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BREAKING AND ENTERING MY OWN COMPUTER: THE CONTEST OF COPYRIGHT METAPHORS

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In the current debate over copyright law, those who support maximum copyright protections have advanced their agenda largely via *the metaphor of ownership in physical property. As part of this metaphorical system, they have successfully argued that digital rights management (DRM) systems deserve legal protections befitting locked doors. This article is a discourse analysis of this related system of metaphors and of opponents' metaphorical and non-metaphorical responses. Scholars who oppose the maximalist vision of copyright have devoted considerable thought to the problem of metaphors, including especially the search for metaphors that can challenge the metaphor of property. The article concludes there is work yet to be done on this count. As an incremental contribution to this conversation, the article suggests additional arguments, including additional metaphors in search of a new means to conceptualize copyright law.*

Copyright owners have long been worried about the ease with which one can copy digital media products such as software, movies and music. For them, one solution is self-help *via* the use of tools collectively known as Digital Rights Management (DRM) or Technological Protection Measures (TPMs).

A DRM system is generally designed to discourage or impede unauthorized—though not necessarily illegal—access to or use of copyrighted materials. The most commonly deployed DRM systems employ encryption:[1] Every copy is encrypted, and the key is hidden from consumers in places such as inside their DVD players or in closed-source software code. DRM-based encryption is an inherently leaky solution.

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[1]*See* BILL ROSENBLATT, BILL TRIPPE & STEPHEN MOONEY, DIGITAL RIGHTS MANAGEMENT: BUSINESS AND TECHNOLOGY 89 (2002).

An enterprising hacker who cracks the encryption and publishes the system's inner workings can render the DRM ineffective. Copyright holders want to prevent this at all costs. Thus enters the law.

By 1998, the entertainment and software industries successfully lobbied U.S. legislators to pass the Digital Millennium Copyright Act (DMCA).[2] The most controversial portion, Title I,[3] bans the manufacture or distribution of tools designed to circumvent DRM.[4] It also bans the mere act of circumventing most DRM,[5] albeit with narrow exceptions.

Before and after its passage, the statute's supporters have provided a wide variety of justifications, including treaty compliance, economic growth, and rewards to creative artists.[6] Perhaps a more compelling argument, however, has been that of copyright as deserving of the same legal protections as the ownership of physical property. Speakers who push such a view—those who are in the *strong copyright coalition*—either espouse an explicit belief that owning a copyright is just like owning a house, car or computer, or draw an analogy with the legal treatment of tangible property. This is a powerful metaphorical device—metaphorical because copyright is a limited monopoly unrelated to the law on physical property, and powerful because the rights of physical property are both much stronger and much more familiar parts of daily experience. As an extension of the metaphor COPYRIGHTS ARE PROPERTY,[7] several speakers have supported the bill by describing copyright controls as *locked doors* and circumventing copyright controls as *breaking and entering*. They use this rhetoric to support a ban on circumventing encryption schemes, a crime they believe to be as morally suspect as breaking and entering into a locked home.

In sharp contrast, those who advocate for a more limited role for copyright law—those who are in the *free culture coalition*—persistently decry both Title I of the DMCA and the rhetoric that supports it. They proclaim a litany of social costs—ranging from the suppression of academic research to lock-in for media industry incumbents[8]—and demand that the law be repealed or amended. In contrast to the policy of strong

[2]Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 5, 17, 28 and 35 U.S.C.) (2004).

[3]17 U.S.C. §§1201-1204 (2004).

[4]*Id*. at §§1201(a)(2), 1201(b).

[5]*Id*. at §1201(a)(1).

[6]*See* Bill D. Herman & Oscar H. Gandy Jr., *Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings,* 24 CARDOZO ARTS & ENT. L.J. 121 (2006).

[7]In order to set them apart from the main text, primary conceptual metaphors are identified using small capital letters. Their entailments are italicized.

[8]*See* LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 155-57, 181-82 (2004).

copyright, they rally for the related causes of free culture,[9] fair use[10] and the freedom to tinker.[11] Thus far, the free culture coalition has not coalesced around one unifying non-property metaphor that connotes an alternative social and legal treatment of DRM.

Through a discourse analysis, this article dissects both the larger metaphor of property and the more specific metaphors of locked property and breaking-and-entering, contextualizing these metaphors within the debate about copyright and Title I of the DMCA. The first section considers some of the relevant literature on metaphors in language, law, and communication law and policy. Section two describes the methodological details of the discourse analysis. The third section explores strong copyright advocates' use of metaphor COPYRIGHTS ARE PROPERTY, including the entailment that copyright controls are *locked doors*. Section four examines free culture advocates' reactions, metaphorical and non-metaphorical, to the metaphors of property. The fifth section describes the critical reactions to the metaphor of locked doors. Section six suggests potentially improved rhetorical strategies for those who oppose the continued growth of copyright law. The seventh, concluding section suggests further brainstorming in search of an improved metaphorical language of copyright policy.

METAPHOR

A metaphor is a tool for explaining or understanding one idea, concept or situation in terms of another, more familiar concept. This contrasts with propositional statements or claims that are intended literally. Most people believe metaphors are atypical, and few treat them as particularly important. Under this common view, most statements are literally true or false, and a metaphor is "a device of the poetic imagination and the rhetorical flourish—a matter of extraordinary rather than ordinary language."[12] In a tradition dating to Aristotle, most linguists also dismiss the importance of metaphors, focusing instead on propositional

[9]*See* LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 105 (Vintage Books 2002) (2001).

[10]Fair use is the legal right to make certain socially valuable uses of copyrighted works. The vague and widely debated conditions for fair use are set out in 17 U.S.C. §107 (2004). As Herman & Gandy explain, the members of this coalition often invoke the term "in a broader, almost colloquial sense of (sometimes merely allegedly) non-infringing uses generally." *Supra* note 6, at 158 n.173.

[11]Edward W. Felten, *Freedom to Tinker*, *at* http://freedom-to-tinker.com (last visited July 1, 2007). Felten, Princeton University Professor of Computer Science and Public Affairs, is a well-known DMCA reformer.

[12]GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 3 (2003).

statements.[13] Despite this general dismissal, "[M]etaphor is pervasive in everyday life, not just in language but in thought and action. Our ordinary conceptual system, in terms of which we both think and act, is fundamentally metaphorical in nature."[14]

Even in law and policymaking—an area renowned for the careful parsing of words, facts and logic—metaphors have substantial influence. Out of fear that metaphors unduly constrain or prejudice arguments, some prominent jurists have discouraged their use,[15] but the political power of metaphors can help shape both the statutes that jurists are asked to interpret and their judicial interpretations. Those who seek to understand the development and application of the law are thus well served to consider the workings of metaphors in language generally and in law specifically. Before studying a specific legal metaphor, it is also helpful to examine other metaphors from the area of law under study—in this case, other metaphors from communication law and policy.

Metaphors in Language

A metaphor functions by connecting an unfamiliar or difficult concept to another, more familiar concept at one point of similarity. Communication scholars Oscar H. Gandy Jr. and Kenneth N. Farrall elaborate:

> [M]etaphor is constructed of a source and target domain. The source domain is one in which the communicating agents are assumed to be familiar (or at least to share knowledge of certain relative characteristics) while the target domain is the less familiar area, where understanding can be increased *via* association with the source domain. The act of communicating in metaphor is an invitation to the receiver to consider the less familiar in terms of the more familiar. The familiar aspects of the source domain are its entailments. The entailments inherent in metaphoric expressions mean that certain aspects of the target domain are highlighted while others are hidden.[16]

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[13]*See generally,* Klaus Krippendorff, Major Metaphors of Communication and Some Constructivist Reflections on Their Use 3 (1992) (unpublished manuscript, on file with author).

[14]LAKOFF & JOHNSON, *supra* note 12, at 3.

[15]*See* Patricia Loughlan, *Pirates, Parasites, Reapers, Sowers, Fruits, Foxes ... The Metaphors of Intellectual Property*, 28 SYDNEY L. REV. 211, 215-16 (2006).

[16]Oscar H. Gandy Jr. & Kenneth N. Farrall, *Metaphorical Reinforcement of the Virtual Fence: Factors Shaping the Political Economy of Property in Cyberspace*, *in* ROUTLEDGE HANDBOOK OF INTERNET POLITICS (Andrew Chadwick & Philip N. Howard eds., forthcoming August 2008) (July 2007) (manuscript at 3, on file with author).

The metaphor thus highlights the points of similarity, suggesting them as particularly important parts of the target domain.

This metaphorical understanding is generally part of a broader system that can be summed up with one broad, conceptual metaphor. For instance, underlying the general understanding[17] of what it means to have an argument is the conceptual metaphor ARGUMENT IS WAR. It is the simplest way to explain the system of metaphorical descriptions that characterize our understanding of argument—hence, its characterization as a *conceptual* metaphor.

This conceptual metaphor is at the root of how arguments are described. Common descriptions include, "Your claims are *indefensible.* He *attacked every weak point* in my argument. His criticisms were *right on target*. I *demolished* his argument."[18] Under the guiding metaphorical concept, ARGUMENT IS WAR, the desirable outcome from an argument is to *destroy* one's *enemy*. If other goals are primary—for instance, if one is seeking to learn about the other's viewpoint, obtain information, or support them in an emotionally trying time—it is hard to see this as an argument. Thus, the underlying conceptual metaphor governs the explained concept and *via* the metaphor and its related system of metaphorical concepts. These related metaphorical concepts—these entailments—follow from the core metaphor.

There are two additional points about metaphors that are important to consider before examining their role in political life.[19] First, "understanding generated by metaphor is always culturally mediated, and a product of shared understandings."[20] The culture of the speaker shapes the generation of the metaphor, and the culture of the audience shapes its interpretation. A culture that accepts or values war will treat the metaphor ARGUMENT IS WAR much differently than will a culture that seeks to avoid conflict at all costs.

Second, "[A]ll metaphors highlight some aspects of a situation, event or process but obscure others,"[21] thus shaping understanding, discourse and behavior. This point is particularly important once metaphors have come to be taken for granted. As management scholars Gill Musson,

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[17]Claims such as this are intended to refer only to American culture; their applicability to other cultures may vary. Importantly, note that COPYRIGHTS ARE PROPERTY is a paradigm that is not necessarily shared by other cultures, yet it is still the starting point for international negotiations on copyright law. *See, e.g.,* KEMBREW MCLEOD, OWNING CULTURE: AUTHORSHIP, OWNERSHIP, AND INTELLECTUAL PROPERTY LAW 158-59 (2001).

[18]LAKOFF & JOHNSON, *supra* note 12, at 4.

[19]*See* Gill Musson, Laurie Cohen & Susanne Tietze, *Pedagogy and the "Linguistic Turn" Developing Understanding Through Semiotics*, 38 MGMT. LEARNING 45, 50-51 (2007).

[20]*Id*. at 50.

[21]*Id*. at 50-51.

Laurie Cohen and Susanne Tietze explain, "In time . . . we can lose sight of [what is highlighted and what is hidden] and metaphors can appear 'dead.' The original creative connection is concealed in subliminal understanding; it is so deeply embedded in our thinking as to appear natural, normal and true."[22] Just as cultural understanding shapes metaphors, the metaphors that become part of ordinary language shape our understanding of the world. Again, arguments are conducted in a war-like fashion not least because the metaphor of war supports that understanding of how to conduct an argument. This is not necessary:

> Imagine a culture where an argument is viewed as a dance, the participants are seen as performers, and the goal is to perform in a balanced and aesthetically pleasing way. In such a culture, people would view arguments differently, experience them differently, carry them out differently, and talk about them differently. But *we* would probably not view them as arguing at all: they would simply be doing something different.[23]

This metaphor thus highlights and enables the war-like aspects of argument while hiding and disabling non-war-like aspects.

Legal Metaphors

The literature on metaphor in law extends the claims of some theorists of language—George Lakoff and Mark Johnson are two—that metaphors are of vital importance in shaping how both communicator and audience understand an issue, and they therefore have an important role in shaping beliefs and actions.[24] Professor Michael R. Smith observes: "The more the legal profession learns about metaphors, the more opportunities exist for legal advocates to develop rhetorical strategies around them."[25] He notes that a metaphor can serve in any level of legal argument: the foundational principles governing an issue, the legal method used to decide individual cases, the rhetorical style of the communicator, or the inherent structures of language.[26] Familiar metaphors help ground foundational legal principles governing a number of issues. These include, "The 'marketplace of ideas' principle in First Amendment law, . . . the 'overbreadth' doctrine under constitutional law, [and]

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[22]*Id*. at 51.

[23]LAKOFF & JOHNSON, *supra* note 12, at 5.

[24]*See generally,* LAKOFF & JOHNSON, *supra* note 12.

[25]Michael R. Smith, *Levels of Metaphor in Persuasive Legal Writing*, 58 MERCER L. REV. 919, 921 (2007).

[26]*Id*. at 920.

the 'chilling effect' doctrine under constitutional law."[27] These examples all highlight certain aspects of a legal situation and hide others, clarifying foundational principles in specific directions. In addition, that the metaphors of overbreadth and chilling are fine examples of dead metaphors.

If an advocate is unhappy with the implications of a metaphor, the advocate may attack it directly as poorly representing the point of law in question. Smith dubs this strategy the "Cardozo Attack"[28] in honor of renowned jurist Benjamin Cardozo, who famously admonished, "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."[29] Cardozo suggests that those who practice law should generally avoid metaphors. This statement's ironic use of metaphor has not gone unnoticed.[30] More importantly, it was made before the literature on metaphors cited herein, which suggests the inefficacy of a propositional attack in totally dislodging a metaphor's explanatory and persuasive power. As previously indicated, metaphors hide some aspects of a case and highlight others; thus, Cardozo is right to be skeptical that they can properly convey the subtleties of the appropriate doctrine without substantial modification. Yet metaphors are both so embedded within language and so powerfully persuasive, and so hard to offset without another compelling metaphor, that advocates cannot simply avoid or distance themselves from them.

There are two additional problems with a propositional Cardozo Attack.[31] First, it works best in cases where an attacker can appeal directly to a reasonably well-developed body of case law. Metaphors help bring the unfamiliar within the province of the familiar and are thus most likely to shape decisions in areas where the law is struggling with new questions.[32] This is the very time when a case is most likely to shape

[27] *Id*. at 922.

[28] *Id.* at 923.

[29] Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926).

[30] *See* Loughlan, *supra* note 15, at 215.

[31] "Cardozo Attack" is used herein to describe propositional attacks on the validity of metaphors. This is a deliberate shift from Smith's use, which also includes the strategy of proposing alternative metaphors. The latter is not exactly a high-fidelity representation of the admonition to watch metaphors closely. This article is an example; it urges those who oppose the COPYRIGHTS ARE PROPERTY metaphor to creatively imagine a plethora of alternative metaphors, try several, and coalesce around the most persuasive alternative. Cardozo urges advocates to unleash their minds from metaphors; this article urges advocates to unleash the metaphors from their minds.

[32] *See* Stephanie A. Gore, *A Rose by Any Other Name: Judicial Use of Metaphors for New Technologies*, 2003 U. ILL. J.L. TECH. & POL'Y 403, 408-09 (2003); Jacqueline Lipton, *Mixed Metaphors in Cyberspace: Property in Information and Information Systems*, 35 LOY. U. CHI. L.J. 235, 240-41 (2003).

future decisions, creating path dependency and making future corrections more difficult.[33]

Second, it works best in communicating with those whose focus is on interpreting the law as written. As Professor Philip Napoli points out, "[T]he court is but one of the institutions relevant to communications policy that must grapple with the meaning and applications of the concept."[34] Policymaking bodies such as the Federal Communications Commission, the Copyright Office and Congress—all of which are subject to greater political pressure from the public than are the courts—also shape the law. For these policymakers and the public, the appeal to the law as written, compared to a broader concept conveyed by an accepted metaphor, is not likely a persuasive strategy. As embodied in metaphors, "[N]ormative understandings of [areas of law such as] copyright exercise some constraints on the actual legal provisions that the lobbyists can come up with, agree on, convince Congress to pass, and persuade outsiders to comply with."[35] Where the law fails to conform to a given metaphor, this dissonance is more likely a cause for efforts at reform than a cause for rejecting the metaphor in favor of the status quo.

Another strategy is to fight metaphor with metaphor, arguing "for a new metaphoric rule that (in the opinion of the advocate) more effectively captures the legal abstraction."[36] As part of a broader imperative always to frame the debate in one's preferred paradigm, this is much more likely to succeed as a broader rhetorical strategy. As Lakoff urges:

> Remember, don't just negate the other person's claims; reframe. The facts unframed will not set you free. You cannot win just [by] stating the true facts and showing that they contradict your opponent's claims. Frames trump facts. His frames will stay and the facts will bounce off. Always reframe.[37]

When he teaches his students about framing, he tells the class, "Don't think of an elephant!"[38] Instantly, they all think of an elephant.[39] What is true of frames broadly is true of metaphors specifically: Beginning

[33] *See* Gandy & Farrall, *supra* note 16, manuscript at 4-5.

[34] PHILIP M. NAPOLI, FOUNDATIONS OF COMMUNICATIONS POLICY: PRINCIPLES AND PROCESS IN THE REGULATION OF ELECTRONIC MEDIA 109 (2001).

[35] JESSICA LITMAN, DIGITAL COPYRIGHT 77 (2001).

[36] Smith, *supra* note 25, at 924.

[37] GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT: KNOW YOUR VALUES AND REFRAME THE DEBATE 115 (2004).

[38] *Id*. at 3.

[39] *Id*.

from an opponent's metaphor is a difficult rhetorical position, so choosing one's own metaphor from which to begin is generally a much better strategy.[40]

For an audience of attorneys and jurists, the appeal to black letter law is a powerful frame from which to begin; this gives the propositional Cardozo Attack its power. When metaphor conflicts with the clear meaning of the law, jurists prioritize black letter law,[41] but this works best only when the law is both clear and taken for granted. It is less reliable when the law in question is unclear or is being developed or rewritten. In these circumstances, it is poor strategy to accept a loaded conceptual metaphor that undercuts one's position. Whether seeking specific policy outcomes[42] or legal interpretations,[43] one must be ready to propose alternative metaphors.

Metaphors in Communication Law and Policy

As with law and policy generally, metaphors play an important role in shaping the development and interpretation of communication law and policy. This is particularly true in areas where the established case and statutory law are not exceptionally clear or when the law is still being developed.

Like copyright, First Amendment law is an area that is subject to multiple, competing legal interpretations. In his study of the role of metaphor in shaping legal precedent, communication scholar Haig Bosmajian concluded that metaphorical arguments from First Amendment cases are particularly likely to shape future cases.[44] As the exemplar of influential First Amendment metaphors, the metaphor of THE MARKETPLACE OF IDEAS has played a vital role in both communication policymaking[45] and First Amendment jurisprudence.[46] In his 1919 dissent from an opinion affirming a conviction under the Espionage Act,[47]

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[40]*See generally* LAKOFF, *id.*

[41]*See, e.g.,* David McGowan, *Property Rights on the Frontier: The Economics of Self-Help and Self-Defense in Cyberspace*, 1 J.L. ECON. & POL'Y 109 (2005).

[42]*See generally, e.g.,* LAKOFF, *supra* note 37.

[43]*See, e.g.,* Gore, *supra* note 32, at 455-56.

[44]HAIG A. BOSMAJIAN, METAPHOR AND REASON IN JUDICIAL OPINIONS 13 (1992).

[45]*See, e.g.,* NAPOLI, *supra* note 34, at 147; Robert M. Entman & Steven S. Wildman, *Reconciling Economic and Non-Economic Perspectives on Media Policy: Transcending the "Marketplace of Ideas,"* 42 J. COMM. 5, 6 (1992).

[46]*See* BOSMAJIAN, *supra* note 44, at 49.

[47]*See* Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 MERCER L. REV. 949, 964 (2007) (citing Barbour Espionage Act, ch. 30, §1, 40 Stat. 217 (1917) (repealed 1948)).

Justice Oliver Wendell Holmes wrote, "[T]he ultimate good desired is better reached by free trade in ideas. . . [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."[48]

This marketplace metaphor reflects an assumption of laissez-faire economics. One is *free to buy and sell* any ideas to anybody. This hides important differences between markets and democratic deliberation. As Cass Sunstein notes, "The preconditions of an economic marketplace can be specified by the assumptions of neoclassical economics. The same is not at all true for the preconditions of a system of free expression."[49] Bosmajian imagines alternative metaphors with different entailments:

> Since there is no literal marketplace of ideas in the world, a [court] might just as well rely on a metaphoric "quest," "war," "forest," "galaxy," or "rainbow" of ideas. But Justice Holmes was part of a laissez-faire society, and his "free trade in ideas" in the "competition of the market" entered our judicial vernacular. ... By relying on the Holmes metaphor, [the court has] chosen to highlight competitiveness in the buying and selling of ideas; had a "quest" metaphor prevailed, we would be highlighting searching, a journey, inquiry.[50]

Instead, the neoliberal assumptions of the market have informed policymaking, including a growing emphasis on the economic entailments of the metaphor. For instance, Philip M. Napoli illustrates the central role the metaphor played in shaping Federal Communications Commission policy from 1965 through June 1998, finding the metaphor "has clearly been used far more often in deregulatory contexts,"[51] even when compared to the overall ratio of deregulatory decisions.[52] Napoli also finds that, beginning in the late 1980s, "[T]he democratic theory dimension of the marketplace of ideas metaphor has been virtually absent from the FCC's use of the concept, more so than at any other period in the 33 years studied."[53] The economic interpretation of the metaphor, assuming that capital serves as a proxy for audiences' choices of ideas, has eclipsed the interpretation based on democratic theory.[54] It is thus

[48]Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[49]CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 178 (1993).

[50]BOSMAJIAN, *supra* note 44, at 200-01, *quoted in* Gore, *supra* note 32, at 419.

[51]NAPOLI, *supra* NOTE 34, AT 115.

[52]*Id*. at 116.

[53]*Id*. at 119.

[54]This shift highlights how a metaphor's meaning will differ along with differing cultures in which they are interpreted. In this case, the emphasis on the market and support for neoliberal thinking grew substantially over the course of Napoli's study. *See,*

unsurprising that the FCC has often invoked the metaphor as part of its deregulatory movement.

Other metaphors have contributed to the development of law and policy governing new media technologies such as the Internet. Regarding the Internet, "[I]t remains a well-established principle that the nature and extent of legal protection accorded to any action depends on the metaphor chosen to analyze the action in question."[55] For instance, consider UNAUTHORIZED NETWORK USAGE IS TRESPASSING TO CHATTELS.[56] This sets the standard for harm higher than trespass to real property, in which any unauthorized encroachment is a challenge to the property claim and thus automatically trespassing.[57] A charge of trespass to chattels, meanwhile, requires some degree of actual harm, such as dispossession or diminished value.[58]

While scholars disagree as to the influence of this metaphor on legal outcomes,[59] its frequent use suggests a substantial role in judicial reasoning. Courts, like people generally, understand network administrators' frustrations with those who send spam, distribute malware such as viruses, and otherwise make socially devalued uses. In an effort to justify the legal doctrine that such behavior is punishable, courts have used the idea of trespass as a vehicle for achieving just such an outcome.[60]

This metaphorical understanding of the problem is not the end of the story. Jurists often discuss the differences between network resources—including data and capacity—and tangible property such as land or chattels, which by itself may suggest the limited impact of this metaphor.[61] One should not assume that metaphors are all-powerful, trivializing "judicial opinions without engaging them."[62] Nonetheless, a long series of cases dealing with unauthorized network usage have exhibited a substantial degree of confusion over the applicability of the law of

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e.g., Anthony E. Brown & Joseph Stewart Jr., *Competing Advocacy Coalitions, Policy Evolution, and Airline Deregulation, in* POLICY CHANGE AND LEARNING: AN ADVOCACY COALITION APPROACH 83, 83 (Paul A. Sabatier & Henry Jenkins-Smith eds., 1993). Thus, the neoliberal interpretation of the metaphor, highlighting the economic and transactional elements, is a reasonable outgrowth of this shift.

[55]Shyamkrishna Balganesh, *Common Law Property Metaphors on the Internet: The Real Problem with the Doctrine of Cybertrespass*, 12 MICH. TELECOMM. TECH. L. REV. 265, 302 (2006), *available at* http://www.mttlr.org/voltwelve/balganesh.pdf.

[56]*See, e.g.*, Gandy & Farrall, *supra* note 16. A chattel is an "article of personal property, as distinguished from real property. [It is a] thing personal and movable." BLACK'S LAW DICTIONARY 162 (abridged 6th ed. 1990).

[57]*See* Balganesh, *supra* note 55, at 275.

[58]*See id*. at 276.

[59]*See* Krippendorff, *supra* note 13, manuscript at 4-5.

[60]*See generally* Balganesh, *supra* note 55.

[61]*See* McGowan, *supra* note 41.

[62]*Id*. at 110.

trespass.[63] Early decisions[64] justified findings of liability for unauthorized network access using an understanding of trespass to chattels.[65] This has contributed to a vacuous standard of liability based on "the largely subjective and abstract determination of actual harm."[66] Over time, the required demonstration of harm has become so small as to render the standard virtually coextensive with that required for trespass to real property,[67] only adding to the doctrinal confusion. In short, the metaphorical entailments associated with chattels have shaped the governance of networking resources, even when those entailments are not ideally suited to the specifics of the case.

METHODOLOGY

Three related research questions inform this research: First, how do advocates of strong copyright policy deploy the metaphor COPYRIGHTS ARE PROPERTY, as well as the entailment that copyright controls are *locked doors*, and their corollaries? Second, how do free culture advocates respond to this metaphor? Third, how might this response be improved?

The answers to these questions are developed through a critical discourse analysis[68] of documents from the far-reaching debate over

[63]*See, e.g.,* Balganesh, *supra* note 55, at 333.

[64]*See* CompuServe v. Cyber Promotions, Inc., 962 F. Supp. 1015 (S.D. Ohio 1997); Thrifty-Tel v. Bezenek, 54 Cal.Rptr.2d 468 (1996).

[65]*See* Balganesh, *supra* note 55, at 279-82. Balganesh notes that courts consciously chose the metaphor of chattels over that of realty. *Id*. at 301. Even though this suggests that doctrine is leading the choice of metaphor—as McGowan, *supra* note 40, argues and as those who share Cardozo's preference for black letter law, *supra* note 29, would prefer—this does not diminish the importance of metaphor in legal reasoning. First, as Balganesh demonstrates, courts agonized over this choice of metaphor in large part because jurists understood the doctrinal implications. Balganesh, *supra* note 55, at 279-82, 301. Second, the tangled doctrinal understanding that emerges from these earlier cases suggests undue metaphoric influence. *Id*. Finally, the metaphor of tangible property, especially that of real property, has played an important rhetorical role in debates about internet policy reform. *See, e.g., At SBC, It's All About "Scale and Scope,"* BUSINESSWEEK ONLINE, Nov. 7, 2005, paras. 25-26, http://www.businessweek.com/@@n34h*IUQu7KtOwgA/magazine/content/05_45/b3958092.htm (containing an excerpt from an interview between Roger O. Crockett and Edward Whitacre, CEO, SBC Telecommunications). Whitacre, then CEO of SBC Telecommunications (now AT&T), argued his company should be able to surcharge third-part internet services companies such as Google and Vonage for the right to communicate with SBC broadband customers.

[66]*Id*. at 300.

[67]*Id*. at 291.

[68]*See* NELSON PHILLIPS & CYNTHIA HARDY, DISCOURSE ANALYSIS: INVESTIGATING PROCESSES OF SOCIAL CONSTRUCTION (2002); Norman Fairclough, *Critical Analysis of Media Discourse*, *in* MEDIA STUDIES: A READER 308 (Paul Marris & Sue Thornham eds., 2000).

U.S. copyright law. These documents are from various media, including blogs, periodicals, Internet news sites, copyright case law, congressional hearing transcripts, books and law reviews and other academic writings.[69]

The sole criterion for inclusion is that a document use or refer to one of the metaphors discussed here. Gathering documents from a host of sources, rather than in a random sample from one source—such as law reviews in a database—is preferable for two reasons. First, it aids the focus on specific metaphors. No single data source likely includes the depth and breadth of metaphorical content as is gathered here. Second, it follows the suggestion of Nelson Phillips and Cynthia Hardy to capture "naturally occurring" texts: "Generally, 'naturally occurring' texts—in the sense that they appear in the normal day-to-day activities of the research subjects—are considered a better source of data for discourse analysis because they are actual examples of language in use."[70] The give-and-take of the copyright debate occurs across several media, so a proper study of the metaphors of the debate is fortified by a multimedia dataset.

This research begins from the following premises: Strong copyright advocates regularly use the property and locked doors metaphors, free culture advocates regularly and deliberately respond to these metaphors, and this response can improve.[71] A representative sample to demonstrate these claims is beyond the scope of this study for the reasons noted previously. Nonetheless, the diverse sources espousing these metaphors and responses stand as reasonable proof of the first two premises. No measurement of audience reaction buttresses the third assumption, but the continued centrality of the property metaphor over the last twenty-five years[72] demonstrates both its power and the failure of free culture activists to dislodge it with a more compelling metaphor.

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[69]The author is an advocate for the free culture side of this debate and a Ph.D. candidate studying media policy, including copyright law. Many of the documents included thus represent small pieces of an earnest, *in situ* attempt to participate in the advocacy culture. Most of the sources were in the possession of the author and needed only to be identified as relevant and included. This collection by itself was too small, however, which called for further searching. Additional online sources were identified *via* Google searches. Law review articles were retrieved from the LexisNexis full-text database. Most materials were gathered in the fall of 2005, with supplemental materials collected in the fall of 2007.

[70]PHILLIPS & HARDY,*supra* note 68, at 70-71.

[71]In all fairness, the author also belongs on the list of those indicted.

[72]*See* KEMBREW MCLEOD, FREEDOM OF EXPRESSION: OVERZEALOUS COPYRIGHT BOZOS AND OTHER ENEMIES OF CREATIVITY 109 (2005).

METAPHORS OF CONTROL: PROPERTY AND LOCKED DOORS

The metaphors of copyright are discussed in two parts. First is the broader metaphor of copyrighted works as tangible property, including some notions implicitly based on chattels and others implying landed property. Second is the more specific metaphor of copyright controls as locked doors.

Copyrights as Property

Many legal scholars, including Neil W. Netanel, identify the strong intellectual current behind the growth of copyright protections. Several thinkers as well as United States and European Union officials "have aggressively promoted the view of cultural expression as a commodity of trade.... At the behest of their constituent producers and purveyors of sound recordings, films, television programs and software, they have insisted that countries be required to minimize limitations on copyright holder rights."[73] This is justified in terms of a broad, neoliberal vision of the copyright monopoly that would grant copyright owners "broad proprietary rights that extend to every conceivable valued use."[74]

This neoliberal vision comes in both a weak and a strong variant. In the weak version, copyright is a property right akin to that in personal property, or chattels. Under this paradigm, infringement is a function of some degree of harm. This has some resemblance to the black letter law on copyright, which is generally disinclined to punish harmless uses,[75] albeit a shrinking tendency.[76]

In the strong version of the property rights claim, copyright is akin to real property, such as land. Virtually any unauthorized use is forbidden. As Netanel suggests, this version is the true home of the copyright maximalists. The copyright notice accompanying National Football League games provides an excellent example of this view: "This telecast is copyrighted by the NFL for the private use of our audience. Any other use of this telecast or of any pictures, descriptions, or accounts of the game

[73]Neil W. Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 219-20 (1998).

[74]Neil W. Netanel, Copyright and a Democratic Civil Society 1 (1998) (unpublished J.S.D. dissertation, Stanford University) (on file with author).

[75]*See, e.g.,* 17 U.S.C. §107(4) (2004) (setting out "the effect of the use upon the potential market for or value of the copyrighted work" as one of the four factors to be considered in weighing a claim that an unauthorized use was a fair use).

[76]*See, e.g.,* Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561 (2000).

without the NFL's consent, is prohibited."[77] If U.S. copyright is the body of law contained in Chapter 17 of the U.S. Code and the court decisions that interpret it, this statement borders on the absurd. However, if copyright is a real property right, the NFL gets near total control over how the telecast is used, and the statement merely reflects this. Even if one starts from the premise that copyright is a property right akin to that in chattels, this right is subject to the trend seen in the case law on unauthorized uses of computer networks: If the standard for demonstration of harm to chattels is set low enough, the legal difference between chattels and real property becomes virtually moot. If a football telecast is owned as personal property, but there is no such thing as a harmless non-private use, the NFL is still correct.

The metaphor of ownership of physical property has come to define how many people think about copyright law — lawyers[78] and laypersons alike. As communication scholar Kembrew McLeod argues, "Over the last quarter century, the dominant metaphor for copyright changed from a shared, balanced model to one of private property that needs to be protected, by any means necessary."[79] The image of physical property even underlies most of the specific metaphors commonly bandied about in debates over copyright. In one article, Professor Patricia Loughlan identifies

> [T]hree "metaphor clusters" found, *passim*, in the writings of intellectual property, namely, the metaphor of the unauthorised user of intellectual

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[77] *Quoted in* Wendy Seltzer, *My First YouTube: Super Bowl Highlights or Lowlights* (Feb. 8, 2007), *at* http://wendy.seltzer.org/blog/archives/2007/02/08/my_first_youtube_super_bowl_highlights_or_lowlights.html.

[78] *See, e.g.,* William Patry, *Does It Matter if Copyright is Property?*, *at* http://williampatry.blogspot.com/2006/06/does-it-matter-if-copyright-is.html (June 20, 2006) (on file with author). In this blog post, Patry cites a number of lengthy law review articles that attempt to resolve the extent to which copyright does and does not conform to the law of property. The comments also reflect very thoughtful consideration. For instance, Timothy Phillips argues:

> When we say that the copyright (not the copyrighted work) is personal property for some purposes, isn't this merely a way of saying that, in the absence of explicit statute law, cases will be resolved by analogy to the law of personal property? Would we get a better outcome in hard cases if we drew our default principles from some other area of law, or would we merely be exchanging one set of conundra for another?
>
> Many careless writers, of course, make the mistake of writing as though the copyrighted work itself, not the copyright, is personal property. If treating copyrights as some other form of legal privilege than property would prevent people from falling into this mistake, that might itself be a worthwhile benefit.
>
> Adam Smith (Lectures on Jurisprudence) thought that a copyright was an "exclusive privilege," like a right of first refusal, or the exclusive right of a hunter hot on the trail to the hare, unless he gave over the chase before taking her. So there is precedent for thinking of the copyright as something other than personal property.

[79] MCLEOD, *supra* note 72, at 109.

> property as a "pirate" or "parasite" or "poacher," the metaphor of the author or inventor of an intellectual work as a "farmer," and the metaphor of intellectual creations, which are not subject to the private ownership, as a "common."[80]

Each of these metaphors is merely a specific iteration of the property metaphor, drawing explanatory power by connecting the producer of a copyrighted work with the owner of a piece of physical property—whether it be shipping cargo, farmland, or the town square. Even the metaphor of choice for free culture advocates, the COMMONS, is based on notions of property, which has a degree of power for the other side of the debate—a point considered below.

The widespread prevalence of the metaphor is in large part the result of copyright holders consistently framing the debate in terms of property. Working from the source domain of tangible property, they map notions such as ownership and theft onto the much less familiar target domain of copyright law. The common adoption of the language of property has helped to obscure the term's metaphorical past. Further, a copyright holder does have several legal rights that are held by owners of tangible property—most importantly, the right to sell, lease or otherwise dispose of a copyright.[81] Additionally, the copies themselves are clearly property; one family can own a book for centuries. To a remarkable extent, however, many people describe copyrighted works—for instance, the combination of words that make up a book—in terms that allude to tangible property such as chattels or land.

Writer Susan Cheever, for instance, claims, "Words are property. This principle has been upheld by the law since 1710."[82] As a propositional legal statement, this claim is utterly untrue. Words themselves are decidedly not property, and even the reach of property-like protections is far more limited than those for tangible property. The Statute of Anne, enacted in Britain in 1710, granted a publishing monopoly of just fourteen years, renewable just once for another fourteen-year term.[83] The doctrine that the copyright monopoly has the same common law status as physical property lasted a mere five years in eighteenth century Britain—the time between the 1769 case *Millar v. Taylor*[84] and *Don-*

[80]Loughlan, *supra* note 15, at 216.

[81]The claim of property, as applied to the privileges granted by copyright that inhere in a given copyrighted work, is a far cry from a claim of property in the expression contained in the work.

[82]Susan Cheever, *Just Google "Thou Shalt Not Steal,"* NEWSDAY, Dec. 12, 2005, at B13.

[83]*See* Martha Woodmansee & Peter Jaszi, *Introduction*, *in* THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 1, 4 (1994).

[84]98 Eng. Rep. 201 (K.B. 1769).

aldson v. Beckett, which vacated *Millar* in 1774.[85] The applicability of the common law of property has not been literally true since. However, as communication scholar Siva Vaidhyanathan notes, "[T]he arguments and the rhetoric, the 'property talk' that informed the decision in *Millar v. Taylor*, have lasted more than two hundred years."[86]

Among this property talk is the metaphor of authors "mixing their labor with the raw materials of existing ideas and stories. This 'mixing metaphor' is the operative principle behind John Locke's theory of property."[87] Based on this rhetoric, and extending the familiar world of tangible property to the arcane world of copyright regulations, scholars and ordinary people alike use Lockean notions of property to explain copyright law. In testifying before Congress in support of Title I of the DMCA, Johnny Cash appears to cite this Lockean theory, arguing that copyright "says our laws respect what we create with our heads as much as what we build with our hands."[88]

Consider some of the entailments of this metaphor. First and foremost, unauthorized use becomes theft of property. Infringements constitute the "misappropriation and distribution of copyrighted property and the destruction of a copyright owner's rights to that property."[89] The appearance of peer-to-peer networks becomes a problem of stealing and theft.[90]

Cheever urges readers to imagine discovering our own stolen furniture for sale at an online auction house; this, she intimates, is the experience of authors and artists who find their "stolen" work online.[91] This theft is no petty crime. As suggested by her article's title, "Just Google 'thou shalt not steal,'" copyright violation is unholy. Perhaps even worse, it is an act of piracy, which for centuries constituted "[r]obbery, kidnapping, or other criminal violence committed at sea."[92] Like literal pirates, copyright pirates flourish in areas where Western-style law and order is nonexistent, including the Internet and countries that do not enforce

[85] 1 Eng. Rep. 837 (H.L. 1774).

[86] SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 43 (2001).

[87] *Id*. at 41-42.

[88] *WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act, Hearing on H.R. 2281 and H.R. 2280 Before the Subcomm. on Courts and Intell. Prop. of the House Comm. on the Judiciary*, 105th Cong. (1997) [hereinafter *Judiciary Hearing*] 198, 199 (statement of Johnny Cash, vocal artist).

[89] Carolyn Andrepont, *Digital Millennium Copyright Act: Copyright Protections for the Digital Age*, 9 DEPAUL-LCA J. ART & ENT. L. 397, 398 (1999).

[90] Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 23 (2004).

[91] Cheever, *supra* note 82, at B13**.**

[92] HENRY CAMPBELL BLACK & BRYAN A. GARNER, BLACK'S LAW DICTIONARY, "piracy" (2004).

international treaties. The former often builds on the metaphor of the Internet as the U.S. Western frontier.[93] In supporting the DMCA, several witnesses and members of Congress draw rhetorical leverage from the threat of international piracy.[94]

Another entailment is that respect for copyright holders' property rights is a central tenet of capitalism, itself built on a strong belief in private property rights. Several participants on one video gaming message board display this belief in staggering clarity while debating the ethics of buying used games—that is, games bought legally on the second-hand market. To wit:

> If you're buying it used, the company isn't making any money, just as if someone bought the game and made pirated copies and then distributed them for free around the Internet. And please, cars and software are two completely different things. You can't, for instance, just decide to let your friend borrow your car and license for a few days. Yeesh.[95]

Cheever implies a definition of infringement coextensive with trespass to chattels, but these gaming enthusiasts view copyright in a way closer to landed property rights. Any uninvited treading is trespass, and like minerals from the ground, even unexpected future extractions rightfully belong to the owner. Within this worldview, the copyright holder owns all derivative revenues, period. Paying is a predicate of capitalism, and failing to do so at every transaction "is basic communism."[96] Similarly,

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[93]*See* Alfred C. Yen, *Western Frontier or Feudal Society? Metaphors and Perceptions of Cyberspace*, 17 BERKELEY TECH. L.J. 1207 (2002).

[94]*See, e.g.*, *Judiciary Hearing*, *supra* note 88, at 199 (statement of Johnny Cash, vocal artist); *The WIPO Copyright Treaties Implementation Act, Hearing on H.R. 2281 Before the Subcommittee on Telecomm., Trade, and Consumer Protection*, 105th Cong. 6 (1998) [hereinafter *Commerce Hearing*] (statement of Rep. John D. Dingell); *id*. at 36 (statement of Robert W. Holleyman II, President and C.E.O., Business Software Alliance); *id*. at 53 (statement of Steven J. Metalitz, Smith & Metalitz, L.L.P., on behalf of the Motion Picture Association of America).

[95]Insane-Sama, *in* Jake, *The Ethics of Used Videogames and Fair Use*, http://www.8bitjoystick.com/archives/jake_the_ethics_of_used_videogames_and_fair_use.php (last modified August 5, 2007) (on file with author). Though the rest of the discussion ended in 2003, Insane-Sama posted a response in 2004 and another in 2007. The 2007 post in particular modifies this stance somewhat. In part,

> I never intended to try and make the argument that buying a used videogame was illegal. I was only trying to say that the company gets the same profit whether or not you buy a used game or a ROM (that is to say, 0$) [*sic*] By that logic, why is it wrong to simply get ROMs instead of used games? The company was not going to make any profit out of your used game purchase. And it certainly isn't making any cash from your ROM download.

Id.

[96]Pugo, in Jake, *The Ethics of Used Videogames and Fair Use*, http://www.8bitjoystick.com/archives/jake_the_ethics_of_used_videogames_and_fair_use.php (last modified August 5, 2007) (on file with author).

people as visible as Bill Gates have derided free culture activists as communists.[97] Regardless of whether one sees copyright as protection akin to the property right in chattels or that in land, current U.S. culture is a prime rhetorical context for the appeal to copyright as essential to capitalism and the smear that all who disagree support communism. In a nation with remarkably deep respect for property rights, COPYRIGHTS ARE PROPERTY puts copyright holders on the side of both God and country, and those who violate this right are thieves, sinners, pirates and communists.

Copyright Controls as Locked Doors

An entailment of COPYRIGHTS ARE PROPERTY is that the owner can dictate the terms of access and lock out trespassers. A property holder can use an array of barriers in maintaining control of his property. The strong copyright crowd explicitly invokes this connection, describing copyright controls as *locked doors*.[98] Additional entailments of this connection include, for instance, circumventing copyright controls is *breaking and entering,* and legal protections for copyright controls are *laws against breaking and entering*.[99] Supporters of the DMCA deploy these metaphors in congressional testimony, and a federal judge uses them in enforcing Section 1201. Supporters also invoke them repeatedly in the popular press.

In written testimony supporting the act, Register of Copyrights Marybeth Peters makes an explicit connection between property-like copyright and right to control access *via* digital locks:

> It has long been accepted in U.S. law that the copyright owner has the right to control access to his work, and may choose not to make it available to others or to do so only on set terms. This means . . . that he can publish it while controlling the conditions under which others are allowed to see it such as charging a fee or imposing restrictions on how the work may be used. . . . The bill would continue this basic premise, allowing the copyright owner to keep a work under lock and key and to show it to others selectively. Section 1201 has therefore been analogized to the equivalent of a law against breaking and entering. Under existing law, it is not permis-

[97]*See* Michael Kanellos, *Gates Taking a Seat in Your Den*, http://news.com.com/Gates+taking+a+seat+in+your+den/2008-1041_3-5514121.html (last modified Jan. 11, 2006) (on file with author).

[98]*See infra* notes 100-10 and accompanying text.

[99]*See infra* notes 100-10 and accompanying text.

> sible to break into a locked room in order to make fair use of a manuscript kept inside.[100]

A homeowner can exclude or invite others at will. If copyright holders own their monopoly rights on similar terms, they can lock out trespassers and expel unwelcome guests. Making this norm legally binding turns digital works from freely circulated bytes to fully owned property.

The metaphor of the locked door contains additional entailments; breaking and entering is a serious and morally reprehensible violent crime that is profoundly traumatizing and dangerous for its victims. Connecting circumvention to breaking and entering—as opposed to, say, picking bicycle locks—carries profound moral weight, leaving opponents in a difficult rhetorical position. In addition to Peters, at least two additional pro-DMCA congressional witnesses use this breaking and entering metaphor—implicitly[101] or explicitly.[102] The metaphor is thus both an important concept and an important rhetorical ploy on the part of those who support the ban on circumvention.

The metaphor also factors into the law's interpretation and enforcement.[103] Federal District Judge Susan Illston invokes the metaphor in supporting a fairly strict interpretation of the statute. Illston's use of the metaphor requires some background. Most motion picture DVDs are encrypted using a format called "Content Scrambling System" (CSS). 321 Studios sold software that easily copied encrypted DVDs. They were targeted at ordinary computer users; other programs (DeCSS, for example) had long circulated for free among computing enthusiasts, but there was no such user-friendly product for sale. 321 suggested the DMCA did not apply in this case because CSS is ineffective at preventing unauthorized access and use.[104] A measure must be effective for the law to apply, and since the means of circumventing CSS were all over the Internet, 321 questioned whether the encryption scheme had earned the legal protection befitting effective protections.[105]

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[100]*Judiciary Hearing*, *supra* note 88, at 49 (statement of Hon. Marybeth Peters, Register of Copyrights, Copyright Office of the U.S.).

[101]*Id*. at 39 (statement of Hon. Bruce A. Lehman, Assist. Sec. and Comm'r of Patents and Trademarks, Patent and Trademark Office, Dept. of Commerce). Circumventing an access control "is the electronic equivalent of stealing a copy of a book from an author who has *secured* that copy." *Id*. (emphasis added).

[102]*Commerce Hearing*, *supra* note 94, at 38 (prepared statement of Robert W. Holleyman II, President and C.E.O., Business Software Alliance): "H.R. 2281 makes illegal the act of circumvention in the same way that criminal laws make illegal the act of breaking and entering into a home or warehouse." *Id*.

[103]*See* 321 Studios v. MGM Studios, Inc., 307 F. Supp. 2d 1085 (N.D. Cal. 2004).

[104]*Id*. at 1095.

[105]*Id*.

Judge Illston was not persuaded. In rebuffing 321's reasoning, she writes, "This is equivalent to a claim that, since it is easy to find skeleton keys on the black market, a deadbolt is not an effective lock to a door."[106] Illston explicitly invokes the image of locked doors and breaking and entering, shaping an early, important interpretation of the act.

These specific metaphors also spring up in the popular press. In opposing a bill that would amend the DMCA to permit fair use circumvention of DRM, and the tools to do so,[107] Progress and Freedom Foundation Vice President Patrick Ross argued the "keys" to technological protection measures must be kept private: "That hated TPM would disappear from the market, as there's no reason to employ a lock if everyone has a legal right to the key."[108] A commenter on Ernest Miller's blog provides another vivid example of this system of metaphors. Drawing on cryptographic principles, Miller insists that DRM systems are not particularly effective. As a hypothetical test, he suggests revoking their legal protection and seeing if copyright holders still bother to use them.[109] Brad Hutchings replies:

> I have an idea Ernest. How about we prove that dead bolts work. Make it legal for people to break locks and enter other people's homes. Would you like that? The result won't be that people get to use each other's homes. It will be that a lot of people get shot.[110]

The explicit reference to a violent state of property-invasion anarchy is morally charged rhetoric,[111] suggesting a choice between strong pro-

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[106] *Id*.

[107] H.R. 1201, 109th Cong. (2005).

[108] Patrick Ross, *Here's A Surefire Way to Stifle Innovation*, *at* http://news.com.com/Heres+a+surefire+way+to+stifle+innovation/2010-1025_3-5889596.html (Oct. 6, 2005) (on file with author).

[109] Ernest Miller, *Prove DRM Works: Eliminate the DMCA, at* http://importance.corante.com /archives/004619.html (June 28, 2004) (on file with author).

[110] Brad Hutchings, *in* Miller, *id*.

[111] It is also remarkably similar to the argument that landed property rights avert a return to the state of nature, found for instance in the writings of Hobbes and Locke. These philosophers used this argument to justify the enclosure of the commons into property held by the wealthiest few:

> The happy coincidence of the large landowner's sacred rights and economic productivity, and the small farmer's lack of rights and uselessness, is vividly portrayed by Locke in the fifth chapter of his *Second Treatise of Government*, entitled *Of Property*. First published in 1690, the treatise should be understood in context, as the manifesto of a wealthy investor in the Royal Africa Company and Bank of England, whose patron was the first Earl of Shaftesbury, himself a man of extensive holdings in land and stock. It was also written during the early stages of parliamentary acts of enclosure and the post-revolutionary "illegal alienation of the Crown Estates," a giveaway some have called "a gigantic fraud on the nation."

Hannibal Travis, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 BERKELEY TECH L.J. 777, 795 (2000).

tection and the total destruction of the media world. This elaborate metaphorical scenario, based on the locked-doors entailment of COPYRIGHTS ARE PROPERTY, illustrates the metaphors' power.

RESPONSES TO PROPERTY, PROPOSITIONAL AND METAPHORICAL

Those who advocate something more like the free culture paradigm acknowledge the dangers of the COPYRIGHTS ARE PROPERTY metaphor and have begun to collectively develop responses that might unseat the rhetoric of property. Cultural historian and communication scholar Siva Vaidhyanathan notes the battle over metaphors is at the very center of the battle for rhetorical high ground, urging nonprofit organizations to abandon the phrase "intellectual property" and discuss copyright as a bundle of rights.[112] Likewise, Professor Jessica Litman traces the expansion of copyright over recent decades as springing in part from the shift to a discussion "of copyright as property that the owner is entitled to control."[113] In short, free culture advocates are already anxious to unsettle the metaphor of property. They often challenge it in propositional terms, which for reasons discussed above, are expected to be of limited effectiveness. Attempts to develop an alternative metaphorical system have reflected a common understanding of this problem, though each of the attempts considered herein leaves room for the consideration of still further suggestions.

Propositional Rebuttals

At one level, free culture writers regularly refute the COPYRIGHTS ARE PROPERTY metaphor as though it were a propositional statement. Several notable scholars have detailed the differences between copyrighted works and tangible property, and that between copyright law and common law property rights.[114] In his cultural history of copyright law, Vaidhyanathan concludes:

> Copyright in the American tradition was not meant to be a "property right" as the public generally understands property. . . . The use of "property" as

James Boyle likens this enclosure to the rapid growth of copyright law in recent years. *See, e.g.*, James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003).

[112]Siva Vaidhyanathan, *The State of Copyright Activism*, 9 FIRST MONDAY n. 4 (Apr., 2004), http://firstmonday.org/issues/issue9_4/siva/index.html.

[113]LITMAN, *supra* note 35, at 81.

[114]*See*, *e.g.*, C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 905-08 (2002); LESSIG, *supra* note 9; Netanel, *supra* note 73.

> a metaphor when considering copyright questions is not new. . . . However, throughout the eighteenth and nineteenth centuries in both England and the United States, property talk was balanced and neutralized by policy talk—a discussion of what is best for society.[115]

This argument is essentially that the metaphor of property is inappropriate and should be discarded in lieu of more precise, propositional terms.

Free culture advocates rely heavily on legal traditions like the principle of fair use.[116] Codified three decades ago and recognized long before by the courts, fair use is the most important set of copyright exceptions. For instance, it permits the use of short quotations. Invoking fair use, free culture activists decry each escalation of copyright protections.[117] These arguments can be persuasive to those with the requisite legal knowledge, but they lack the clear link to daily experience found in COPYRIGHTS ARE PROPERTY.

Even worse for their cause, free culture thinkers often begin with COPYRIGHTS ARE PROPERTY and explain copyright law in terms of the differences. Professor Lawrence Lessig argues, "This story about real property doesn't map directly onto intellectual property. For as I have described, intellectual property is a balanced form of property protection. I don't have the right to fair use of your car; I do have the right to fair use of your book."[118] This cedes much rhetorical ground to his opponents and stakes out territory based on vague legal concepts.

Metaphors are foundational in how we think and act. Everyone knows what it means to own a car, but even legal scholars are unsure what fair use means. The former makes sense, while we must *make sense of* the latter.

Free culture advocates also argue that copyright is best characterized as a monopoly. In a historical study of the conceptions of copyright that preceded and guided the authors of the U.S. Constitution, Professor

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[115]VAIDHYANATHAN, *supra* note 86, at 11. Note the appeal to a balance between interests. This argument, also commonly used in this debate, is an example of a metaphorical idea that has been co-opted into ordinary language. *See infra* note 147 and accompanying text. Unlike that example—the chilled speaker—the image of balancing has little additional rhetorical value in this debate when turned into something more clearly metaphorical; in copyright debates, nobody can agree on the relative weights of any of the competing values, so everyone can claim their position as the only one to achieve balance.

[116]17 U.S.C. §107 (2004).

[117]*See, e.g.*, YOCHAI BENKLER, THE WEALTH OF NETWORKS 416-17 (2006); MCLEOD, *supra* note 72, at 32, 83-85; Jake, *supra* note 95. Many free culture advocates also acknowledge the limitations of fair use. For instance, fair use is no substitute for statutory licensing for derivative works, especially music sampling. *See, e.g.*, LESSIG, *supra* note 8, *at* 294-96; MCLEOD, *supra* note 72, at 112-13.

[118]LESSIG, *supra* note 9, at 187.

Lewis Hyde writes that the debate has for centuries involved both the metaphors of the private landed estate and of the commons.[119] But the story does not end there:

> [T]here was yet a third frame that regularly stood alongside these and gave more complex meaning to each, . . . though it probably doesn't strike the modern ear with the resonance it must have carried some centuries ago. Listeners in 1774 would have found a range of associations at hand when Lord Camden spoke of those who would "monopolize [God's] noblest gifts.". . . Monopoly had a marked historical meaning for early theorists of intellectual property, seventeenth-century Puritans having begun their argument with royal power over exactly this issue.[120]

Jefferson's fear of monopolies guided his reservations about granting Congress the power to confer exclusivity in copyrights and patents.[121] This appeal to the language of monopoly is also a current plea. In his tour-de-force critique of common assumptions about originality, plagiarism and copyright, writer Jonathan Lethem argues:

> Copyright is a "right" in no absolute sense; it is a government-granted monopoly on the use of creative results. So let's try calling it that—not a right but a monopoly on use, a "usemonopoly"—and then consider how the rapacious expansion of monopoly rights has always been counter to the public interest, no matter if it is Andrew Carnegie controlling the price of steel or Walt Disney managing the fate of his mouse.[122]

This is easier rhetorical ground than "not property," a rhetorical shift with connotations that tilt away from the property-like rights discourse of the strong copyright coalition. Most Americans still have a negative view of monopolies, even if the virulent hatred of yesteryear has been replaced by something more like vague distrust.[123]

Yet even though the charge of unfair monopoly power is itself a loaded claim, it is not yet a metaphor. Literally speaking, copyright *really is* a license on the right to make copies that the government grants to just

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[119]Lewis Hyde, *Frames from the Framers: How America's Revolutionaries Imagined Intellectual Property*, *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=870073 (Dec. 13, 2005) (unpublished manuscript, on file with author).

[120]*Id*., manuscript at 10.

[121]*Id*., manuscript at 14-15.

[122]Jonathan Lethem, *The Ecstasy of Influence: A Plagiarism*, HARPER'S MAG. 59, 63 (Feb., 2007). Lethem's article is an eloquent performative critique of the romantic author and current copyright policy, cobbled together almost entirely using quotations and paraphrases from an astonishing variety of sources. This quotation, however, is Lethem's alone.

[123]*See, e.g.,* Hyde, *supra* note 119, manuscript at 14-15.

one person or institution. If a claim is literally true, it is generally not well suited to dislodging as powerful a metaphor as that of property, and this is true of the language of monopolies. The terms and conditions of government-granted monopolies are neither as familiar nor uncontested as those governing property. As Hyde notes, the cries of monopoly carry far less weight today than they did centuries ago.[124] Thus, as with the rebuttal that stronger copyright erodes fair use, the claim that copyright extends monopoly powers is most persuasive for those who already speak the language of the law and agree with the speaker—that is, not particularly persuasive.

Metaphorical Rebuttals

The free culture movement also advances its own metaphors. Three are particularly noteworthy. First is the idea of the *public domain*, especially as contrasted with the second enclosure movement.[125] Second is the *commons*, which substantially overlaps the idea of the *public domain*.[126] Third, many free culture advocates have argued that strong copyright chills free speech; some have begun in small ways to resurrect the meteorological imagery from this dead metaphor.[127]

Public Domain

In recent years, there has been increasing emphasis on the idea of the public domain as a metaphor for understanding the perils of the endless expansion of information monopolies such as copyright.[128] While others have played a role, Professor James Boyle has been a particularly strong advocate of this metaphorical system.[129] He begins with a brief retelling of the history of the English enclosure movement—the slow, uneven "process of fencing off common land and turning it into private property" from the fifteenth to the nineteenth centuries.[130] In this process, those who had formerly worked the common land were subject to tremendous hardship, justified long after it was underway by arguments appealing both to economic efficiency and natural rights in property.[131]

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[124]*Id.,* manuscript at 10.

[125]*See infra* notes 128-140 and accompanying text.

[126]*See infra* notes 141-145 and accompanying text.

[127]*See infra* notes 146, 148-50 and accompanying text.

[128]*See* Boyle, *supra* note 111, at 69.

[129]*Id*. at 69-70. While he omits his work from his history of this trend, citing "self-preservation if nothing else," he has in fact played such a considerable part in sounding this call that even he must reluctantly acknowledge his role.

[130]*Id*. at 33-34.

[131]*See* Travis, *supra* note 111, at 781.

Today, the argument goes, the process is happening again, with all public domain elements of our culture being seized by those who claim both moral and economic justifications for the ever-greater expansion of intellectual property, including *via* copyright law.[132] Through ever-greater protection, those areas that were viewed as beyond the pale of potential regulation have repeatedly been swallowed up by property claims on intangibles.[133] As in the first enclosure movement, this has come with real social, economic and political consequences. Boyle hopes to use this metaphor, in part, to slow this growth of property-like protection and thus to preserve the commonly available intellectual resources that would otherwise be lost to the holders of exclusive rights.

As part of his call to save the public domain, Boyle draws a hopeful analogy with the growth of environmentalism.[134] Environmental activism has successfully deployed two analytical tools:

> The first was ecology, the study of the fragile, complex and unpredictable interconnections between living systems. The second was welfare economics, which revealed the ways in which markets can fail to make economic actors internalize the full costs of their actions.[135]

These two tools have helped the environmental movement to build a perception of collective interest in preventing the market failures of environmental degradation—even across groups that formerly had no association.

Based on an analogy with the environmental movement, Boyle sees an avenue for the potential success of the movement to reform intellectual property law. In both cases, he argues, "[T]he very structure of the decision making process tends to produce a socially undesirable outcome."[136] In both cases, a select few reap the rewards of specific policies. The broader society pays a larger total cost for a net loss of economic value, but the impact is spread so thinly as to create a substantial collective action problem.

The appeal to "the environment" in general has played an important role in overcoming this collective action problem. He elaborates on why the appeal to a broad notion has worked:

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[132]*See* Boyle, *supra* note 111, at 38.

[133]*See id*. at 38-39.

[134]James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87 (1997).

[135]*Id*. at 108-09.

[136]*Id*. at 110.

> There are certainly lots of discrete contexts in which the idea of nature or the environment is raised, and many different arguments for and against a particular type of development or technology. Why not simply deal case-by-case with the harms to this river, that wetland, this species, or that way of life? . . . Part of the answer, of course, is rhetorical. The idea of the environment seems to add a moral overtone to the discussion, to counterbalance the arguments about "progress" and "growth" and "modernity." And this is hardly an unimportant function.
>
> But that is not all there is to it. The environmental movement also gained much of its persuasive power by pointing out that there were structural reasons for bad environmental decisions—a legal system based on a particular notion of what "private property" entailed, and a scientific system that treated the world as a simple, linearly-related set of causes and effects. In both of these conceptual systems, the environment actually disappeared; there was no place for it in the analysis. Small surprise, then, that we did not preserve it very well. . . . [T]he same is true about the public domain.[137]

While activism also played an important role in the environmental movement,[138] these twin intellectual pillars of overarching collective interest and structural failure served an important role in structuring the mindset and rhetoric of successful activism. Boyle envisions a similar combination in the case of the fight for free culture.

There are signs this environmental metaphor is having some influence. Professor Yochai Benkler describes the recent moves to expand copyright protection by "framing these various changes as moves in a large-scale battle over the institutional ecology of the digital environment."[139] This *ecosystem* is fragile; conditions too favorable for *one genus of creative activity*—in particular, those who seek to sell copyrighted works such as media companies and authors—will have negative effects on the rest of the *other species of creative activity*. Specifically:

> The battle over the institutional ecology of the digitally networked environment is waged precisely over how many individual users will continue to participate in making the networked information environment, and how much of the population of consumers will continue to sit on the couch and passively receive the finished goods of industrial information producers.[140]

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[137]Boyle, *supra* note 111, at 71.
[138]Boyle, *supra* note 134, at 112.
[139]BENKLER, *supra* note 117, at 381.
[140]*Id*. at 385.

The unpredictability and nonlinearity of the ecology suggests the rhetoric of endangered species, an excellent explicit addition by Benkler. Yet these thinkers only begin to flesh out this metaphor, leaving much room for systematically teasing out its entailments and seeking deeper connections to the copyright debate.

There are, however, two problems limiting the potential efficacy of this metaphor. First, there is no immediate metaphorical connection to copyright law. Quite the contrary, the connection to environmental policy works at cross-purposes here. The goal of environmental reformers is generally to prevent property owners from sharing certain byproducts—including their smog, heavy metals and toxic chemicals—with those who seek to avoid these negative externalities. The goal of free culture reformers, in contrast, is at some level to *force* copyright holders to share certain byproducts—including knowledge, enjoyment and inspiration—despite efforts to capture and monetize these positive externalities.

The other problem is that the metaphor fits seamlessly within—indeed builds upon—that of COPYRIGHTS ARE PROPERTY; even worse, it assumes real property. The understanding of real property rights did not always exclude the right to pollute; quite the contrary, a necessary component of the environmental movement is to shift the definition of property in a way that curtails what a landowner can do on his or her land. The metaphor of *public domain ecology* thus asks an audience to grant strong property rights to copyright holders—for reasons that make intuitive sense—only to take them away for reasons that are less clearly analogous to environmental destruction but with no actual threat to human or animal life. This is a highly disadvantageous starting point for free culture advocates.

The battle has been hard and slow and has still met only partial success in the case of protecting the actual ecosystem, and this is even though the long-term viability of the human species is at stake. It would be a hard enough fight for free culture advocates to begin from the conception of copyright as a property right in chattels, which itself is in excess of the monopoly granted by copyright—so much so that many advocates for greater copyright protection regularly start from the metaphor of personal property. For free culture advocates to begin from a metaphor that implicitly grants the much stronger right of real property to copyright holders is to begin battle from the floor of a deep ravine.

The Commons

With a subtly different approach, other free culture advocates call for the *preservation of the commons*. Streets, parks and oceans are all

commons. Everyone is free to use a commons, within limits, without the permission of others. This can lead to overuse, which economists describe as a "tragedy of the commons."[141] Examples include litter and over fishing.

While the differences between the public domain and the commons are subtle—so much so they may not matter at all for the instant argument—it is worth clarifying the small differences between these two conceptual limits on the boundaries of that which copyright law can protect:

> The old dividing line in the literature on the public domain had been between the realm of property and the realm of the free. The new dividing line, drawn on the palimpsest of the old, is between the realm of individual control and the realm of distributed creation, management, and enterprise. To be sure, the two projects share a great deal, but they are also different in important ways. To put it bluntly, some of the theorists of the e-commons do not see restraints on use as anathematic to the goal of freedom; indeed, they may see the successful commons as defined by its restraints. Those restraints may be legal—Lessig's liability rules—or they may be built on community norms and prestige networks of various kinds. The point is that "property's outside," property's antonym, was now being conceived of differently, though frequently, and somewhat confusingly, using the same words and many of the same arguments.[142]

Lessig calls for the saving of the commons as part of his effort to help limit the growth and accelerate the reform of copyright. He grants the prevalence of the assumption that a commons will be tragic, but he insists that this is not true here because copyrightable works are nonrivalrous: "A nonrivalrous resource can't be exhausted. . . . Thus the issue for nonrivalrous resources is whether the Edith Whartons of the world have enough incentive to create."[143] Once a movie or song is produced and converted into data, its reproduction is cheap and easy. Following this metaphor through, this invites the reader to imagine that a creative work is thus like a park in which litter is impossible, a street that is never congested, or a fish that can be caught an infinite number of times; as long as the resource is available once, it can be made available to everyone for practically zero additional cost. The best copyright system thus provides enough incentives to *build new parks* but limits private ownership in these parks so that they quickly *become public*

[141]LESSIG, *supra* note 8, at 22.
[142]Boyle, *supra* note 111, at 66.
[143]LESSIG, *supra* note 8, at 21.

domain. This is educational, but it draws on the metaphor of the spoiled commons only to combat it with hard-to-imagine impossibilities.

Lessig contends commons exist for good reasons. We often keep "a particular resource—such as a public road, right-of-way, a navigable waterway, or a town square—in common"[144] for good reasons. It could be held privately, but "the public has a superior claim to these resources because 'the properties themselves [are] most valuable when used by indefinite and unlimited numbers of persons.'"[145] Consider streets: Private owners could siphon their value, so holding them in common ensures easy and efficient use by the community. This metaphor suggests limitations on copyright—such as finite terms and privileged uses such as fair use—demarcate the copyright commons. If quotation was forbidden or licensed, for instance, intellectual production would come to a grinding halt. Fair use makes remix culture possible. Fair use is the *system of roadways* and fair use is the *neighborhood park* become subsets of the claim that that which is not copyrightable is the COMMONS.

Here, Lessig gives a fairly clear metaphor that also helps one to imagine reasons to reject maximum copyright protection. Yet it accrues two disadvantages, which are essentially the same two that accrued to the metaphor of the public domain. First, it begins with an image with connotations that work against his case, seeking connotations that help his case in the exceptions. Copyrighted works are *parks that, once built, cannot be spoiled* goes against our visualization of literal parks. Parks can be spoiled, so the first instinct of a strongly capitalist society will, at a minimum, be to punish those who make unauthorized uses of public property. Second, as with the public domain/ecology metaphor, it also works within COPYRIGHTS ARE PROPERTY, again implying even the strong copyright right of realty.

Chilling Free Speech

A third and final set of metaphors for the free culture coalition is built on the argument that strong copyright chills free speech. The concept of chilled speech has a long tradition in constitutional, especially First Amendment jurisprudence,[146] so much so that the term *chill* has a literal—that is, propositional—legal meaning. Yet the concept that it expresses is built upon a metaphorical reference to cold; specifically,

[144]*Id*. at 87.

[145]*Id*.

[146]*See, e.g*., Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244 (2002) ("The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere."). *See generally* Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969); Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685 (1978).

cold weather discourages speech. The rather specific legal use of *chill* is one part of "a metaphorical concept . . . [that became] part of our ordinary literal language."[147] Laws that are critiqued for chilling speech are similar in effect to a cold day; one can still speak or listen despite threats of suit or prosecution, just as one can do so outside in the dead of winter, but fewer will do so in either case.

As with all such metaphorical concepts that have entered literal language, this leaves much room for expansion *via* use of the hitherto-unused part of the metaphor. Several groups and scholars have done just this, drawing in all manner of meteorological entailments. Most notably, the Chilling Effects Clearinghouse, "a unique collaboration among law school clinics and the Electronic Frontier Foundation"[148] that fights threats to online speech, embodies this metaphor. While Chilling Effects works on many issues, much of their work combats threats of copyright liability.

The Chilling Effects home page prominently features two thermometers and links to a section called "Weather Reports."[149] This metaphor expresses the negative externalities of copyright litigiousness. As Netanel explains, "[T]he very uncertainty and threat of litigation over whether an author has appropriated another's copyrightable expression may itself chill what might be properly characterized as the permissible, and even laudable, taking of an idea."[150] Here, free culture theorists have a metaphor with clarity comparable to COPYRIGHTS ARE PROPERTY, though it has not been developed to provide comparable explanatory power. The metaphor describes the harms of overzealous copyright, but does not yet provide a complete visual or experiential means of conceptualizing the entire copyright system.

LOCKED DOORS: RESPONSES

As with the broader metaphor of property, copyright reform advocates have largely responded to the metaphor of locked doors in ways that are either propositional or within the metaphor. In the discussion on his weblog, Miller responds to Hutchings by arguing the metaphor does not map properly onto copyright protections:

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[147]LAKOFF & JOHNSON, *supra* note 12, at 52.

[148]Chilling Effects Clearinghouse, *About Us*, *at* http://www.chillingeffects.org/about (last visited July 1, 2007) (on file with author).

[149]Chilling Effects Clearinghouse, *Chilling Effects Clearinghouse*, *at* http://www.chillingeffects.org (last visited July 1, 2007) (on file with author).

[150]Netanel, *supra* note 73, at 298-99.

> Geez, Brad, do I have to explain this again. [*sic*] Physical locks and digital locks have quite different characteristics. If they didn't, then we could just have one set of laws and everything would be hunky-dory. Just as the fact that copyrighted works can be cheaply and easily copied means that we have different rules and purposes for copyright law than standard property law. They are related, yes, but they are also different in non-trivial ways. So, I'm terribly sorry if I don't see your physical example as particularly relevant.[151]

Miller is not the only person to respond in propositional terms. Lessig uses the retort, "I don't have the right to fair use of your car; I do have the right to fair use of your book,"[152] as a response not only to COPYRIGHTS ARE PROPERTY, but also to the claim that copyright controls are analogous to locked doors. He grants that laws protecting locks on real property are unobjectionable, but he contests the applicability of the metaphor. As with COPYRIGHTS ARE PROPERTY, the first instinct of free culture activists is often simply to rebut the applicability of the metaphor.

While free culture advocates have attempted to create metaphors that effectively compete with COPYRIGHTS ARE PROPERTY, they regularly work within the imagery of copyright controls as locked doors. There are a number of potential reasons, but perhaps first among them is the relative ease of co-optation. Miller's first response is to note the failure of the metaphor to exhaustively explain the situation. A second response, however, specifically turns this imagery to his benefit:

> [N]o one goes around claiming that physical locks stop burglary. Everyone recognizes that it isn't the lock that does the work, but the law. Any reasonably competent crook can bypass most security systems. If they don't it is because of law, not the physical aspects of the lock.[153]

Miller uses the burglary metaphor to demonstrate that locks can be bypassed by nearly anyone with enough desire to do so; this is a threat to a DMCA plaintiff's burden of proving that a specific DRM technology is indeed effective. As part of an extended critique of the triennial rule-making to determine exemptions to the anti-circumvention statute, Bill D. Herman and Oscar H. Gandy Jr. also turn this metaphor in critiquing Peters' congressional testimony:

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[151]Miller, *supra* note 109.
[152]LESSIG, *supra* note 9, at 187.
[153]Miller, *supra* note 109.

> To our knowledge, there are few if any laws against breaking into a room per se. If one has legally purchased the lock, the room, and the manuscript, breaking into the room would be perfectly legal—the objections of MasterLock notwithstanding. ... On this count, at least, section 1201 gives copyright holders rights that [exceed] ownership rights in physical property.[154]

Another common inversion is the argument that copyright controls *lock in consumers*. Within this metaphor, locks are not so much to keep out intruders as to keep consumers where copyright holders want them—buying content on the copyright holder's terms. DRM represents "the effort of the content industries to create a 'leak-proof' sales and delivery system. . . Then, they can control access, use, and ultimately the flow of ideas and expression."[155] DMCA opponents sometimes speak of "DMCA lock-up"[156] and "using litigation to lock . . . customers into using [specific] products."[157] In this case, users of popular hardware devices, from Lexmark printers[158] to the iPod,[159] are locked into buying from the technology vendor. This metaphorical inversion, while ultimately adopting the metaphor of locked doors, delivers some rhetorical traction for those who seek to fight back against some of the most egregious effects of the law.

As in the copyright debate generally, the charge of monopoly is common among those who decry the DMCA. In one headline, technology journalist Andy Dornan sums this position nicely: "Apple's demand for a state-sponsored monopoly shows that DRM aims to stop competition, not piracy."[160] Libertarian blogger Jason Vallery echoes this rhetoric in

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[154]Herman & Gandy, *supra* note 6, at 190 n.108.

[155]SIVA VAIDHYANATHAN, THE ANARCHIST IN THE LIBRARY: HOW THE CLASH BETWEEN FREEDOM AND CONTROL IS HACKING THE REAL WORLD AND CRASHING THE SYSTEM 52-53 (2004).

[156]Timothy B. Lee, *Circumventing Competition: The Perverse Consequences of the Digital Millennium Copyright Act,* CATO Institute, *at* http://www.cato.org /pubs/pas/pa564.pdf (Mar. 21, 2006) (manuscript at 16, on file with author).

[157]*Id*. at 18.

[158]*See, e.g.*, Lee, *id*, at 16-18. "The consumer-serving innovations lost to this DMCA lock-up cannot be known." *Id*. at 16.

[159]*See, e.g., id*. at 9, 18. Lee argues that Apple should only be permitted to enforce do-not-hack conditions *via* contract law, which would require suing the customers who agreed to the licensing terms for iTunes. The bad publicity from suing customers "would make Apple think twice about using litigation to lock its customers into using its products." *Id*. at 18. The DMCA, though, gives them an easy way to preserve lock-in; Apple can pursue "third-party developers of circumvention tools rather than compete to please customers." *Id.*

[160]Andy Dornan, *Apple's Demand For A State-Sponsored Monopoly Shows That DRM Aims To Stop Competition, Not Piracy*, INFORMATION WEEK, *at* http://www.informationweek.com/blog/main/archives/2006/03 /apples_demand_f.html (Mar. 23, 2006).

expressing concerns about the state's sanctioning of monopoly power through the DMCA. In particular, he decries the role of this law in supporting the Motion Picture Association of America's use of its near-total control over their industry to impose design restrictions on electronics manufacturers: "The DMCA uses a government sponsored monopoly to force encryption on the digital media we consume, and makes it illegal for us to use tools that would free us of their constraints."[161] As in the copyright debate generally, this argument usually appears in a form that is propositionally true rather than metaphorical—and is thus subject to the same weaknesses.

One metaphoric response is specifically to the debate over DRM and the DMCA, though it has not caught on. Extending the image of an information commons, Benkler asks readers to picture a world where property owners have recently discovered the property-protecting value of fences.[162] Copyright controls are *fences*, not locked doors. In their enthusiasm, property owners have begun fencing in even the sidewalks, co-opting formerly public space. Some copyright controls *fence off* commonly owned property. As a solution, people begin carrying stepstools to surmount sidewalk-hogging fences as they encounter them. DRM circumvention *reclaims common property*. But the law soon prevents people from carrying fence-hopping stepstools or using them to surmount even sidewalk-blocking fences. The DMCA *protects land grabbers* at public expense. This is a rather clever metaphor, drawing on the popular metaphor of a commons, yet despite Benkler's exceptional standing among theorists of communication law and policy,[163] the fair-use coalition has not cited it regularly.

UNLOCKING THE COPYRIGHT DEBATE

In response to this nexus of property metaphors, free culture advocates have some alternatives, though they may rely too heavily on attempts to co-opt metaphors from the property nexus. In response to extreme laws such as the DMCA, this is an expedient means of arguing that a law has gone too far. Surely copy controls should not have *more* protections than deadbolts, they argue, but they will not be satisfied if these two technologies have the same legal protections. Combating

[161]Jason Vallery, *Libertarian Point of View on Digital Rights Management*, *at* http://vallery.net/2007/05/04/libertarian-point-of-view-on-digital-rights-management (May 4, 2007).

[162]Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 420-22 (1999).

[163]LESSIG, *supra* note 9, at 23 (describing Benkler as "perhaps the best communications theorist of our generation").

COPYRIGHTS ARE PROPERTY with the metaphors of the commons and the chilled speaker are more ground-shifting strategies and thus more potentially effective. While each offers some power, they are not yet developed enough to provide a compelling counter-metaphor that can shift the meaning of the copyright debate. Further metaphors may advance this cause, offering additional means of framing the copyright debate. Suggested proposals include reversing claims of property and developing accompanying metaphors, extending the metaphor of the chilled speaker to include an entire temperature-and-food system, and a brief attempt to advance a monopoly metaphor.

Reversing Claims of Property

Playing on the notion of property may be a reasonable free culture strategy, but rather than perpetuating the metaphor, it would be more effective to appeal to physical property over intellectual property. The Sony "rootkit" scandal highlights this strategy. As one commentator notes, "Sony rightly came under fire. . . from programmers and Internet users for injecting an undetectable copy-prevention utility into Microsoft Windows when certain CDs are inserted."[164] Installed without users' knowledge or permission, the rootkit exposed computers to substantive security threats that were quickly exploited. Sony immediately recalled millions of CDs and is facing several lawsuits. In seeking to protect intellectual property, the company wreaked havoc on actual property. In this case, propositional terms *can* trump metaphorical ones, because *the metaphorical claim conflicts with the literal claim*. Rootkit victims can sue to protect their physical property rights, which include the right to say "No" to such invasions of their computer.

The rhetoric of tangible property has further applications. For instance, limitations on the use of physical copies of media products—for instance, music CDs—are also easily described as contrary to the users' obvious ownership of those objects. If free culture activists appeal to rights of physical property, then copyright holders must demonstrate that their metaphorical property right trumps a literal property right. Judging by the outcry over the Sony scandal, most people believe their right to physical property outweighs the claim of copyright holders. Some activists, including Columbia Law Professor Tim Wu, have seized on this conflict to decry current copyright law. Wu notes that, despite Sony's liability for violating users' property rights, users are still legally

[164]Declan McCullagh, *Why They Say Spyware Is Good For You*, *at* http://news.com.com/Why+they+say+spyware+is+good+for+you/2010-1071_3-5934150.html (Nov. 7, 2005) (on file with author).

forbidden from removing Sony's software due to the DMCA.[165] To the extent that people learn about this law due to Sony's blunder, reformers are in a good position. Yet as with the metaphor of the commons, the rhetoric of real property still leaves free culture activists needing a good metaphorical nexus to supplant COPYRIGHTS ARE PROPERTY.

Continuing with the appeal to literally tangible property, one could invoke COPYRIGHT IS STATE SEIZURE OF PROPERTY. Any legal doctrine within this category works reasonably well. Copyright can be seen as a form of *imminent domain*—and not a relatively palatable case of needing a parcel to build a highway. Rather, it looks like a case involving the state enriching a wealthy private actor at the expense of a citizen of more modest means, claiming but not obligated to demonstrate a broader public benefit—ala *Kelo v. City of New London*.[166] Alternatively, copyright could also look like *taxation*, with the purpose of redistributing wealth from the masses to the few. By highlighting the literal property claim in chattels such as computers and media, one can create metaphors with entailments that are intuitive, connect the complexities of copyright to the simple understanding of daily experience, and further the goals of the free culture advocate.

The Bazaar of Ideas

While this is a reasonable strategy, it is worth considering other options that build separate metaphorical systems. STRONG COPYRIGHT CHILLS FREE SPEECH is a strong appeal to American political traditions, but as yet it paints an incomplete picture. Is there a correct, middling temperature? How do we find that temperature? One could begin here: COPYRIGHT IS THE AIR CONDITIONING IN THE BAZAAR OF IDEAS. Importantly, note the metaphorical entailments that follow from the image of a bazaar. No central planner decides what will be offered. The wealthy and humble alike are welcome to buy and sell there. Vendors view it primarily as a place to sell their wares, but the public may go there to buy or simply to visit. Anyone can go to the bazaar to discuss politics, meet people, or even criticize the wares on offer, and doing so is both

[165] *Id.* ("'I think it's pretty clear that circumventing Sony's controls violates the DMCA,' says Tim Wu, a Columbia University professor who teaches copyright law.").

[166] 545 U.S. 469 (2005) (holding that legislative judgment of the public good is sufficient to determine a "public use" under the Takings Clause of the Fifth Amendment): "[T]he City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. . . . The disposition of this case therefore turns on the question whether the City's development plan serves a 'public purpose.' Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments" as to what public needs justify the use of the takings power. *Id*. at 477, 480.

legal and socially acceptable. Buying products may or may not be part of the trip. The bazaar is both a commercial space and a public space.[167]

This contrasts sharply with the means by which millions of Americans do their shopping every day: the strip mall. In the strip mall, a handful of major sellers dominate the space. Managers for each store decide what will be offered, and attempts to sell one's products through these outlets require either substantial industry clout or endless treks through the bowels of corporate middle management. Attempts to use this space to discuss politics, to criticize the wares on offer, or even to meet people are often grounds for prosecution for trespassing. This is exactly how the major media companies view their businesses. Their business and legal practices make one message quite clear: Come to us as a customer or don't come at all.

The image of the bazaar helps dislodge the assumption of a strictly transactional experience. In a bazaar, sellers can still profit handsomely, but the public also gains something that is not fully captured by market transactions. These externalities—especially the creation of an open social and political space—are wholly absent in a strip mall. Thus, by shifting the metaphorical venue to a bazaar, the free culture coalition has already reframed the debate in a way that highlights the public domain they seek to protect. It also highlights the utilitarian paradigm that is perhaps the key to dislodging the assumption of property.[168] A successful bazaar is judged not only by how much product is bought and

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[167]This is similar to hacker Eric Steven Raymond's twin metaphor of the cathedral and the bazaar, contrasting styles of open-source development of computer programs. Eric Steven Raymond, The Cathedral and the Bazaar (revision 1.57, Sept. 11, 2000), *available at* http://www.catb.org/~esr/writings/cathedral-bazaar/cathedral-bazaar. Raymond explains:

> Linux overturned much of what I thought I knew. I had been preaching the Unix gospel of small tools, rapid prototyping and evolutionary programming for years. But I also believed there was a certain critical complexity above which a more centralized, a priori approach was required. I believed that the most important software (operating systems and really large tools like the Emacs programming editor) needed to be built like cathedrals, carefully crafted by individual wizards or small bands of mages working in splendid isolation, with no beta to be released before its time.
>
> Linus Torvalds's style of development—release early and often, delegate everything you can, be open to the point of promiscuity—came as a surprise. No quiet, reverent cathedral-building here—rather, the Linux community seemed to resemble a great babbling bazaar of differing agendas and approaches (aptly symbolized by the Linux archive sites, who'd take submissions from *anyone*) out of which a coherent and stable system could seemingly emerge only by a succession of miracles.
>
> The fact that this bazaar style seemed to work, and work well, came as a distinct shock.

Id.

The metaphor presented here is different, however; it imagines the development and distribution of copyrighted works all happening within the same bazaar. *See also* ERIC S. RAYMOND, THE CATHEDRAL AND THE BAZAAR: MUSINGS ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY (2001).

[168]*See, e.g.*, Balganesh, *supra* note 55, at 330.

sold—the criterion for judging a strip mall—but by who participates, what it means to them, and what this adds to the community.

Unfortunately, true bazaars are hard to locate in the United States today. They are usually one-time or seasonal events such as farmers' markets, community fairs and carnivals.[169] This dilutes the value of this rhetorical strategy. Normally, asking the body politic to champion an image that is the opposite of their comfortable daily experience—in this case, to choose the bazaar over the strip mall—is not likely a successful rhetorical strategy. In this case, however, there is an important, commonly experienced space that is the bazaar of ideas incarnate: the Internet, which happens to be "the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen."[170] THE INTERNET IS A BAZAAR OF IDEAS could, with some usage, become a common and then a dead metaphor, becoming a literal term to explain the conceptual link it connotes, with the metaphorical nature forgotten entirely. This is not far from the notion of a marketplace of ideas; in fact, it is a subset. It makes clear what kind of marketplace the Internet does and should represent: a bazaar rather than a strip mall.

While even an indoor bazaar has no central planner to decide what should be sold, it does require some centralized management to maintain a comfortable experience for all involved. This includes setting the right temperature. Again, this applies to the copyright debate *via* COPYRIGHT IS THE AIR CONDITIONING IN THE BAZAAR OF IDEAS. Air conditioning is especially important for *frozen food vendors* and *produce stands*, those information producers who sell copyrighted works to fund their corporate or individual livelihood. In the bazaar of ideas, the *frozen foods section* includes most media corporations, and the *produce section* includes authors who hope to sell their works—Benkler's Mickeys and Romantic Maximizers, respectively.[171] If the copyright laws are too liberal—if the bazaar is *too warm to sell cold food*—these vendors will not show up because their products will not last. Excessive *heat* spoils these *perishable* works. Sellers cannot wait for the right price and are thus forced to give away their produce.

Likewise, if copyright laws are too strong—the bazaar is *too cold* for the public to enjoy themselves—the crowd will be too small and be unwilling to participate. The society misses out on the potential for substantial positive externalities from socializing and information exchange. *Frozen out of the bazaar*, the public has less conversation.

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[169]For more on the carnivalesque experience of music embodied in the legally suspect rave scene (as opposed to the sanitized, legalized club scene), *see* Brian L. Ott & Bill D. Herman, *Mixed Messages: Resistance and Reappropriation in Rave Culture*, 67 WESTERN J. COMM. 249 (2003).

[170]ACLU v. Reno, 929 F. Supp. 824, 881 (E.D. Pa. 1996).

[171]BENKLER, *supra* note 117, at 43.

Informal information sharing, from gossip to sagely advice, is lost in the chill.

The smaller crowd also harms the other stands in the bazaar. Not only will the produce vendors sell less produce,[172] other vendors will not benefit from the smaller crowds' higher price thresholds for cold groceries. Imagine most of the technology sector—including hardware manufacturers, service and repair shops, and Internet companies such as Web site hosts and last-mile service providers—as a series of booths selling hot food. If the bazaar is hot, these vendors have lower costs; it is *cheaper to heat food in a hot room* just as it is cheaper to produce technologies that can copy, edit and distribute copyrighted works in a country where copyright provides little protection. If the bazaar is too cold, the cost to *heat their food*—invent and sell new technologies—can become far too expensive, reducing the number of vendors and reducing the offerings of those who stay. Note that the hot food vendors do not necessarily want the thermostat topped out, either; unlike the frozen food and produce stands, hot food vendors need crowds who could use a *hot bowl of soup*. Consumers will be best satisfied in a room that is comfortable, not only for their own immediate enjoyment, but because it best entices vendors of both cold and hot food to show up, providing them with maximal choice.

Excessive air conditioning harms still other participants, including especially Benkler's Joe Einsteins and Scholary Lawyers.[173] Picture Joe Einstein as a *hobbyist ice cream maker* who gives away cones on Sundays.[174] Imagine two kinds of Scholarly Lawyers. First, there is the *information booth staffer* who wants to promote ideas both for their own sake and to draw attention to the staffer's organization.[175] Second, imagine Free/Libre Open Source Software programmers as circus

[172]Copyright, as a legally granted monopoly license, is one kind of barrier to competitive entry that keeps prices above marginal cost. *See* ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 358 (6th ed. 2005). This means fewer sales at higher prices, creating net deadweight losses but higher profits for sellers. *Id*. at 359. In other words, *produce vendors accept smaller crowds of shoppers* on the assumption that determined shoppers who *fight the cold* will pay more. Copyrighted works, however, exhibit unusual economic characteristics precluding the existence of a competitive market in the traditional sense. Most importantly, they are generally "public goods in that they can be consumed in a nonexclusive and nonrivalrous manner." Haochen Sun, *Overcoming the Achilles Heel of Copyright Law,* 5 NW. J. TECH. & INTELL. PROP. 265, 324 (2007). In most cases, by far the largest cost is in the production of the content that is required to make the first copy; each subsequent copy has a declining marginal cost. Thus, the means of estimating prices in an ordinary competitive market are inapplicable.

[173]BENKLER, *supra* note 117, at 43.

[174]This metaphor is especially applicable in describing those who produce online content for fun, though one may reasonably wonder whether many of these works merit association with Einstein.

[175]This interest in drawing attention to an organization is analogous to the Scholarly Lawyer's interest in advancing a business or career.

performers. (They are highly trained and do some amazing things, especially in teams.) There are several folks who *perform circus tricks* in the bazaar because it is fun or they enjoy the applause. Some of them then profit from these skills in other ways, providing services including *gymnastics lessons* and *on-site performances* (software training and service). Still others have formed into *performance troupes* and perform for the crowd as a means of drawing attention to the group. Anyone is free to *watch* their work in the bazaar, but these performers can still profit handsomely by giving away their performances in this way.[176]

Both the lawyers and Einsteins need to use the same space as the frozen food and produce vendors, but these actors *are disadvantaged in a cold bazaar*. Everyone loses except the frozen food and produce vendors, who demand a highly air-conditioned space so they can charge more for their perishables over longer windows[177] of time.

This culinary twist can go still further. Creating copyrighted works is cooking. Cooking requires the *creative combination of formerly separate ingredients*. The produce stands may set the offering price, but the *cook at home* is free to innovate, even in ways not envisioned by those who sell food. Copyright holders may *deep-freeze* their products by not publishing them, but cultural foods are only enjoyable once *thawed*. Still further, a *healthy diet* of ideas requires *fresh ingredients* and some *home cooking*, while the strong-copyright vision of the copyright industries envisions *pre-packaged, frozen* products that obstruct home cooking. This is *unhealthy* for our culture; home cooking is a vital part of our cultural diet. The call to free culture encourages people to see cultural artifacts as raw ingredients rather than finished products. "'Rip, mix, and [flambé],' says the Apple advertisement," notes Benkler.[178] Instead of insisting on the terms and conditions under which we consume pre-packaged culture, copyright holders should expect that, once home, *home chefs* will mix copyrighted products, even in ways that sellers find *distasteful*. This also suggests a shortened copyright term, since fresh cultural foods have a limited shelf life and a healthy media diet cannot be found exclusively in the frozen culture aisle.

This metaphor has free culture-friendly entailments for the debate over the regulation of DRM. For instance, DRM *locks consumers in the*

[176]Note that they also require *temperate* copyright law; fair use is important, for instance, but so is the right to enforce the General Public License (GPL) *via* copyright. *See* Boyle, *supra* note 111, at 65.

[177]This alludes to the strategy of selling different versions of a media product in different windows of time for successively smaller prices as a vehicle for price discrimination. *See* GILLIAN DOYLE, UNDERSTANDING MEDIA ECONOMICS 84-87 (2002).

[178]Boyle, *supra* note 111, at 40. The Apple ad actually suggests, "Rip, mix, and *burn*" (emphasis added), which is much less appetizing, especially compared to, for example, bananas foster. To sear is another good alternative—an additional rhetorical choice, that is.

freezer, subverting the customer to the needs of the product when it should be the other way around. Further, the DMCA *relegates culture to the deep freeze*. Still further, the ban on circumvention is a ban on bringing culture *into the kitchen*. While just one idea, this metaphorical nexus is perhaps a viable option to replace COPYRIGHTS ARE PROPERTY. Despite its obvious pro-fair use entailments, it has a genuine appeal to centrism and compromise.[179] Its experiential connection is clear, and it maps nicely onto the copyright debate. Implicitly, it also invokes the tension between physical property and intellectual "property" discussed above; once a customer buys a vegetable—or a TV dinner—it is his to use as he sees fit. Imagine an end user license agreement on a frozen potpie.

Copyright Holders are Utility Companies

There are still other viable candidates. As noted previously, Lewis Hyde and others have highlighted the language of monopoly. Rather than carrying forward with additional propositional details, one could turn it into a complete metaphorical nexus. For instance, COPYRIGHT HOLDERS ARE UTILITY COMPANIES carries strong entailments that support free culture.[180] Like a cable or natural gas company, a copyright holder is granted a limited government monopoly for tenable economic reasons, but we should always be skeptical of monopoly utility licenses. As part of this skepticism, utility company monopolies must be limited. Utilities must *earn a monopoly license by playing fairly*. Because of the potential for abuse, regulators must ensure that utility companies do not profiteer.

The application to the debate over DRM circumvention is also beneficial to free culture advocates. After having paid for the utility's product, customers may *use the utility service in creative, nondestructive ways*. This is even if the utility company attempts to ban or obstruct such creative uses. For instance, one does not need the electric company's permission to develop new electrical appliances, even if those new inventions reduce power consumption and thus threaten their

[179]It would concede, for instance, that a total lack of air conditioning causes cultural *spoilage*.

[180]One obvious impact is the shift away from copyright holders' rhetoric of the romantic author. Research into the nature of authorship suggests the romantic author is more cultural construct than empirical reality. *See, e.g.*, THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Martha Woodmansee & Peter Jaszi eds., 1994); Bill D. Herman, *Scratching Out Authorship: Representations of the electronic music DJ at the turn of the 21st Century,* 4 POPULAR COMM. 21 (2006), *available at* http://ssrn.com/abstract=881131. Utility services have a rather unromantic image, which is a useful connotation in the effort to counterbalance the excessive appeals to authors.

profit margins. The ban on circumventing DRM is easily likened to AT&T's mid-century ban on developing nondestructive attachments to telephone jacks—a ban that stopped in 1968 with the *Carterfone* decision,[181] which enabled the development of innovations such as the modem. In both cases, the freedom to tinker is an important condition for innovation.

Monopolies also must permit third parties to help customers use their products. A consumer can re-wire her own home or hire somebody to do it for her. This is an important right being sought by those who seek to modify Section 1201 so that end users can circumvent and hire somebody to do the same. Like COPYRIGHTS ARE PROPERTY, the metaphor of COPYRIGHT HOLDERS ARE UTILITY COMPANIES carries rhetorical weight with entailments that suggest specific legal and policy implications. Unlike the property metaphor, however, the utility company metaphor suggests less—not more—protection for copyrighted works.

CONTINUING THE SEARCH FOR A NEW FRAME

The metaphor of property continues to dominate the public's thinking on copyright law. The metaphor has extended into the debate about circumventing DRM. Even if a customer owns a commercially released motion picture on DVD and a computer, it is illegal for the customer to copy the data from the DVD in order to watch the movie without the disc—though it is fully legal to do the same thing with a music CD. It is also illegal to design or reverse-engineer software that would permit such use of DVDs. The connection between copy controls and locked doors is at least partially responsible for this situation. Drawn to its conclusions, the locked-door rhetoric against this kind of circumvention is akin to accusing would-be circumventors of breaking and entering their own computers.

Those who support values such as free culture and fair use have developed a number of responses. As with the strong copyright coalition's metaphorical nexus of property, these represent a deliberate attempt to frame the debate in a way advantageous to the speaker. Several of these responses have made propositional arguments, directly rebutting COPYRIGHTS ARE PROPERTY and its entailments as though these are also propositional claims. Lakoff and Johnson, however, give reason to doubt the likely success of these strategies. Metaphors are particularly powerful tools for simplifying complicated matters, and the explanatory power of the concept of tangible—especially landed—property is

[181]Use of the Carterfone Device in Message Toll Telephone Service, 13 F.C.C.2d 420 (1968) (holding invalid an AT&T tariff prohibiting the use of telephone attachments not manufactured by the telephone company).

probably too great to overcome by carving out exceptions or citing complex legal concepts.

Unsurprisingly, the free culture coalition has also sought to dislodge or modify the metaphor of property with adjoining or alternative metaphors. Appeals to a *commons* of ideas and culture help illustrate that even property has its limits. Connecting the language of chilling effects with the latent metaphor of temperature is also a powerful means of connecting the First Amendment to the copyright debate in a way that directly speaks to daily experience.

The free culture efforts to rethink the terms of the debate have shown tremendous thoughtfulness, but there remains much room for growth. The appeal to physical property is one partial solution. It can help dislodge COPYRIGHTS ARE PROPERTY by highlighting competing, more experientially transparent claims of ownership. Title I of the DMCA is, in part, a law against breaking and entering one's own computer. With few limits, a citizen has the freedom to tinker with virtually any product he or she owns, from a toaster to a Hummer, yet one cannot tinker with closed-source software programs or commercially released DVDs. For those who support property rights, this is a remarkable limitation on ownership, applied to a very small class of tangible goods. In response, a movie industry executive would be happy to explain that DVD discs are a special kind of property, subject to limitations that make it hard to apply one's ordinary understanding of ownership. When the debate reaches this point, the free culture side is finally winning.

Despite the unique power of the literal claim to debunk a metaphor by the same name, the free culture coalition still can profit from continuing and expanding the deliberate attempt to develop a new metaphor. Building on the tangible property claim, the appeals to taxation or imminent domain may add the necessary rhetorical push. Expanding the metaphor of temperature is another potential means to re-imagine the debate. COPYRIGHT IS THE AIR CONDITIONING IN THE BAZAAR OF IDEAS is an attempt to do exactly this. Especially when supplemented with the metaphorical nexus of fresh versus frozen foods, this has powerfully pro-free culture connotations while still conceding the need for a reasonable degree of copyright protection. COPYRIGHT HOLDERS ARE UTILITY COMPANIES is another potential metaphor particularly suitable for deromanticizing the media industry and highlighting the business part of their business. It also implies copyright as a government concession born of economic necessity rather than a natural right that requires mere recognition.

As with previous research, written with an eye toward reframing the debate, these suggestions are not the final word on the subject. Still further work in this direction is not only possible, it is an important

part of the free culture coalition's attempt to reshape the law and policy of copyright generally and DRM regulation specifically.

While this article is explicitly generative, it is also intended as a contribution to the literature on metaphor in the law more generally. As with First Amendment and Internet law, copyright is an area that is subject to substantial influence by the broader principles enshrined in metaphor. Especially in the rhetoric of policymakers and in the broader public debate, the image of property is very influential, and based in part on that metaphor, strong copyright advocates have successfully lobbied for legislative outcomes that change extant or create new law. The debate also exhibits the same clarity problem exhibited in the development of Internet law: substantial confusion over the best understanding of property to apply. In short, this metaphor behaves as the literature suggests is typical of metaphors, legal metaphors, and metaphors in communication law and policy. This only adds to the exigency for free culture advocates to deliberately attempt to develop and apply one or more new metaphors to the problem of copyright.

From Congress and the courts to formal legal writing, technology news hubs, blogs and advocacy groups, those who support the free culture agenda have been beaten to the punch in the public's eye; voters, students and powerful decision makers alike begin and end their thinking about copyright in terms that draw from COPYRIGHTS ARE PROPERTY. Carving out exceptions and rebutting the metaphor in propositional terms have not yet changed the terms of the debate; inventive metaphors just might do so.

Rather than staying locked in the freezer, we should turn up the heat.