationers' exclusive right was the result of a quid pro quo whereby they would refuse to print manuscripts politically opposed to the Queen.[41] Incentivizing innovation and protecting its apostles were hardly the order of the day, with the symbiotic relationship between commercial and state interests asserting itself in characteristic oppression. That today we operate under the delusion that intellectual property rights are some kind of a natural right belonging to individuals is evidence of just how completely the total state has transformed the assumptions about political power: Where the laboring classes of the slave and feudal economies of antiquity and the Middle Ages, respectively, understood full well the exploitative motivations behind state action, we “enfranchised citizens” of today apparently take the state's PR campaigns at face value. The words of Edmund Burke are significant in considering intellectual property: “Ask of Politicians the End for which Laws were originally designed; and they will answer, that the Laws were designed as a Protection for the Poor and Weak against the Oppression of the Rich and Powerful. But surely no Pretence can be so ridiculous”[42]

The most fundamental error of the more well-meaning and conscientious of American Progressives, those whose suspicion

toward commercial power is sincere rather than a mere affectation, is that the state can be wielded against the interests of the power elite. As I have written elsewhere, they are unfortunately “beguiled by the hopeless chimera of reaching economic equity through the state; [they] would have us apply the one institution defined by violence, injustice, and oppression to thwart the same.”[43] The work of revisionists such as Gabriel Kolko went a long way toward deracinating the baleful myth that the Progressive, regulatory state was anything but a means of cartelizing industry for the favored few.[44] In *The Triumph of Conservatism*, Kolko writes, “The dominant fact of American political life at the beginning of this [i.e., the twentieth] century was that big business led the struggle for federal regulation of the economy.”[45] Kolko’s narrative, then—that established corporations rallied not for the “cutthroat competition” of conventional wisdom, but for state-create and -enforced oligopoly—explodes the folklore of the state as some kind “social power” to counteract corporate greed. When viewed through the lens of these insights about the historical nature of the state and its laws, intellectual property begins to come into focus as something other than just a neutral application for protecting legitimate rights and the innovative spirit.

Were it true, the claim that intellectual property is necessary to incentivize and stimulate innovation would be arguably the strongest in its favor; though it would, in any case, be incapable of changing the historical fact that these goals had nothing to do with intellectual property’s emergence, it would make up a credible and weighty case for the continued existence of these rights. Of particular importance to us is the application of intellectual property to software, to the foundational information of the high technology economy. According to Francis D. Fisher of Harvard Law School’s Educational Technology Group, the purported justifications of intellectual property are not at all bolstered by the data within the software and technology

regard for what it truly is, rejecting the artifice of legitimacy that has been erected around it. It is, for lack of a better or more accurate term, a bogus property right, based not on any sound, philosophical standard, but on the need for capital to remain the middleman in every exchange. The notion that some people ought to own, for instance, software code that directs particular undertakings is as facially absurd as the idea that the men who discovered subatomic particles ought to own them. Mere reform of intellectual property laws will not be enough to promote the utilitarian results that the law should, or to protect the kinds of rights that the law should. Only the abolition of intellectual property is sufficient to free the world economy from what Drahos and Braithwaite call “information feudalism.”[109]

[1] Dirk Grunwald, *The Internet Ecosystem: The Potential for Discrimination*, 63 Fed. Comm. L.J. 411, 427 (2011).

[2] Mark A. Lemley, *Place and Cyberspace*, 91 Cal. L. Rev. 521, 521 (2003).

[3] *Id.* at 522.

[4] Daniel J. Boorstin, *The Lost World of Thomas Jefferson* 125 (The University of Chicago Press 1981).

[5] *Id.*

[6] Jorg Guido Hulsmann and N. Stephan Kinsella, *Property, Freedom, & Society: Essays in Honor of Hans-Hermann Hoppe* 157 (Ludwig von Mises Institute 2009).

[7] Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism* 235, note 9 (Kluwer Academic Publishers 1989).

[8] N. Stephan Kinsella, *Against Intellectual Property* 30 (Ludwig von Mises Institute 2008).

[9] Pierre-Joseph Proudhon, *What is Property?* 12 (Benj. R. Tucker 1876).

countries (at least with the exception of their parasitic leaders) to become genuine stakeholders in the information economy.[104]

Instead, the TRIPS Agreement has decimated already-weak doctrines such as fair use and first sale, which, according to Professor Marci A. Hamilton, have been largely “discarded in favor of copyright protection for every conceivable use of a work.”[105] Beyond the withering of intellectual property’s limiting doctrines and the protection period extensions under GATT, the scope of copyrighted software is today so broad as to permeate virtually every level of economic activity. Much has been made, for example, of the protection afforded to biotechnology processes by TRIPS, but it is too seldom noted how deeply software itself penetrates the technological instruments necessary for the daily operations of biotech firms. [106] Even where patents are not applying directly to biological objects, technological and software considerations pervade the industry. Where what is, as a relative matter, a handful of corporations superintend, with the protection of the state, every technological process that can create wealth, where everyone who wants access to those processes must pay a toll, we have entered into a new stage of enclosure.

The “good news” is that the intangible nature of information (detailed above) will continue to make it impossible for the plutocrats to enforce their intellectual property laws.[107] Individuals will continue to “steal” from their personal computers, with “piracy” becoming an ever more fluid and adaptable current within economic life. We might analogize the proscription of economically viable voluntary exchange as, in a sense, censorship, and in the now famous phrasing of Electronic Frontier Foundation co-founder John Gilmore, “The Internet treats censorship as damage, it routes around it.”[108] To stop the economic crises and injustices that are to flow naturally from the new enclosure that is intellectual property, we must have due

industries relating to their “rate of innovation.”[46] Fisher argues that the burden of proof has not been met by the advocates of intellectual property that the monopoly rights bestowed on powerful software and tech companies serve the common good, insisting instead that such protections—as insulations from competition—function to stifle creativity and progress and hurt the consumer.[47] The incentives for innovation are in fact undone where property rights are concentrated within a small, dominant group and thereby denied to the vast majority of the productive population.[48] Intellectual property protection allows its beneficiaries the comfort of “resting on their laurels,” shielded from any inventiveness from without that might attempt to build on or alter whatever it is they are said to “own.”[49] Were companies unable to idly rely on the protection of the state, the incentive to innovate would be many orders of magnitude stronger. Further, the enormous resources now devoted to intellectual property litigation within the technology industries could be used productive on research and design rather than wasted on contrived legal battles.[50] As Yochai Benkler argues in *The Wealth of Networks*, the strengthening of intellectual property rights corresponds with a strangling off of the “production of new information” due to the artificially and prohibitively high costs of the consumption of information.[51] Rather than encouraging new watersheds in technology, argue Siva Vaidhyanathan and Lawrence Lessig, “the problem with current law is that it over-rewards incumbents and under-rewards future innovators.”[52] Untold potential of enterprising code writers experimenting at home on their personal computers is being choked off at every moment by needless curtailment of intellectual property law. The finish line in the competition created by intellectual property thus comes to be defined by who among the most puissant big business players can assemble the most effective army of lawyers and lobbyists to wield the coercive apparatuses of the state against its competitors. The goal is not to innovate per se, but is rather to find a way to legally prevent

others from doing so, replacing the constant need to look over your shoulder for competitors closing in—which would otherwise exist—with a comfortable place of statutorily-enforced advantage.

In testimony before the Federal Trade Commission, F. M. Scherer outlined a survey of almost 100 companies, where very close to none of them “accorded high significance to patent protection as a factor in their [research and development] investments.”[53] Instead, they cited efficiency and the need to remain competitive as their primary, if not sole, motivators, and most firms said that “legal concerns [regarding intellectual property] rarely entered into product-development decisions.”[54] If intellectual property is actually impeding the kinds of shake-ups within the software and tech industries that lead to breakthroughs beneficial to the consumer, then its “restrictionist price” transactional tolls are actually functioning to create enormous economic inefficiencies and wastes. In the balance, as characterized by University of Colorado Law Professor Nestor Davidson, between “the deadweight loss that attends the grant of a monopoly” and the supposed incentives of intellectual property, then, the former completely downs the latter.[55] Doubtless such inefficiencies operate to some, narrowly-defined benefit—to line the pockets of gatekeepers within industries like software (e.g., Microsoft)—but they cannot be said to propel these arenas forward. “The collective behavior of firms,” where competition, imitation and imagination are unhampered by arbitrary, coercive impediments, best serves the stated aims of intellectual property law regarding the promotion of scientific progress and the public good.[56] One survey of American companies revealed that, in the textile, automobile, rubber, and office supplies industries literally 100% of new inventions would have been developed even in the complete absence of patent protections.[57] There is virtually no good empirical reason to suppose that the costs of intellectual property to society are worth the benefits, but despite the growing skepticism within the legal and economic communities, these

heart of the empire—intact as limited liability containers for their intellectual property rights while licensing those rights to partners overseas.[98] Licensing agreements like these, predicated on state-originated bargaining power disparities,[99] invariably include grant-back clauses that shift new inventions or improvements (growing out of the license) back to the licensor.[100]

The fabric of the international law regarding intellectual property cannot be understood without viewing it within its context of a larger order of American corporate empire; such a claim has nothing to do with conspiracy theories or paranoia, but rather the institutional culture of the organizations—going back to the creation of the Bretton Woods system and before—that have dominated the global political/economic landscape over the past decades. That the United States has taken on the features of an empire, replacing the British one that dominated the nineteenth century, is hardly to be disputed, though today we harbor an aversion to the word “empire.” The structural soundness of this empire and its political economies depends very centrally on “the leading Industrial Nations . . . prevent[ing] [the] emergence of competition by controlling . . . the flows of technology to others.”[101] Treaties like the General Agreement on Tariffs and Trade (GATT), calcifying and expanding intellectual property in revolutionary ways, have been useful for that purpose. The series of GATT negotiations that took place in 1994 gave rise to both the creation of the World Trade Organization (WTO) and the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs), with membership in the former conditional on accession to the latter.[102] “[T]he TRIPs Agreement,” observed Marney L. Cheek, “ushered in a new era of guaranteed protections and mutual recognition of certain fundamental IP rights” (emphasis added).[103] For the United States and the rest of the “developed world,” Third World “development” meant little more than aggressively steering one of the “most effective vehicles of Western imperialism in history,” stripping away any chance for poor

these objections do not seem to appreciate is the easily demonstrable fact that the perversions that they decry are a feature of intellectual property, not a bug.[92] As we have seen, even a passing examination of the history of intellectual property and its uses in actual fact reveal that rather than being a legitimate and practicable right, intellectual property has always been a utensil for privilege and against the interest of the masses. It is just that, with capitalism reaching what Kevin Carson calls “a growing crisis of realization,” the new aristocracy of the corporate economy have had to resort to ever more obviously draconian and extreme implementations of intellectual property.[93]

It would be difficult to overstate the importance of intellectual property within the anatomy of today’s global, corporate capitalism. Even companies that facially do not seem to be engaged in the information sector of the economy are now heavily reliant on software that is protected by both copyrights and patents.[94] Federal Express, for example, utilizes a intricate software system “to control operations and also as a strong selling point to differentiate it from competitors.”[95] A passing review of the Fortune 500, regardless of the particular sector of economic activity that they operate within, uncovers a mass of patents and copyrights used not just in the “finished product” itself, but in all manner of internal operations—monopolized so as to preclude competitors (or potential competitors) from doing anything even remotely similar.[96] The acceleration of intellectual property madness within the corporate economy has dovetailed nicely with what Kevin Carson calls the “neoliberal revolution” of free trade, attended as it has been by a growing number of international treaties that now blanket the world.[97] Under the shelter of intellectual property, American companies have had their dreams of gutting human capital at home in favor of sweatshops abroad come true in ways that “the bosses” probably never imagined. With the growth of intellectual property, these firms have been able to keep their home bases—ensconced in the First World, the

monopolies endure.[58]

As many commentators have noted, the economic advantages of “getting there first” are more than enough incentive for inventors and for publishers.[59] Being on the cutting edge in a particular industry is important not just for the quasi-rents (note that these are distinguishable from the rents imposed by intellectual property monopolies insofar as they do not proceed from the use of political force, but instead from the natural operations of free exchange) that accrue before supply becomes elastic, but also for reputation. Firms that are seen as introducing a new product into the marketplace will be identified with enjoy identification with that product even without intellectual property protection. Even if the economic incentives alone were not enough to compel new inventions or works of art, literature, etc. in the absence of intellectual property, the burden would nevertheless rest with those who advocate the violation of an individual’s legitimate right to use or arrange her personal property in any way she desired.[60] It is specious to claim that intellectual property rights protect ideas and inventions, implying a negative right; what they actually do is grant a positive right to control over someone else’s property, for instance, their pen and ink, computer, or other raw materials to be assembled in a way forbidden by patent.[61]

Carried to its logical ends, intellectual property would—by limiting academics’ publications to only those completely original ideas (the absurdity of which requires no explanation)—prevent all scholarship and scientific advancement. Advocates of intellectual property often demur at this argument, noting that the law recognizes limits (they fail to mention that, if these limits do exist, they’re completely arbitrary), and does not protect scientific discoveries or theories (e.g., the contributions to science of Darwin or Newton). “But this distinction,” observes Roderick Long, “is an artificial one. Laws of nature come in varying degrees of generality and specificity; if it is a law of nature that copper

conducts electricity, it is no less a law of nature that this much copper, arranged in this configuration, with these other materials arranged so, makes a workable battery. And so on.”[62] Where lawmakers, courts, and regulators draw the line partitioning scientific discovery from invention has little, if anything at all, to do with concrete, scientific distinctions.

Contrary to the arguments of intellectual property’s vulgar apologists that it is on the strength of “free competition” that the “U.S. [information and software] industry has triumphed,” intellectual property benefits U.S. companies precisely through forcibly debarring the innovative spirit of potential competitors.[63] It is not difficult, at least for those paying even the most cursory attention, to see how. As Joshua N. Mitchell points out, the courts and Congress have been all too willing to expanding the monopolies inherent in intellectual property far beyond their ostensible purposes as defined by the Constitution.[64] He points to decisions like that of the Supreme Court in *Eldred v. Ashcroft*, in which the Court upheld the constitutionality of the Copyright Term Extension Act (CTEA) where it granted an additional 20 years to copyrights that were set to expire.[65] In that case, the CTEA acted to pull works that had gone into public domain—giving rise to a variety of new products—back into the thralls of the copyright holders.[66] The result “was simply a windfall to copyright owners, a redistribution of money from consumers to copyright owners, and . . . far fewer derivative works being created.”[67] Fair, open competition on a level playing field (i.e., anything but the state capitalists’ version of “free enterprise”), exactly the kind of tempestuous skirmish that truly benefits the lowly consumer, is just what the predominant holders of intellectual property rights use it to prevent.

In drawing parallels between the enclosure of the commons that led to industrial capitalism and the enclosure of knowledge and information that is currently underway, it will be important to

when intellectual property rights aggressively interfere with an individual’s use of her own rightfully-possessed effects. The notion that, due to a lack of monopoly mark-ups in the absence of intellectual property, research and development would grind to a halt under insufficient investment is hardly to be taken seriously. If the latest edition of Windows is as valuable to consumers as intellectual property advocates suggest it is, then we have no reason to think that, for instance, subscribers would not pay in advance.[88] Alternatively, it may yet be discovered that, without intellectual property monopolies protecting independent users from tweaking code to their needs, the Microsofts and Apples of the world would indeed become obsolete. Bearing in mind the economic inefficiencies of intellectual property adumbrated above, it is possible (and arguably likely) that these oversized, top-heavy firms are necessary for developing products in society only at the point of their juncture in society—that their preventing ordinary people from doing the heavy lifting of R&D on an open-source, peer-to-peer basis is itself what gives rise to the enormous capital outlays that seem to justify intellectual property.[89]

Insofar as “[i]ndustrial muscle is no longer enough to ensure a future of growth and profitability,” market actors “lacking intellectual property” are often enlisted to work “for other corporations in a sub-contract relationship.”[90] Such relationships, with Western (mostly American) companies in the position of principal or franchisor, have become increasingly important and prevalent within the paradigm of neoliberalism’s economy of empire. The “intensification [of intellectual property] under the pressures of globalisation” has meant that those “with vast lobbying resources, especially in the USA,” have been the most successfully at manipulating the “protection role” of patents and copyrights in software.[91] In recent years, cries that “big business . . . has perverted the patent system for its own ends” have grown louder and more frequent, but what the sources of

capitalism. The question for the political class, with the growth of software and technology as a truly high-yielding “means of production,” was and is, how can we wrench profits out of something that is, by its very nature, free to all and impossible to ever fully rein in? How can we commodify knowledge itself?[83] And while it has been increasingly difficult in practice to apply Oppenheimer’s “political means” to the ethereal realm of “cyberspace,” there have been no shortage of full-fledged and desperate attempts to cement capitalist rule over the knowledge and information that now drive the engines of global commerce.

Today, multinational corporations have succeeded in stippling the global marketplace with a bevy of laws, both domestic and international, calculated to fabricate and perpetuate the engrossment of the capital pivot point of the information age. “Software,” declared the National Research Council over 20 years ago, “is big business,” with “the economic importance of software” having risen even more dramatically in the 20 years since that proclamation than in the previous 30 that the Council was describing at the time.[84] Because intellectual property is so strikingly concentrated in rich corporate giants, it sits at the center of the class war, its upward redistributions of wealth costing ordinary working people, “particularly those of poorer countries,” tremendously.[85] And although many advocates of intellectual property argue that its protections are justified by the need for technology firms to recoup the losses of research and development, those costs are seldom carried by the firms themselves.[86] Even if we assumed that, for example, software companies were carrying their own costs most of the time, however, the data consistently show that the monopoly profits of intellectual property recover those costs within mere months of a piece of software’s release.[87] For adherents to Warren’s cost principle, broadly conceived, it is perfectly right and just that the capital-intensiveness of software research and development ought to be reflected in the cost of a package. The problem arises only

limn a history of the enclosure period. Furthermore, it will be necessary to demonstrate the ways in which enclosures of land accomplished the ruling class’s need for artificial—that is, state-created—scarcity, or what Franz Oppenheimer famously called “the political means” to wealth.[68] British historian Hilaire Belloc, treating the enclosures as a return to “slavery” as the “fundamental conception of society” following the “economically free” High Medieval period.[69] While Belloc perhaps overly romanticizes or idealizes the late Middle Ages, the dramatic rise in political enclosures certainly represented a fundamental and momentous change in the structuring of economic life. Belloc was a Catholic and a Distributist, and, as Marx and Engels recount it in *Capital*, “[T]he suppression of the monasteries, &c., hurled their inmates into the proletariat. The estates of the church were to a large extent given away to rapacious royal favourites.”[70] Traditional rights that included access and the ability to cultivate and take from the land were politically stamped out, not because some better, higher title had been discovered, but because the engrossment of the land was convenient for the powerful. The political class, wielding the coercive instruments of the state, thus “drove out, en masse, the hereditary sub-tenants and threw their holdings into one,” putting an end to the “open fields” that had provided sustenance to the working poor.[71] Beyond the seizures of Church-held lands, there was, under the Tudors, “a mighty surge” of enclosures that amounted to legal theft, on a catastrophic scale, of lands that rightfully belonged—if indeed they belonged to anyone—to those who had worked them for hundreds of years.[72] The end of feudalism in England, and the transformation of the legal framework that accompanied it, merely replaced one system of forced labor with another. The feudal rights, however few, of serfs evaporated under acts of Parliament that, while they are thought of today as “a triumph of the spirit of freedom,” functioned to “saddle[] . . . on the people at large” the dues formerly paid by the lords themselves.[73] Once the ability to subsist on previously

open lands was removed with high-handed indifference to the Lockean standards discussed above, the ruling class was free to rent the workers' own land back to them. If the capitalists were to have a pliable and amenable labor force, it was necessary to rule out the survival alternatives to wage labor, a condition that—contrary to capitalist apologetics—few if any would choose where the state had not intervened to cut off access to productive resources.

Rather than dwelling on the historical ephemera here, our purposes are sufficiently accomplished in the acknowledgement that the enclosures meant an imposition of an artificial right to private property (for the benefit of the elite), which right supplanted the natural right that, by any measure, remained with the toiling peasants. The English anarchist philosopher Thomas Hodgskin, a socialist in the lost sense of consistently adhering to the theories of Ricardo and Smith, described the natural/artificial dichotomy as follows: “[T]he great object of law and of government has been and is, to establish and protect a violation of that natural right of property they are described in theory as being intended to guarantee.”[74] Among the most central goals for the beneficiaries of the statist, capitalist economy today, is “creating an artificial scarcity for ideas and information where there need be none.”[75] The need for such a goal is clear enough. Just as access to an otherwise abundant “means of production” at the time of the genesis of capitalism would have threatened to destabilize the class society—and thus the idle, rentier lifestyle of the political class—today’s information economy undermines the ability of some to live off of the labor of others.

Economically, the effect of the artificial scarcities generated by legal monopoly or oligopoly is to restrict the supply side such as to push the price of whatever it is at issue higher than it would otherwise be, that is to say, without the coercive intervention of the state on behalf of the elite.[76] In the case of the enclosures of

England, the violent monopolization of land enabled a small few capitalists at the top of the pyramid to attain the status of oligopsonists in their purchase of labor. Although the paeans of capitalists exalt “competition,” had the capitalists had to compete with the alternatives for subsistence that they had used the state to defeat, the price of labor would have been driven to its cost. As explained by economists Michele Boldrin and David K. Levine in their book *The Case Against Intellectual Property*, “[T]he cost of innovation is a fixed cost and ideas are distributed at zero . . . marginal cost. Since perfect competition prices at marginal cost, the fixed cost cannot be recouped. Consequently, if producers of intellectual property are forced to compete with their customers, they will not be able to recoup the cost of creation.”[77] This argument, the claim that intellectual property violates “the cost principle,”[78] was the primary reason that nineteenth century anarchists like Benjamin Tucker opposed patents and copyrights. [79] Tucker’s forebear Josiah Warren maintained that in a free, stateless society, costs—which would, in the absence of state intervention, be fully internalized by each individual—would be “made the limit of price.”[80] Warren and Tucker did not think that price ought to be “made” to reflect cost using the declaration of some fiat of government, but that price would naturally express costs (of labor and materials) if no one were granted privileges from the state. They were thus ardent believers in the labor theory of value, but they knew that Boldrin and Levine neoliberal idea of “perfect competition” was a chimerical fool’s errand in calling for the state to create or foster this sublime condition.[81]

In making a comparison of land enclosures and those of intellectual property similar to the one undertaken here, C. Ford Runge writes that in both cases enclosure has simply meant a “right[] to exclude others from a stream of rents.”[82] In the new economy, wherein the sources of wealth are so often incorporeal mists floating somewhere out in the ether, the preservation of those rent streams has become vital for the continuation of