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## **COPYRIGHT, THE CREATIVE INDUSTRIES AND THE PUBLIC DOMAIN**

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### **Abstract**

This chapter argues that copyright's commodification of creativity has established a structure that, allied with aspects of the market for cultural goods and services, enables the domination of cultural output by the creative industries. The chapter argues that the primary tools of the commodification process have been the alienability of the copyright interest, the long duration of copyright, its horizontal expansion, its strong distribution rights, and the apparent demise of some of the most significant user rights. The consequent dominance of the creative industries over cultural output has had the effect of contracting the public domain and potentially restricting creativity. The chapter focuses on the question of available legal strategies for preserving, or even reclaiming, a portion of the public domain order to address the negative effects of the commodification process.

Keywords: creative industries, copyright, commodification, creativity, public domain.

### **Introduction**

In recent times the discourse of copyright has become, for better or worse, intimately connected with that of the so-called creative industries. This discourse recognises an essential aspect of copyright law, which is that it is focused on stimulating investment in the distribution of creative works. To some extent, this focus has an uneasy juxtaposition with copyright's more general claim to support and encourage creativity of the artistic and cultural variety. Whether or not the aims of supporting creativity and supporting investment in distribution are inherently uneasy bedfellows, it seems that the current system of international copyright law<sup>1</sup> has produced effects that tend to marginalize individual creativity: the cultural industries have not only spread out over most the bed, they are also hogging the blankets.

### **Copyright and Creativity**

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<sup>1</sup> Comprised by the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPs Agreement) and the Berne Convention for the Protection of Literary and Artistic Works of 1886.

The threat that the international copyright system poses to creativity, and associated values such as cultural diversity,<sup>2</sup> is a consequence of the process by which it commodifies and instrumentalises the cultural outputs with which it is concerned. There are five interdependent aspects of copyright law that have been essential to this process.<sup>3</sup> The first and most basic tool of commodification is the alienability of the copyright interest. This is a critical factor in the context of this chapter. Copyright law operates on the basis of a distinction between the author of copyright works and the owner of those works. While the author maintains some symbolic significance in copyright law,<sup>4</sup> the rights conferred by copyright are enjoyed by its owners. Sometimes authorship and ownership coincide. Authors of literary, dramatic, musical and artistic works are usually the first owners of the copyright in those works; and film directors typically have a share of the copyright interest.<sup>5</sup> However, at least in the Anglo-American system, these interests can be freely transferred by contract. Thus, it is frequently the case that authors of copyright works come under pressure to transfer their copyright to those who are making an investment in the distribution of the works, such as publishers, and music and film production companies. In other words, it is the practice of the creative industries to take advantage of the alienability of the copyright interest to gather in as many copyright interests as it can. Since the transfer of copyright interests is a question of contract, the extent to which a publisher or production company will be successful in doing this is largely a matter of relative bargaining positions and market power. Nevertheless, where this process of “gathering in” is successful, it has the consequence of uniting in the same hands the copyright interests in primary creative works and the copyright interests already enjoyed by those who invest in the distribution of those same works.<sup>6</sup>

A second significant aspect of copyright law making it an important tool of trade and investment is its duration. The long period of copyright protection increases the asset value of individual copyright interests.<sup>7</sup> Thirdly, copyright’s horizontal expansion means that it is progressively covering more and more types of cultural production. Fourthly, the strong commercial distribution rights,<sup>8</sup> especially those which give the

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<sup>2</sup> As enshrined, eg, in the UNESCO Convention on the Protection and Promotion of Cultural Diversity 2005. For an account of the overlaps between the concepts of culture with which the UNESCO Convention is concerned, and the subject matter of copyright law, see F Macmillan, “The UNESCO Convention as a New Incentive to Protect Cultural Diversity”, in H Schneider & P van den Bossche (eds), *Protection of Cultural Diversity from a European and International Perspective* (Antwerp: Intersentia, 2008), 163-192.

<sup>3</sup> For a fuller version of this argument see: F Macmillan, “Copyright and Culture: A Perspective on Corporate Power”, (1998) 10 *Media and Arts Law Review* 71-81; F. Macmillan, “Copyright and Corporate Power”, in R Towse (ed), *Copyright and the Cultural Industries* (Cheltenham: Edward Elgar, 2002), 99-118; & F Macmillan, “The Cruel ©: Copyright and Film” (2002) 24 *European Intellectual Property Review* 483-492.

<sup>4</sup> Eg, duration of copyright in literary, dramatic, musical and artistic works is calculated according to the life of the author: see, eg, UK Copyright, Designs and Patents Act 1988, s 12, & EU Copyright Term Directive 93/98/EEC.

<sup>5</sup> See, eg, UK Copyright, Designs and Patents Act 1988, s 11.

<sup>6</sup> Ie. copyright in the sound recording or film, copyright in the typographical arrangement of the published edition, copyright in the broadcast.

<sup>7</sup> See R Towse, “Copyright, Risk and the Artist: An Economic Approach to Policy for Artists” (1999) 6 *Cultural Policy* 91-107.

<sup>8</sup> See esp the WTO TRIPs Agreement, Arts 11 & 14(4), which enshrine rental rights in relation to computer programmes, films and phonograms; WIPO Copyright Treaty 1996, Article 7; and WIPO Performances and Phonograms Treaty 1996, Articles 9 & 13.

copyright holder control over imports and rental rights, have put copyright owners in a particularly strong market position, especially in the global context. Finally, the power of the owners of copyright in relation to all those wishing to use copyright material has been bolstered by a contraction of some of the most significant user rights in relation to copyright works, in particular fair dealing/fair use and public interest rights.

Viewed in isolation from the market conditions that characterise the cultural industries, copyright's commodification of cultural output might appear, not only benign, but justified by both the need for creators to be remunerated in order to encourage them to create<sup>9</sup> and, in particular, the need for cultural works to be disseminated in order to reap the social benefits of their creation.<sup>10</sup> However, viewed in context the picture is somewhat different. Copyright law has contributed to, augmented, or created a range of market features that have resulted in a high degree of global concentration in the ownership of intellectual property in cultural goods and services. Five such market features, in particular, stand out.<sup>11</sup> The first is the internationally harmonized nature of the relevant intellectual property rights.<sup>12</sup> This dovetails nicely with the second dominant market feature, which is the multinational operation of the corporate actors who acquire these harmonized intellectual property rights while at the same time exploiting the boundaries of national law to partition and control markets. The third relevant feature of the market is the high degree of horizontal and vertical integration that characterises these corporations. Their horizontal integration gives them control over a range of different types of cultural products. Their vertical integration allows them to control distribution, thanks to the strong distribution rights conferred on them by copyright law.<sup>13</sup> The fourth feature is the progressive integration in the ownership of rights over content and the ownership of rights over content-carrying technology. Finally, there is the increasing tendency since the 1970s for acquisition and merger in the global market for cultural products and services.<sup>14</sup> Besides being driven by the regular desires (both corporate and individual) for capital accumulation,<sup>15</sup> this last feature has been produced by the

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<sup>9</sup> See, however, R Towse, *Creativity, Incentive and Reward: An Economic Analysis of Copyright and Culture in the Information Age* (Cheltenham: Edward Elgar, 2001), esp chs 6 & 8, in which it is argued that copyright generates little income for most creative artists. Nevertheless, Towse suggests that copyright is valuable to creative artists for reasons of status and control of their work.

<sup>10</sup> For arguments about the importance of copyright in securing communication of works, see W van Caenegem, "Copyright, Communication & New Technologies" (1995) 23 *Federal Law Review* 322-347; & N W Netanel, "Copyright and a Democratic Civil Society" (1996) 106 *Yale Law Journal* 283-388.

<sup>11</sup> For a fuller discussion, see F Macmillan, "Public Interest and the Public Domain in an Era of Corporate Dominance" in B Andersen (ed), *Intellectual Property Rights: Innovation, Governance and the Institutional Environment* (Cheltenham: Edward Elgar, 2006), 46-69.

<sup>12</sup> Through, eg, Berne Convention for the Protection of Literary and Artistic Works of 1886, the TRIPs Agreement, Arts 9-14, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty.

<sup>13</sup> For a discussion of the way in which the film entertainment industry conforms to these features, see Macmillan, "The Cruel ©", n 3 *supra*.

<sup>14</sup> See R Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property* (Boulder: Westview Press, 1996), at 37ff. See also J Smiers, "The Abolition of Copyrights: Better for Artists, Third World Countries and the Public Domain", in *Copyright and the Cultural Industries*, n 3 *supra*, 119-139.

<sup>15</sup> Bettig, n 14 *supra*, at 37.

movements towards horizontal and vertical integration, and integration of the ownership of rights over content and content-carrying technology.

So far as creativity and cultural diversity are concerned, the consequences of this copyright facilitated aggregation of private power over cultural goods and services on the global level are not happy ones. Through their control of markets for cultural products the multimedia corporations have acquired the power to act as a cultural filter, controlling to some extent what we can see, hear and read.<sup>16</sup> Closely associated with this is the tendency towards homogeneity in the character of available cultural products and services.<sup>17</sup> This tendency, and the commercial context in which it occurs, has been well summed up by the comment that a large proportion of the recorded music offered for retail sale has “about as much cultural diversity as a Macdonald’s menu”.<sup>18</sup> It makes good commercial sense in a globalized world to train taste along certain reliable routes, and the market for cultural goods and services is no different in this respect to any other.<sup>19</sup> Of course, there is a vast market for cultural goods and services and, as a consequence, the volume of production is immense. However, it would obviously be a serious mistake to confuse volume with diversity.

The vast corporate control over cultural goods and services also has a constricting effect on the vibrancy and creative potential of what has been described as the intellectual commons or the intellectual public domain.<sup>20</sup> As Waldron comments, “[t]he private appropriation of the public realm of cultural artifacts restricts and controls the moves that can be made therein by the rest of us”.<sup>21</sup> The impact on the intellectual commons manifests itself in various ways.<sup>22</sup> For example, private control over a wide range of cultural goods and services has an adverse impact on freedom of speech. This is all the more concerning because control over speech by private entities is not constrained by the range of legal instruments that have been developed in Western democracies to ensure that public or governmental control over speech is minimised.<sup>23</sup> The ability to control speech, arguably objectionable in its own right,<sup>24</sup>

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<sup>16</sup> See further Macmillan, “Public Interest and the Public Domain in an Era of Corporate Dominance”, n 11 *supra*; and, in relation to the film industry, see Macmillan, “The Cruel ©”, n 3 *supra*, at 488-489. See also A Capling, “Gimme shelter!”, in *Arena Magazine* (February/March 1996), 21-24; R L Abel, *Speech and Respect* (London: Stevens & Son/Sweet & Maxwell 1994), at 52; R L Abel, “Public Freedom, Private Constraint” (1994) 21 *Journal of Law and Society* 374-382, esp at 380.

<sup>17</sup> See also Bettig, n 14 *supra*.

<sup>18</sup> Capling, n 16 *supra*, at 22.

<sup>19</sup> See T Levitt, “The Globalisation of Markets” (1983) 61 *Harvard Business Review* 92-102. Cf J Gray, *False Dawn: The Delusions of Global Capitalism* (New York: New Press, 1998), at 57-58. However, Gray’s view seems to be that diversity stimulates globalization, which must be distinguished from the idea that globalization might stimulate diversity.

<sup>20</sup> This is a concept that has become, unsurprisingly, a central concern of intellectual property scholarship: see, eg, C Waelde & H MacQueen (eds), *Intellectual Property: The Many Faces of the Public Domain* (Cheltenham: Edward Elgar, 2007).

<sup>21</sup> J Waldron, “From Authors to Copiers: Individual Rights and Social Values in Intellectual Property” (1993) 69 *Chicago-Kent Law Review* 841, at 885.

<sup>22</sup> See further Macmillan, “The Cruel ©”, n 3 *supra*; Macmillan, “Public Interest and the Public Domain in an Era of Corporate Dominance”, n 11 *supra*; & F Macmillan, “Commodification and Cultural Ownership” in J Griffiths & U Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses* (Oxford: Oxford University Press 2005), 35-65.

<sup>23</sup> See further F Macmillan Patfield, “Towards a Reconciliation of Copyright and Free Speech”, in E Barendt (ed), *Yearbook of Media Law and Entertainment Law* (Oxford: Clarendon Press, 1996), 199-233; & Macmillan, “Commodification and Cultural Ownership”, n 22 *supra*.

facilitates a form of cultural domination by private interests. This may, for example, take the subtle form of control exercised over the way we construct images of our society and ourselves.<sup>25</sup> But this subtle form of control is reinforced by the industry's overt and aggressive assertion of control over the use of material assumed by most people to be in the intellectual commons and, thus, in the public domain. The irony is that the reason people assume such material to be in the commons is that the copyright owners have force-fed it to us as receivers of the mass culture disseminated by the mass media. The more powerful the copyright owner the more dominant the cultural image, but the more likely that the copyright owner will seek to protect the cultural power of the image through copyright enforcement. The result is that not only are individuals not able to use, develop or reflect upon dominant cultural images, they are also unable to challenge them by subverting them.<sup>26</sup> Coombe describes this corporate control of the commons as monological and, accordingly, destroying the dialogical relationship between the individual and society.<sup>27</sup> Some remnants of this dialogical relationship ought to be preserved by copyright's fair dealing/fair use right. It is, after all, this aspect of copyright law that appears to be intended to permit resistance and critique.<sup>28</sup> Yet the fair dealing defence is a weak tool for this purpose and becoming weaker.<sup>29</sup>

### Protecting the Public Domain

Since the contraction of the public domain is a key aspect of the problem that the copyright system poses for creativity, it is important to give some consideration to the public domain's relationship with the propertised domain of copyright law. The juxtaposition, implicated in such a consideration, of the public domain and the propertised domain tends to suggest that the metaphorical realm of intellectual space is composed of a simple binary opposition,<sup>30</sup> which divides it between that which is subject to private intellectual property rights and that which is not. The two are envisaged as butting up against one another so that, if we were to conceive of this in physical terms, each fits snugly against the shape of the other. More than this, if the

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<sup>24</sup> See, eg, the discussion of the justifications for the free speech principle in E Barendt, *Freedom of Speech* (Oxford: Oxford University Press, 2005, 2<sup>nd</sup> ed).

<sup>25</sup> See further, eg, R Coombe, *The Cultural Life of Intellectual Properties* (Durham/London: Duke University Press, 1998), at 100-129, which demonstrates how even the creation of alternative identities on the basis of class, sexuality, gender and race is constrained & homogenised through the celebrity or star system.

<sup>26</sup> See, eg, *Walt Disney Prods v Air Pirates*, 581 F 2d 751 (9<sup>th</sup> Cir, 1978), *cert denied*, 439 US 1132 (1979). On this case, see Waldron, n 21 *supra*; & Macmillan, "Public Interest & the Public Domain in an Era of Corporate Dominance", n 11 *supra*. See also M Chon, "Postmodern 'Progress': Reconsidering the Copyright and Patent Power", (1993) 43 *DePaul Law Review* 97-146; D Koenig, "Joe Camel and the First Amendment: The Dark Side of Copyrighted and Trademark-Protected Icons" (1994) 11 *Thomas M Cooley Law Review* 803-838; & Macmillan Patfield, "Towards a Reconciliation of Copyright and Free Speech", n 23 *supra*.

<sup>27</sup> Coombe, n 25 *supra*, at 86.

<sup>28</sup> See J Gaines, *Contested Culture: The Image, the Voice and the Law* (Chapel Hill/London: University of North Carolina Press, 1991), at 10.

<sup>29</sup> See further Macmillan, "Public Interest & the Public Domain in an Era of Corporate Dominance", n 11 *supra*.

<sup>30</sup> E Hemmungs Wirtén, "Out of Sight & Out of Mind: On the Cultural Hegemony of Intellectual Property (Critique)" (2005) 20 *Cultural Studies* 165.

two also take up the whole of intellectual space, altering the contours of intellectual property will alter those of the public domain. In this sense, there is a tendency to imagine the public domain as a largely passive victim of the aggressive presence of intellectual property – so that the boundary between the two changes only when intellectual property rights expand.

The idea of the public domain in intellectual space is heavily dependent on principles of Roman law governing physical space. Some of the conceptual problems that arose with respect to physical space in Roman law have also emerged in the modern notion of intellectual space. At the same time, the metaphorical existence of modern intellectual space seems to lack some of the complexity of its forbear in physical space. The relevant Roman law principles recognised various dimensions of nonexclusive – but not necessarily public - property.<sup>31</sup> The most well-used of these so far as intellectual property/public domain debate are concerned are *res communes* and *res publicae*. The former referring to things incapable by their nature of being exclusively owned, while the latter referring to things open to the public by operation of law. These seem to have translated into the modern day debate about property in intellectual space in the specific form of the concepts of the commons and the public domain. The fact that these expressions are often used interchangeably is probably not much of a surprise given that the Romans had a similar problem with *res communes* and *res publicae*,<sup>32</sup> which reflected the modern day tendency “to mix up normative arguments for ‘publicness’ with naturalistic arguments about the impossibility of owning certain resources”.<sup>33</sup> This confusion between the commons and the public domain, *res communes* and *res publicae*, has done nothing to simplify the epistemological basis of the dichotomy between intellectual property and intellectual public space.<sup>34</sup> More than this, it has tended to conceal the fact that, traced back to their Roman law origins, neither of these concepts seems to provide a particularly strong basis for a vibrant public or non-exclusive intellectual space in today’s world.

So far as *res communes* is concerned, one might be forgiven for thinking that because of the non-rivalrous and non-wasteable nature of things in intellectual space they are all incapable by their nature of being exclusively owned or appropriated.<sup>35</sup> As is well-known, there has been a tendency for law governing physical space, particularly environmental law, to foreclose or regulate the use of the physical commons. At least in some cases, this has been a benevolent response to the famous “tragedy of the commons”,<sup>36</sup> according to which resources held commonly are plundered, degraded and eventually exhausted.<sup>37</sup> The non-rivalrous and non-wasteable nature of things in

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<sup>31</sup> See C M Rose, “Romans, Roads and Romantic Creators: Traditions of Public Property in the Information Age” (2003) 66 *Law & Contemporary Problems* 89.

<sup>32</sup> Rose, n 31 *supra*, at 96, citing A Borkowski, *Textbook on Roman Law* (London: Blackstone, 1994), at 144.

<sup>33</sup> Rose, n 31 *supra*, at 96.

<sup>34</sup> See also Hemmungs Wirtén, n 30 *supra*, who suggests that it is time for “some good old epistemological soul-searching”.

<sup>35</sup> Except, and for so long as, they are kept secret: Rose, n 31 *supra*, at 95.

<sup>36</sup> See G Hardin, “The Tragedy of the Commons” (1968) 162 *Science* 1243, 1244.

<sup>37</sup> See further, eg, Hardin, n 36 *supra*; & E Ostrom, *Governing the Commons: The Evolution of Institutions or Collective Action* (Cambridge & New York: Cambridge University Press, 1990), esp ch 1, in which the tragedy of the commons is contrasted with other models of the commons.

intellectual space tends to suggest that this is not a reason for the foreclosure of common intellectual space, but intellectual property law has done it anyway. Or, at least, it has tried to do it. It may be that there are certain things that not even the might of intellectual property law can convert into property capable of exclusive ownership in any meaningful sense. For example, the ease of copying works available in digital form allied with the difficulty in identifying and proceeding against unauthorised copiers, may be an indication that this part of intellectual space is incapable of the type of exclusive ownership enjoyed in relation to other types of intangible works. On the other hand, the combined effect of technology and law may render even this part of intellectual space appropriable.

Intellectual property law has not, of course, sought to foreclose all of the intellectual commons. Copyright law, famously, rejects the ownership of ideas, embracing the tenuous distinction between the unprotected idea and the protected expression,<sup>38</sup> although this concept seems to be unevenly applied<sup>39</sup> and subject to much erosion.<sup>40</sup> More generally, creative acts that do not fall within the realm of copyright law are not appropriated.<sup>41</sup> However, copyright (along with intellectual property rights related to it) has been distinguished by a tendency to extend its reach over more and more creative or innovative acts in intellectual space.<sup>42</sup> To the extent that intellectual property laws continue to exclude certain parts of intellectual space from the propertised domain, it is far from clear whether their exclusion is because they are, by their legal nature, incapable of being owned, and therefore part of the commons, or because they should not be brought into the private domain of intellectual property but should be kept in the public domain.

Arguably, because things in intellectual space are all incapable of ownership in the sense that things in physical space may be owned, but are all – or nearly all – quite capable of being appropriated in another way by force of law, the concept of the commons or *res communes* is a difficult one to apply to intellectual space. At least, it is difficult once we concede any concept of ownership in intellectual space, unless by referring to the commons we merely mean to be descriptive and refer to those things that, as a matter of fact, have not been subsumed into the intellectual property regime. The concept of the *res publicae*, where there is the scope for what Rose describes as

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<sup>38</sup> See, eg, *Donoghue v Allied Newspapers* [1938] Ch 106; *Fraser v Thames Television* [1983] 2 All ER 101; *Green v Broadcasting Corporation of New Zealand* [1989] RPC 469 & 700.

<sup>39</sup> Eg, the two dimensional/three dimensional infringement rule in relation to artistic works in, eg, the UK Copyright Designs and Patents Act 1988, s 17(3), arguably breaches the idea/expression rule: see further F Macmillan, “Artistic Practice & the Integrity of Copyright Law” in M Rosenmeier & S Teilmann (eds), *Art & Law: The Debate over Copyright* (Copenhagen, DJØF, 2005); & F Macmillan, “Is copyright blind to the visual?” (2008) 7 *Visual Communication* 97. See also, eg, the provisions on the protection of preparatory design material for computer programmes in the UK Copyright, Designs & Patents Act 1988, s 3(1)(c).

<sup>40</sup> See, eg, *Krisarts v Briarfine* [1977] FSR 577; *Ravenscroft v Herbert* [1980] RPC 193; *Designer Guild Ltd v Russell Williams (Textiles) Limited* [2000] UKHL 58.

<sup>41</sup> See, eg, *Merchandising v Harpbond* [1983] FSR 32; *Komesaroff v Mickle* [1988] RPC 204; *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 445; *Norowzian v Arks Ltd (No 2)* [2000] FSR 363 (CA).

<sup>42</sup> Eg, the inclusion of computer programmes and preparatory design work for them within the definition of protected “literary works” (see, eg, Directive 91/250/EEC on the legal protection of computer programmes & the UK, Copyright, Designs & Patents Act 1988, s 3(1)) and the database right established under Directive 96/9/EC on the legal protection of databases.

“normative arguments for ‘publicness’”,<sup>43</sup> seems to offer far greater promise. Unlike the concept of *res communes*, *res publicae* in physical space does not reject the notion of private property. According to Rose, *res publicae* is always open to the possibility of ownership “subject to the requirements of reasonable public access”.<sup>44</sup>

In physical space, *res publicae* is regarded as normatively justified by the need to ensure productive synergistic interactions that would otherwise be obstructed by denying public access.<sup>45</sup> The irony in the application of this concept to intellectual space is that precisely because things in intellectual space are non-rivalrous and non-wasteable there are not many reasons why productive synergistic interactions should not take place.<sup>46</sup> That is, there are not many reasons apart from intellectual property law itself. By regarding things in intellectual space as capable of appropriation and not therefore *res communes*, intellectual property law has created a system of obstructions to synergistic interactions. Then, in response to these obstructions, it has created its own mechanisms to defend *res publicae*. Arguably, this sounds slightly more ridiculous than it actually is. One of the reasons that productive synergistic interactions might not take place in unfettered intellectual space is because, in the absence of reward, appropriate investment and effort might not be made. Even accepting this argument and accepting that the most appropriate form of “reward” is the creation of intellectual property rights,<sup>47</sup> it seems reasonably clear that to achieve productive synergistic interactions there needs to be a carefully calibrated balance between property rights in intellectual space and rights that preserve *res publicae*. In copyright law, this is generally achieved through two mechanisms: limits on duration and exceptions to the exercise of the exclusive rights. With respect to the first mechanism, the provisions of the law automatically defend the *res publicae*, whereas in relation to the second those seeking to use the exceptions must make a case. Despite the existence of these mechanisms, it would be straining credulity to suggest that the balance between property rights and rights that preserve *res publicae* in intellectual space is carefully calibrated. The history of intellectual property law generally, and copyright law specifically, has marked a progressive extension of the duration of intellectual property rights and the contraction of their respective exceptions and defences.

The duration of copyright has expanded from the initial maximum period of fourteen years<sup>48</sup> to the current high-water mark of ninety years after the death of the author in some jurisdictions. The vitality of its fair dealing exceptions, which are essential to permitting the sort of access that allows productive synergistic interactions, has been sapped by a combination of restrictive judicial interpretation,<sup>49</sup> technological

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<sup>43</sup> Note 31 *supra*, at 96.

<sup>44</sup> Rose, n 31 *supra*, at 99. On the attributes of *res publicae* see, Rose, *ibid.*, 96-100.

<sup>45</sup> Rose, n 31 *supra*, 96-98.

<sup>46</sup> See also Rose, n 31 *supra*, 102-103.

<sup>47</sup> A point that is not universally accepted: see, eg, Smiers, n 14 *supra*, at 120; & M van Schijndel & J Smiers, “Imagining a World Without Copyright: The Market & Temporary Protection a Better Alternative for Artists & the Public Domain” in H Porsdam (ed), *Copyright & Other Fairy Tales* (Cheltenham: Edward Elgar, 2005); J Smiers & M van Schijndel, *La fine del copyright. Come creare un mercato culturale aperto a tutti* (Viterbo: Stampa Alternativa, 2010).

<sup>48</sup> Statute of Anne 1709 (UK).

<sup>49</sup> See, eg, *Rogers v Koons*, 751 F Supp 474 (SDNY 1990), *aff’d*, 960 F 2d 301 (2d Cir), *cert denied*, 113 S Ct 365 (1992), in which it was held that the fair use right only applied where the infringing work

innovations, and new legal devices that interact with that technology.<sup>50</sup> At the same time as the Internet has opened up a panoply of apparently free artefacts in intellectual space, other forms of digital technology are being used to restrict access to highly sought after information.<sup>51</sup> A further matter that accentuates the lack of balance in the copyright regime is the fact that the application of the exceptions is open to considerable legal disputation, which frequently means that the deep pockets of large corporate rights' holders are pitted against those of more limited means.

The dominance of *res communes* and *res publicae* in informing our notion of the public domain as it relates to intellectual property in intellectual space, appear be connected to its somewhat impoverished and under-imagined nature. While there is nothing inherently unusual about a lack of imagination, especially in relation to legal concepts, its absence here is a little more surprising. This is because there are two further Roman law concepts that could be employed to flesh out the public domain in intellectual space. One of these is *res divini juris*, referring to things that cannot be owned because of their sacred or religious nature.<sup>52</sup> In the physical realm, ownership of things such as temples and icons was offensive to the gods. One can only speculate that offence to the gods would have been caused by general presumptuousness and by the fact that the ownership of such property would confer the type of power that might rival their own. At first blush, the application of this category in the context of the current debate might not be obvious. These days we are not necessarily so sensitive about the feelings of divine beings, however we still recognise the cultural power of the iconic (whether of traditional religious significance or not). Like the Roman gods, if for slightly different reasons, we should be anxious about the idea that such power can be exclusively appropriated in intellectual space.

To some extent, copyright law has eschewed exclusive rights in categories of the iconic. Rose suggests, for example, that in intellectual space this category might include “the canon, the classics, the ancient works whose long life has contributed to their status as rare, extraordinary”.<sup>53</sup> Fortunately, the period of copyright duration has not yet become so long that we have to worry about the inclusion of these sorts of things in propertised intellectual space. However, Rose goes on to argue:

[L]est we forget that all things godlike may be accompanied by lesser gods (or even false ones) and their representations, we might wish to include here too the iconography of modern commercial culture, the Mickeys and Minnies and Scarletts ... though the point is controversial, the category of *res divini juris* could well embrace this iconography and dedicate it at least in some measure to the public, as in copyright law's exception for parody.<sup>54</sup>

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has used a copyright work for the purpose of criticising that work, rather than for the purpose of criticising society in general. On the significance of this case, see further Macmillan, “Corporate Power & Copyright” n 3 *supra*; & Macmillan, “Public Interest and the Public Domain in an Era of Corporate Dominance”, n 11 *supra*.

<sup>50</sup> The particular device in question is the anti-circumvention right. For a case that illustrates the dangers of this right, see *Universal City Studios, Inc v Corley*, 273 F 3d 429 (US Ct of App (2d Cir), 2001). See further, Macmillan, “Public Interest and the Public Domain in an Era of Corporate Dominance”, n 11 *supra*.

<sup>51</sup> A classic example of this is the dispute over access to electronic journals.

<sup>52</sup> Rose, n 31 *supra*, 108-110.

<sup>53</sup> Rose, n 31 *supra*, 109.

<sup>54</sup> Rose, n 31 *supra*, 109.

Copyright law certainly could do this, but there is little evidence currently that it would. Indeed, Mickey and Minnie have been able to rely on intellectual property law to protect them and their cultural baggage from parody.<sup>55</sup> The exception for parody is not well-defined<sup>56</sup> and, to the extent that it must rely on the fair dealing defences, is compromised by their shrinkage.

The final category of non-exclusive property under Roman law that has some resonance in the context of the colonising of intellectual space by intellectual property is *res universitatis*.<sup>57</sup> In modern parlance, this refers to a regime that is bounded by property rights, but creates a type of limited public domain (or commons) within its boundaries.<sup>58</sup> In physical space, this merges the advantages of productive synergistic interaction with the need to avoid the tragedy of the commons. In intellectual space, as discussed above, there is no need to avoid the tragedy of the commons, so the utility of *res universitatis*, or the bounded commons, must be to preserve productive synergies while maintaining the incentive to produce such synergies through the exercise of rights against outsiders. As the name suggests, this type of bounded community is commonly reflected in the activities of academic and scholarly groupings.<sup>59</sup> It may also describe the way in which members of traditional and indigenous communities produce innovations, knowledge and other types of creative expressions. As this example serves to remind us, intellectual property law has some difficulties in recognising these types of creative or innovative communities.<sup>60</sup> The primary reason for this is that intellectual property is always anxious to identify the owner of the relevant right. In doing this, it is likely to disregard many contributions from the relevant community and to muddle up concepts of origination, ownership and use.<sup>61</sup> Copyright law does enjoy a very limited ability to recognise the concept of the bounded creative or innovative community through the device of joint authorship, which it transforms into joint ownership. However, this concept is so limited in law that it can rarely do justice to the dynamic relations of a creative or innovative community.<sup>62</sup> In any case, the successful use of the concept of joint authorship to nourish a vibrant creative or innovative community depends upon an unrealistic degree of goodwill, if not goodness, on the part of all the members of the relevant community.<sup>63</sup>

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<sup>55</sup> See *Walt Disney Prods v Air Pirates*, 581 F 2d 751 (US Ct of Apps (9<sup>th</sup> Cir), 1978), *cert denied*, 439 US 1132 (1979). And see n 26 *supra*, and accompanying text.

<sup>56</sup> See, eg, *Joy Music v Sunday Pictorial Newspapers* [1960] 2 WLR 615; *Williamson Music v Pearson Partnership* [1987] FSR 97.

<sup>57</sup> For a description of *res universitatis*, see Rose, n 31 *supra*, 105-108.

<sup>58</sup> For an example of the application of this concept in physical space, see Ostrom, n 37 *supra*.

<sup>59</sup> See Rose, n 31 *supra*, 107-08; R P Merges, "Property Rights Theory & the Commons: The Case of Scientific Research" (1996) 13 *Social Philosophy and Policy* 145.

<sup>60</sup> In relation to traditional & indigenous communities, see M Blakeney, "Protecting Expressions of Australian Aboriginal Folklore under Copyright Law" [1995] 9 *European Intellectual Property Review* 442; & M Blakeney, "The Protection of Traditional Knowledge under Intellectual Property Law" [2000] 6 *European Intellectual Property Review* 251.

<sup>61</sup> See further, eg, M Chon, "New Wine Bursting From Old Bottles: Collaborative Internet Art, Joint Works, & Entrepreneurship" (1996) 75 *Oregon Law Review* 257.

<sup>62</sup> Chon, n 61 *supra*, at 270-272; & C M Rose, "The Several Futures of Property: Of Cyberspace & Folk Tales, Emission Trades & Ecosystems" (1998) 83 *Minnesota Law Review* 129, at 158ff.

<sup>63</sup> See also Rose, n 31 *supra*, 107, who observes in relation to creative or innovative communities within universities: "Here too there are opportunists, charlatans & zealots - & to some degree commercial users - who can disrupt the process".

## Does the public domain really matter so much?

The importance of the various dimensions of the public domain that may be analogised to *res communes*, *res publicae*, *res divini juris* and *res universitatis* lies in the extent to which they are capable of rising to the role that the public domain needs to play in today's world. The reason that the public domain has come to matter so much in the debate about intellectual space and its creeping propertisation is not just because of some intuitively appealing ideas about the importance of balance between it and the propertised domain, it is rather a consequence of the dangers posed by the power of those few who hold so much of the really bankable property in intellectual space. Intellectual space is no longer divided between a public domain and a propertised zone in which a rich diversity of author-originators each wield exclusive rights over a small plot. To be sure, these people still exist as owners of intellectual property rights, but the commodifiable nature of intellectual property rights means that vast tracts of prime intellectual space have been bought up by powerful multinational corporate interests, the big players of the creative industries.<sup>64</sup> Here, the analogy with physical space similarly held is alarming - and rightly so. This power, which resides to a considerable degree in the hands of concentrated corporate sectors, means that its members are able to exert undue control over the direction of significant areas of cultural and technical development.<sup>65</sup> Even more seriously, the power that has been acquired by the corporate players, partly although not exclusively on the back of intellectual property rights, means that they are able to exert more and more control over the shape of intellectual property law itself.<sup>66</sup>

The public domain is the only place in intellectual space in which the power of the corporate giants can be challenged and resisted. One of the reasons why the power of the concentrated corporate sectors over intellectual property law is a matter of such concern is that intellectual property has a symbiotic relationship with the public domain. That is, it shapes the public domain, which might be conceived of alternatively as its progeny, rather than being in a binary opposition to it. In this lies the tragedy of the modern public domain in intellectual space. If the formation of intellectual property law is subject to the power of those who dominate the propertised part of intellectual space, then it seems likely that this part will expand and the public domain will contract. As the discussion above has attempted to demonstrate, this is exactly what has happened. *Res communes* may be weakly analogised to that part of the public domain that intellectual property law deems incapable (for now) of appropriation. However, intellectual property law has shown a

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<sup>64</sup> For accounts of this process, see eg Bettig, n 14 *supra*; Macmillan, "Public Interest and the Public Domain in an Era of Corporate Dominance", n 11 *supra*; & D Bollier, *Brand-name Bullies: The Quest to Own & Control Culture* (Hoboken, John Wiley, 2005).

<sup>65</sup> See Macmillan, "Public Interest and the Public Domain in an Era of Corporate Dominance", n 11 *supra*; S Vaidhyathan, *Copyrights & Copywrongs: The Rise of Intellectual Property & How it Threatens Creativity* (New York: New York University Press, 2001) ; L Lessig, *Free Culture: How Big Media Uses Technology & the Law to Lock Down Culture & Control Creativity* (New York: Penguin Press, 2004).

<sup>66</sup> The classic example of this is the negotiation & conclusion of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights: see S K Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge: Cambridge University Press, 2003).

tendency to deem more and more of what we might have considered *res communes* as capable, after all, of appropriation. The concept of *res publicae* in intellectual space, which is justified by the importance of productive synergistic interactions, is defended (or not) by the variable and constantly changing rules on duration and a progressively weakening range of defences and exceptions.

What is perhaps of equal concern to the contraction of these aspects of the public domain in intellectual space is that the public domain that has been created by intellectual property law seems to have been a rather thin concept compared to the multilayered idea of the public domain in Roman law. The bounded community envisaged by *res universitatis* is poorly catered for in intellectual property, although licensing devices may be used to create something that looks rather like the bounded creative or innovative community. Such communities are capable of indirectly tilting against the power of the corporate giants by developing an alternative space for creativity and innovation, although their ability to form the basis of a direct attack on the monolith of corporate power is open to question. More capable of mounting such a direct attack is the concept of *res divini juris*, which is grounded in the idea that the potency of some symbols gives too much power to those who might seek to appropriate them. This idea does not seem to have gained much influence in intellectual property law's construction of the public domain, although it does have some atrophying tools that might be used for this purpose.

### **Is that all there is?**

A key aspect of the public domain in both intellectual and physical space is that in order to have vitality it needs to be defended and nurtured. It has been argued above that in intellectual space, intellectual property law, including copyright law, inadequately provides the means for the defence of the public domain. But, despite the imagined binary world of intellectual property, there are other legal tools for the regulation and order of activity in intellectual space. These include, for instance, censorship, obscenity and blasphemy laws, defamation, laws governing national security, and laws protecting human rights, including the right to free speech. It seems that at least some of these laws have the effect of altering the boundary between the public domain and the propertised zone. For example, there is some evidence that courts will refuse to enforce copyright in material that is regarded as obscene,<sup>67</sup> or has been produced contrary to national security obligations.<sup>68</sup> In these sorts of cases it is arguable that artefacts in intellectual space are being forced out of the propertised zone and into the public domain, where they will become subject to other forms of regulation designed to ensure that the public domain remains an orderly and productive one. Of course, it might be argued that copyright law has attempted to internalise considerations of public policy<sup>69</sup> with the result that it has pushed material that transgresses certain norms into the public domain where it may be regulated by areas of law more suited to the purpose. The distinction between exactly what is pushed out by intellectual property law and what is pulled out by other

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<sup>67</sup> Eg *Glyn v Weston Feature Fims* [1916] 1 Ch 261.

<sup>68</sup> Eg *AG v The Guardian Newspapers (No 2)* [1988] 3 All ER 542; & see also F Patfield, "The House of Lords Decision in the Spycatcher Litigation" [1989] 1 *European Intellectual Property Review* 27.

<sup>69</sup> See, eg, UK Copyright, Designs and Patents Act 1988, s 171(3).

areas of law is, however, rather obscure. And it is not necessarily clear that what intellectual property law pushes out into the public domain has a significant degree of identity with that which other areas of the law might seek to pull into it.

The relationship between human rights law and intellectual property law is the clearest (if anything here is clear) example of an uncertain tussle at the borders of propertised intellectual space and the public domain. Human rights law, or at least norms driven by this area of law, seems to knock at the door of the propertised domain in intellectual space requesting the release of certain material for limited times and purposes. A primary human rights concern in the context of copyright law relates to freedom of speech issues.<sup>70</sup> In essence, the tension is between the control that the copyright owner has over the copyright work and the argument that the work should, for certain purposes, subsist in the public domain.

Despite the fact that copyright law grounds a system that might be argued to constitute extensive private control over speech, it has shown little concern with freedom of speech issues. The key to copyright law's comparative inattention to countervailing concepts of free speech appears to be threefold. First, the role of copyright in stimulating expressive diversity is often considered to outweigh or nullify any negative effects on freedom of speech.<sup>71</sup> It is accepted that a certain degree of copyright protection is necessary for the maintenance of free speech, perhaps because it is likely to encourage expressive autonomy and diversity, but at least because it is likely to encourage the widespread dissemination of such expressive autonomy and diversity. These are, in turn, prerequisites for the sort of vigorous public domain that is essential to maintaining a democratic political and social environment, which is the main utilitarian concern of free speech principles.<sup>72</sup> This does not, however, mean that we should be blind to the possibility that under certain conditions the way that copyright law restricts activities that might otherwise take place in the public domain raises serious freedom of speech concerns. The second reason why copyright has paid little attention to free speech concerns is that there is a prevailing belief that copyright has internal mechanisms that are capable of dealing with freedom of speech issues, if they arise. Particular emphasis in this respect is placed on the idea/expression dichotomy and the fair dealing defences. There is no doubt that the idea/expression dichotomy is of considerable importance here because it prevents the monopolisation of information and ideas that are capable of being expressed differently to the way in which they are expressed in the material subject to copyright protection. However, the utility of the dichotomy in relation to non-literary copyright material is dubious.<sup>73</sup> Where the idea/expression dichotomy cannot do the job, the fair dealing defences may provide a partial back-up. But it is only partial: despite the potential usefulness of the fair dealing defence for criticism and review, the defences are unable to take into much account the most critical factor in relation to securing free speech.

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<sup>70</sup> For a comprehensive overview of the relationship between copyright & free speech, see Griffiths & U Suthersanen, n 22 *supra*.

<sup>71</sup> See, eg, Netanel, n 10 *supra*.

<sup>72</sup> See Barendt, n 24 *supra*, ch 1; Netanel, n 10 *supra*; & Macmillan, "Commodification and Cultural Ownership", n 22 *supra*, at 35.

<sup>73</sup> See further M Nimmer, *Freedom of Speech* (1984), 2:05[C], 2-73, concerning photographs of the My Lai massacre; Waldron, n 21 *supra*, 858n, concerning the video film of two white Los Angeles policemen beating Rodney King, a black motorist; Macmillan Patfield, n 23 *supra*.

The critical factor in securing free speech in a vibrant public domain is not so much the question of the extent to which material is subject to property rights, it is rather the nature of the rights' holder and, specifically, the degree of power wielded generally by that rights' holder in intellectual space. This is linked, in a negative way, to the third key to copyright's inattention to free speech principles, which is that the very fact that copyright enables the exercise of private, rather than governmental, control over speech means that the risks that copyright poses to free speech are underestimated or ignored. This is despite the fact that a vigorous public domain is as much threatened by the concentration in private hands of copyright ownership over cultural products as it would be if such ownership was concentrated in the hands of the state. In fact, an argument might even be made that concentration of such ownership in private hands is all the more dangerous because at least the state is accountable for the way it wields power both through the electoral process and through the tools of administrative law. The private sector is, of course, accountable through market mechanisms. Some questions might be raised about the effectiveness of these mechanisms in the case of the media and entertainment corporations, which have vast and valuable property rights in intellectual space and hold overwhelming power in the market for cultural products. Since these corporations have acquired the ability to shape taste and demand through selective release and other devices for cultural filtering, along with the ability to suppress critical speech about the process of taste-shaping,<sup>74</sup> one might conclude that the market mechanism is somewhat defective.

### **Conclusion: Re-Drawing the Boundaries**

As the foregoing discussion has attempted to demonstrate, while there is a range of other laws that regulate intellectual space, only intellectual property has a symbiotic relationship with the public domain. That is, the rights attaching to intellectual property shrink and expand conversely with the alterations in the contours of the public domain. Moreover, intellectual property law is largely responsible for drawing the boundary between what is subject to property rights, when and how, and what is not. Some (shrinking) parts of intellectual space have been ignored or excluded by intellectual property law. Effectively, in Roman law terms they are for the time being something akin to *res communes*, legally incapable of appropriation. Doubtless, there are also vast swathes of intellectual space that might currently be analogised to the Roman law concept of *res nullius*, the space in which things belong to no-one because no appropriation recognised by law has yet taken place. However, much of intellectual space has been colonised by intellectual property. Within that space, intellectual property law itself has declared some things to be in the public domain, either for certain limited purposes or by effluxion of time. Most of what is in the public domain for these purposes might be analogised to the concept of *res publicae*, although the current limits to this aspect of the public domain seem to be depriving it of much vitality. Other Roman law concepts of the public domain in physical space,

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<sup>74</sup> See further; Macmillan, "Copyright and Corporate Power", n 3 *supra*; Macmillan, "The Cruel ©: Copyright & Film" n 3 *supra*; Macmillan, "Public Interest and the Public Domain in an Era of Corporate Dominance", n 11 *supra*.

such as *res divini juris* and *res universitatis*, seem to have had little impact on the way in which intellectual property law creates the public domain in intellectual space.

If intellectual property law not only has a symbiotic relationship with the public domain in intellectual space, but also is largely responsible for determining the boundary between it and the exercise of exclusive property rights, then an obvious way in which to give the public domain more vitality is to alter those aspects of intellectual property law that have the most obvious impact on the shape of the public domain. Most obviously, this would involve reversing the current trend whereby more and more of intellectual space is sucked into the propertised domain. For copyright law, this would involve limiting if not reversing its tendency to spread horizontally to cover new forms of activity in intellectual space, along with a renewed commitment to distinguishing between ideas and expressions and keeping the former in the intellectual *res communes*. Due to doubts about whether the concept of *res communes* can have any meaningful existence in intellectual space, it may be that these are really arguments about *res publicae* in intellectual space. The line between these two concepts, if it exists in intellectual space, is not easy to apply. What is clearer, however, is that the protection of the *res publicae* in intellectual space requires more than just a re-appraisal of the horizontal scope of intellectual property laws.

In order to safeguard the vitality of the *res publicae* in intellectual space so far as it relates to copyright, a critical re-appraisal of the duration rules is needed.<sup>75</sup> In the early life of English copyright law, much of the justification for increases in the duration of copyright appears to be a manifestation of the influence of romantic conceptions of the author and the author's right to control the work.<sup>76</sup> Given that the process of commodification divorces the author from his or her work<sup>77</sup> so that the author has become a somewhat marginalised figure in copyright law, extensions of the copyright interest based upon the figure of the author seem to have little justification. A similar lack of justification affects the contraction of the defences to copyright infringement, especially the fair dealing defences, which are the other important aspect of copyright law that needs to be considered if we are to increase the protection of *res publicae*.<sup>78</sup> Early on in the history of copyright, as a result of the focus on the now marginalised figure of the author, there was a transition in the application of the fair dealing defences from a focus on what the defendant had added to what the defendant had taken.<sup>79</sup> The contraction of the right has moved forwards in leaps and bounds in recent times. Optimists may argue that subsequent decisions on both sides of the Atlantic in cases like *Campbell v Acuff-Rose Music, Inc*<sup>80</sup> and *Time Warner Entertainments Company LP v Channel 4 Television Corporation plc*<sup>81</sup> repair

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<sup>75</sup> On reforming the duration rules, see further Netanel, n 10 *supra*, 366-371.

<sup>76</sup> See L Bently, 'Copyright and the Death of the Author in Literature and Law' (1994) 57 *Modern Law Review* 973, 979 & 979n, in which reference is made to Wordsworth's support for Sergeant Talfourd's famous campaign to extend the duration of copyright. See also Vaidhyanathan, n 65 *supra*, ch 2.

<sup>77</sup> See, eg, Gaines, n 28 *supra*, at 10.

<sup>78</sup> On reform of the fair dealing defences, see further Netanel, n 10 *supra*, at 376-382.

<sup>79</sup> Bently, n 76 *supra*, at 979n, cites *Sayre v Moore* (1785) in *Cary v Longman* (1801) 1 East 358, 359n, 102 ER 138, 139n; *West v Francis* 5 B & Ald 737, 106 ER 1361; & *Bramwell v Halcomb* (1836) 2 My & Cr 737, 40 ER 1110, as examples of this transition.

<sup>80</sup> 114 S Ct 1164 (1994).

<sup>81</sup> [1994] EMLR 1.

or mitigate some of the damage that *Rogers v Koons*<sup>82</sup> has done to the vitality of the fair dealing/fair use defence as a weapon for securing the intellectual commons. However, the more likely result of this mish-mash of case law is to create confusion about the scope of the defence.

So far as those parts of the public domain analogous to the concepts of *res divini juris* and *res universitatis* are concerned, as has been argued above, they hardly rate any recognition in the current organization of intellectual space. There is potential for productive synergies in *res universitatis*, but in the current climate of corporate domination too much valuable intellectual space has already been acquired by interests hostile to the type of closed creative or innovative communities that it envisages. A modern version of *res divini juris* might very well take its place alongside a re-invigorated *res publicae* in order to ensure that the power that might otherwise flow from concentrations of ownership in intellectual space do not give rise to at least some types of unacceptable abuses or limitations on the rights of others. However, even if all the different aspects of the public domain could be catered for using expanded versions of the devices that intellectual property currently uses, the question of the adequacy of these devices would remain. Other ways of drawing material out into the public domain of intellectual space may also be needed. At present the most obvious tools for this lie within the realms of human rights law. This area of law does not yet seem to have adapted itself for this purpose, although its adaptation remains a viable option. What is arguably important in any future development of this kind is that the relevant aspects of human rights law are not subsumed into intellectual property law. The inevitable result of such subsumption will be the subjugation of human rights to the essentialism of the property paradigm. Human rights will then go the way of all the other exceptions to intellectual property law designed to maintain the public domain. Rather, to be effective in manipulating the border of propertised zone and the public domain in intellectual space, human rights law needs to maintain its own integrity as an area of law in potential normative clash with intellectual property law.

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<sup>82</sup> Note 49 *supra*.