

**A KALEIDOSCOPIC MAPPING OF
INTELLECTUAL PROPERTY DISCOURSES:
IS THE PUBLIC DOMAIN AN ILLUSORY
CONCEPT THAT IS INVOKED TO JUSTIFY
EXCESSIVE MONOPOLIES?**

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ABSTRACT

This Article proposes a kaleidoscopic mapping of intellectual property discourses to embrace a dynamic public domain-monopoly interrelation in its variable formations across US, UK, and EU law narratives of patent, copyright, and trademark.

The central question—Is the public domain an illusory concept that is invoked to justify excessive monopolies?—embraces two core elements connected via an excessive-illusory justificatory link. This Article’s “illusory” inquiry has a bipartite focus on both material intangibility and normative deceptiveness, while the “excessive” monopoly is explored in a threefold manner: first, as an unchecked, discretionary right; second, as a substantive, distributionally marginalizing idea; and third, as a movement-centered, progress-stagnating concept.

Ultimately, this Article employs a changeable, patterned kaleidoscope in its argument that in some discourses a deceptively illusory public domain is invoked to justify excessive monopolies in all three senses.

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I. INTRODUCTION

The fabrication of “thingness”¹ out of public good-type, informational thin air can be observed in Thomas Jefferson’s utilitarian depiction of a public domain-monopoly justificatory link. Here the latter arises as a *de minimis* exclusivity to homogenously bolster the common good² of the former in an uneven balance which, like the

¹ Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1378 (1989); *see also, e.g.*, Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 971 (1990) (contrasting the tangible thingness of real property with the lack of “thingness” associated with intellectual property); Jeanne L. Schroeder, *Virgin Territory: Margaret Radin’s Imagery of Personal Property as the Inviolable Feminine Body*, 79 MINN. L. REV. 55, 60–61 (1994) (“Generations of legal scholars have repeated Wesley Newcomb Hohfeld’s *faux pas* that property rights do not require a res, or object, at all.”); David Vaver, *Intellectual Property: The State of the Art*, 32 V.U.W.L.R. 1, 13 (2001) (“[T]he process of reification – treating intellectual property as a thing and deducing principles from its ‘thingness’ – has become so entrenched internationally among . . . lawyers and lawmakers as to have become its own state of the art.”). *See generally* Michael J. Madison, *Law as Design: Objects, Concepts, and Digital Things*, 56 CASE W. RES. L. REV. 381 (2005), for an overview of “things in law.”

² JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 20 (2008); *see also* *Letter from Thomas Jefferson to Isaac McPherson* (Aug. 13, 1813), in XIII THE WRITINGS OF THOMAS JEFFERSON 334 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903) (discussing the goal of the patent grant as being to “produce utility”).

temporary tying of a balloon to capture free-flowing air, relegates individualism to a privilege³-based monopoly that serves a progressive social benefit—the balloon remains firmly tied to publicly-held ground.

However, despite the distinction that Jefferson posits between the socially-sanctioned stability⁴ of real property and its more ephemeral, intellectual cousin, the discrete, “line”-drawing pressure of the former haunts his treatment of the latter. This is reflected in his inability to demarcate the perimeter of necessary “embarrassment” that accompanies a patent, separating innovation which *is* worth⁵ its commodification from that which *is not*.

And so, if we assume Jefferson’s counterpart⁶ dynamic, in which the utility⁷-seeking public of a free-moving public domain is invoked to justify residual patent rights, the correlativity of taking some *thing*⁸ from the

³ Oren Bracha, *The Commodification of Patents 1600-1836: How Patents Became Rights and Why We Should Care*, 38 *LOY. L.A. L. REV.* 177, 180 (2004); see also Boyle, *supra* note 2, at 31 (highlighting the property right-privilege distinction of some utilitarian discourses). See generally Hans Morten Haugen, *Intellectual Property—Rights or Privileges?*, 8 *J. WORLD INTELL. PROP.* 445 (2005), for a discussion of the “right” and “privilege” concepts in characterizing intellectual property.

⁴ See Jefferson, *supra* note 2 (“Inventions . . . cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them”).

⁵ Jefferson, *supra* note 2.

⁶ Séverine Dusollier, *Scoping Study on Copyright and Related Rights and the Public Domain*, at 4, WIPO Doc. CDIP/7/INF/2 (Mar. 4, 2011), https://www.wipo.int/edocs/mdocs/mdocs/en/cdip_7/cdip_7_inf_2.pdf [<https://perma.cc/5ARD-S4XD>].

⁷ Jefferson, *supra* note 2.

⁸ Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 *CARDOZO ARTS & ENT. L.J.* 37, 62 (2009).

public realm and vesting it in the private, still permeates intellectual property discourses where knowledge input and output⁹ often circulate an invisible, quantitative reference point. As such, any shift in the monopoly construct in line with the central question of this Article, from Jefferson's exception-type status to its now bearing a possible *excessive* quality, implicitly begs the real property question: "relative to what?"

Likewise, on the opposite side of the boundary, the characterization of the public domain as illusory—here defined in a bipartite manner as involving both material intangibility¹⁰ and a normatively-infused, deceptive¹¹ dimension—presupposes that the "relative to what" query has already been answered. For not only does it presume a tangible benchmark from which the public domain has materially deviated, but it also anticipates the ironic sting of a normative promise that the public domain has failed to deliver.

So, like its "excessive" counterpart, the "illusory" determination ironically dooms the public domain from the outset, leaving it to trace an empty justificatory circle. This is because it betrays a real property bias, having already

⁹ R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995, 998 (2003).

¹⁰ David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147, 147 (1982) ("[T]he subject matter of intellectual property is unlike the subject matter of more conventional forms of property which have in common an underlying attribute of tangibility"). See generally Brad Sherman, *What Is a Copyright Work?*, 12 THEORETICAL INQ. L. 99 (2011), for the relationship between the tangible and intangible dimensions of the copyright work.

¹¹ *Definition of Illusory*, COLLINS DICTIONARY, <https://www.collinsdictionary.com/dictionary/english/illusory> [<https://perma.cc/67f5-TJFS>] (last visited Apr. 20, 2019).

posited the either-or separatedness¹² of plots and roads,¹³ mediated by a static normativity, as its ideal reference point—the public domain is invariably otherized.

Therefore, to make something out of a doomed nothing, intellectual property discourses frequently perpetuate the real property template, seeking to fill the public domain ownership void with an artificial positivity that only cements the illusory charge. By carving a tangible opposite to the “right to exclude” in the proprietary language of a “right *not* to be excluded,”¹⁴ for example, the quest to bolster the public domain as a real property self-characterized by its own public rights¹⁵ is often extended to demand a “right *to* be included,”¹⁶ thereby forging a mythical *res*¹⁷ from logical incoherence—a negative right *not* to x is conflated with a positive right *to* y, in a “harmony of illusions.”¹⁸

¹² Rajshree Chandra, *Intellectual Property Rights: Excluding Other Rights of Other People*, 44 *ECON. & POL. WKLY* 86, 87 (2009).

¹³ Boyle, *supra* note 2, at 39.

¹⁴ Malla Pollack, *The Owned Public Domain: The Constitutional Right Not to Be Excluded - Or the Supreme Court Chose the Right Breakfast Cereal in Kellogg v. National Biscuit Co.*, 22 *HASTINGS COMM. & ENT. L.J.* 265, 280 (2000) (emphasis added); *see also* JAMES TULLY, *A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES* 61 (1980) (discussing Locke’s characterization of common property.).

¹⁵ Mark Rose, *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 *LAW & CONTEMP. PROBS.* 75, 77 (2003); *see also* Lange, *supra* note 10 (characterizing the public domain positively, rather than as the opposite of intellectual property).

¹⁶ Pollack, *supra* note 14 (emphasis added).

¹⁷ Dev S. Gangjee, *Property in Brands 2* (LSE Legal Studies Working Paper No. 8, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2249765 [<https://perma.cc/8C4U-QVHR>]; *see also supra* note 1 and accompanying text.

¹⁸ LUDWIK FLECK, *GENESIS AND DEVELOPMENT OF A SCIENTIFIC FACT* 87 (Thaddeus J. Trenn & Robert K. Merton eds., Fred Bradley et al. trans., Univ. of Chi. Press 1981) (1935).

In the light of the justificatory emptiness of this spatial¹⁹ framework, this Article explores the excessive-illusory correlation using a shifting, *self-other* motif to ground its irreducible relativity.²⁰ However, instead of entrenching the public-private relation in a bottomless, boundary-delineating struggle, this Article establishes the monopolistic self and the public domain other as a dynamic continuum²¹ that orients itself around a contextually-situated balance.²² This Article characterizes this justificatory reference point as a *sui generis*, value concept which seeks an optimized, distributional²³ confluence of those innovative, creative, and competitive narratives that fluctuate within a paradigm-shifting forum—the ideal, self-other balance is essentially a freedom of symbiotic *movement* between inclusivity and exclusivity²⁴ (Part II).

So the “relative to what” question, once structured around a quantitative demarcation, now confronts a public domain of shifting publics that embraces its own

¹⁹ Julie E. Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, in *THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW* 137 (L. Guibault & P. Bernt Hugenholtz eds., Kluwer Law International 2006). See generally Litman, *supra* note 1, at 1007 (discussing the drawing of boundaries in copyright law).

²⁰ Dusollier, *supra* note 6, at 36. See generally Carol M. Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, 66 *LAW & CONTEMP. PROBS.* 89, 101–02 (2003) (“[I]t is a mistake to suppose that the public domain and private property are independent realms. Instead, the two are intimately intertwined, both historically and economically.”).

²¹ Richard H. Jones, *The Myth of the Idea/Expression Dichotomy in Copyright Law*, 10 *PACE L. REV.* 551, 598 (1990).

²² Mario Biagioli, *Weighing Intellectual Property: Can We Balance the Social Costs and Benefits of Patenting?*, 57 *HIS. SCI.* 140, 140 (2018).

²³ See Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 *CAL. L. REV.* 1331, 1331 (2004).

²⁴ Dusollier, *supra* note 6, at 6.

intangibility, like the subjective “nothingness”²⁵ that bears its own essence beneath the changing face of a Lacanian mask²⁶—informational thin air slips through our fingers, and justifiably so.

Following this normativity of an interlocking self, other, and their shifting context, this Article defines “monopoly” in a three-fold manner: first, as a discrete right; second, as a substantive idea, capable of distributional marginalization; and third, as a movement-centered concept, with the potential to produce progressive stagnation.

Ultimately, this Article employs a kaleidoscopic mapping of intellectual property discourses to explore the potential for a radical, excessive-illusory modification of Jefferson’s public-private balance. Like a Fullerian spider web, where the pulling of one strand²⁷ vibrates the entire edifice, the application of differing discourses (lenses) through which one may view the changing, self-other relationship will provide a normative framework through which to answer the “relative to what” question. Using this kaleidoscope, whether and the extent to which an illusory public domain may be invoked to justify excessive monopolies will be explored through varying, self-other patterns assessed relative to this Article’s symbiotic ideal.

²⁵ SLAVOJ ŽIŽEK, *THE METASTASES OF ENJOYMENT: SIX ESSAYS ON WOMAN AND CAUSALITY* 143 (1994); *see also, e.g.*, JACQUES LACAN, *THE SEMINAR OF JACQUES LACAN, BOOK XI: THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS* 111–12 (Jacques-Alain Miller ed., Alan Sheridan trans., W.W. Norton & Co. 1981) (1973); Jeanne L. Schroeder, *Unnatural Rights: Hegel and Intellectual Property*, 60 U. MIAMI L. REV. 453, 468 (2006).

²⁶ Schroeder, *supra* note 25, at 467.

²⁷ Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395 (1978).

In the light of this reconceived, justificatory reference point of movement, Part II reveals monolithic, contextually-estranged discourses to invoke a deceptively open public domain to justify market-stagnating patents, in the third excessive sense. In Part III, the fetishized thingness and nothingness discourses reflect, in the former, all-embracing trademarks legitimated by an illusion of seller activity and consumer passivity, and in the latter, an incoherently romantic public domain that justifies creativity-stagnating and discretionarily unchecked copyright—excessive monopolies in the first and third senses.

In sum, this Article employs a kaleidoscope to qualitatively answer the question of an illusory-excessive, public-private nexus through a changeable, patterned spectrum. It is thereby argued that in some discourses a deceptively illusory public domain is invoked to justify excessive monopolies in all three understandings—ultimately the Jefferson balloon, of now unrecognizable capacity, breaks free of its utilitarian tether.

II. JUSTIFYING THE KALEIDOSCOPE: THE VALUE OF MOVEMENT

A. Introduction

At first blush, the socially-optimizing, quid pro quo that Jefferson posits between the public and private dimensions of the patent bargain alludes to a measurable, weighing scale-type balance,²⁸ any deviation from which separates Mario Biagioli's mutually beneficial "right" notion from his mutually exclusive "monopoly." According to this distinction, the innovation-disseminating

²⁸ See generally Biagioli, *supra* note 22 (discussing the origin of this weighing scale imagery).

potential of the former exceeds its increase in social access costs, whereas the latter achieves the opposite, thereby benefiting the inventor “at the expense of”²⁹ the public.

This Article submits that, by so echoing the real property desire to delineate the public-private relation into respective territories,³⁰ this utilitarian, cost-benefit analysis of the incentivization-access dynamic attempts to quantify that which is immeasurable. The further impression that Jefferson’s justificatory equilibrium has been disturbed, the public domain now being invoked to justify *excessive* monopolies, perpetuates this cost-justified rationale, which seeks to balance a quantitative, time-limited³¹ patent right against a qualitative, timeless³² public domain—they circulate one another as mutually incommensurable.

So, following the cyclical emptiness that condemns any attempt to weigh³³ an ephemeral public domain against a quantifiable monopoly, this Article examines Jefferson’s public-private, justificatory link through the intangibility of

²⁹ Biagioli, *supra* note 22. Cf. Birgitte Andersen, ‘Intellectual Property Right’ Or ‘Intellectual Monopoly Privilege’: Which One Should Patent Analysts Focus On? 3 (Globelics Working Paper Series 2003) (“[F]rom an *economic principle* or *definition* point of view, patents are not monopolies but merely competitive properties of exclusive rights. However . . . it is not difficult to imagine how an exclusive right *in practice* might lead to a monopoly.”).

³⁰ Lange, *supra* note 10, at 158.

³¹ See Boyle, *supra* note 2, at 27 (highlighting the twenty-year duration of the patent monopoly). Cf. 35 U.S.C. § 154(a)(2) (2012) (declaring the patent term to be twenty years); The Patents Act, (1977) § 25(1)(1) (Eng.) (specifying that the patent term in the United Kingdom is twenty years).

³² Cf. Munzer & Raustiala, *supra* note 8, at 48 (describing the time-unlimited evolution of traditional knowledge).

³³ Biagioli, *supra* note 22. See generally Dusollier, *supra* note 6, at 14 (discussing the “balanced counterpart” dynamic between the public domain and intellectual property).

movement, which provides a balanced reference point from which to explore the illusory-excessive correlation. Later, varying discourses—here defined as contextual lenses that provide snapshots of a moving, self-other dynamic—will be discussed, illustrating a shifting normativity that underpins the public-private spectrum.

Ultimately, it is submitted in Part II that the illusory-excessive link, rather than occupying a causal relationship, may instead be the product of incoherent discourses. For such discourses, in either determining the public-private balance through a real property lens or estranging it from its context, may in fact legitimate *both* an excessive monopoly *and* a deceptive public domain.

***B. The Intangible Public Domain:
Subjectifying the Mask***

The first dimension of an illusory public domain—its incorporeal nature—illustrates the real property bias of the public-private, justificatory link in some discourses, the rejection of which requires rationalization before this Article can define the public domain.

It is submitted that the implicit quest for tangibility within these discourses entrenches an incoherent public-private dynamic which ironically facilitates excessive monopolies, justified by a pre-alienated,³⁴ intangible concept of the public domain. This Article emphasizes its first monopoly strand—an all-encompassing “right”

³⁴ Cf. e.g., PETER WORSLEY, *MARX AND MARXISM* 25 (Routledge 2002) (1982) (discussing generally Marx’s concept of the alienated worker); Samuel E. Trosow, *The Illusive Search for Justificatory Theories: Copyright, Commodification and Capital*, 16 CAN. J.L. & JURIS. 217, 240 (2003) (discussing Marx’s theory of alienation in the context of intellectual property).

notion—as here rendered excessive by an unchecked potential for establishment on incoherent, judicially whimsical foundations.

1. Alienation Through a Real Property Lens

The obscurity of a species of non-property, as the anonymous other within the binary,³⁵ public-private relationship, permeates those discourses which prioritize its positive³⁶ opposite. This alienation is arguably compounded by a broader cultural narrative in which the romanticism of inventiveness, for example, as an active construct, renders passive³⁷ its raw material. This is reflected in the *res nullius*³⁸-like treatment of traditional knowledge which, owing to its *sui generis* nature, was previously otherized in US patent law³⁹ in favor of a geographically-demarcated, accessibility notion of prior art.⁴⁰

Therefore, to the extent that a trespass⁴¹-type characterization of the public-private separation persists,

³⁵ Chander & Sunder, *supra* note 23, at 1334.

³⁶ See Dusollier, *supra* note 6 (“[S]ome recommendations [suggest] that, by viewing the public domain as material that should receive some positive status and protection, [we] might help to support a robust public domain”).

³⁷ Gangjee, *supra* note 17, at 3.

³⁸ Rose, *supra* note 20, at 92. See generally W. W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 184 (Peter Stein ed., Cambridge Univ. Press 3d ed. 1963).

³⁹ See Margo A. Bagley, *Patently Unconstitutional: The Geographical Limitation on Prior Art in a Small World*, 87 MINN. L. REV. 679, 682–83 (2003) (discussing the “geographical limitation” on prior art under 35 U.S.C. § 102(b) (2000)).

⁴⁰ *Id.*

⁴¹ Litman, *supra* note 1. For an example of this characterization, see Lange, *supra* note 10, at 158–59 (“[T]he law of trademarks . . . has

this materially protean⁴² public domain—sometimes conceptualized as a check against overt propertization⁴³—is doomed to justify excessive monopolies merely because it is *incapable* of discrete quantification. Here, tangibility and its ephemeral opposite invariably move “past each other.”⁴⁴

This can be observed in Richard Jones’s treatment of the inherent malleability⁴⁵ of the idea-expression dichotomy which, despite its recharacterization as a distinction between “unprotectible” and “protectible expressions” mediated by an “originality and creativity”⁴⁶ assessment, is made incoherent by an implicit, line-drawing pressure—the qualitative public domain is rendered invisible beneath a quantitative framework. This is because the perennial desire to demarcate a boundary on the public-private continuum, thereby artificially amalgamating an intangible spectrum with a real property template, forces Jones to circulate an empty, idea-expression tautology.

For example, by emphasizing that facts lack the “requisite originality and creativity of expression”⁴⁷ to be

begun to spill over its boundaries and encroach into territories in which trademark protection amounts to trespass.”)

⁴² Dusollier, *supra* note 6, at 20.

⁴³ Cf. Trosow, *supra* note 34, at 223 (highlighting the burden imposed upon public domain duty-holders, correlative to the monopoly held by right-holders). See generally Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI-KENT L. REV. 841, 844 (1993) (discussing the right-duty relationship that characterizes the right to exclude).

⁴⁴ Cohen, *supra* note 19, at 121.

⁴⁵ Jones, *supra* note 21, at 552 (“[A]ny idea must necessarily have an expression. Thus . . . the sole distinction to be made is between those expressions which are protectible and those which are unprotectible.”).

⁴⁶ Jones, *supra* note 21, at 597.

⁴⁷ Jones, *supra* note 21, 598.

protectible, Jones merely repeats “if x, then [not] y,”⁴⁸ the first attempt constituting a statement to the effect that, “if the item is a protectible expression, then it is not an unprotectible expression,” and the second, “if it is original and creative, then it is not unoriginal and uncreative.” We are thus no closer to delineating an idea from an expression, an unprotectible from a protectible expression, and an original and creative expression from one that is neither, *ad infinitum*. This Article contends that his continuum inevitably begs the line-drawing question: how creative is *creative enough*, such that a protectible expression is distinguishable from its unprotectible neighbor?

In answer to this question, Jones’s *de minimis* creativity standard⁴⁹ inevitably circulates the same in-or-out dichotomy of the previous idea-expression divide that he seeks a coherent⁵⁰ escape from. This is because he hopelessly offers the illusion of a quantifiable minimum to cleanly demarcate the protectible and unprotectible regions of the expression continuum, without clarifying the threshold according to which a “modicum of creativity”⁵¹ may, in fact, be measured—as such, we can only imagine the realms of “in” and “out” without seeing, for ourselves, their dividing line.

Given this incoherence, Jones’s first stage—separating the protectible from the unprotectible features of

⁴⁸ Cf. John V. Canfield, *Criteria and Method*, 5 METAPHILOSOPHY 298 (1974) (discussing the Wittgensteinian tautology). See generally LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS (D. F. Pears & B. F. McGuinness trans., Routledge Classics 2002) (1921).

⁴⁹ Jones, *supra* note 21, at 593 (“Protectible expressions are only those writings whose form exhibit originality and minimal creativity.”).

⁵⁰ Jones, *supra* note 21, at 552–53 (“[T]he traditional distinction between idea and expression is misguided and irrelevant.”).

⁵¹ Jones, *supra* note 21, at 592.

the copyright work⁵²—encircles an empty tautology in which an intangible public domain is arguably capable of justifying the placement of *any* boundary, thereby leaving unchecked the potential for excessive monopolies in the first, discretionary sense.

Therefore, this Article submits that Jones’s discourse, ostensibly tinged with a line-drawing bias, illuminates a real property-type, normative ideal that invariably dooms an illusory public domain to being capable of simultaneously justifying *both* the presence of a right *and* its absence, in a bottomless tautology—it is this breadth of unconstrained discretion that is excessive, the public domain having been pre-alienated from its role as an intangible shield.⁵³

2. Tying Oneself into Cyclical Knots: The Quest for Tangibility

Further dooming the illusory (because intangible) public domain to the justification of such monopolies, Jones’s copyright infringement test—centered around a “substantial similarity”⁵⁴ determination—arguably

⁵² *Designers Guild Ltd. v. Russell Williams (Textiles) Ltd.* [2000] 1 WLR 2416 (HL) at 2422 (appeal taken from Eng.) (Hoffmann, L.J.), <https://publications.parliament.uk/pa/ld199900/ldjudgmt/jd001123/design1.htm> [<https://perma.cc/6CPA-ART5>]; *see also, e.g.*, *Baigent v. Random House Grp. Ltd.* [2007] EWCA Civ 247, [4], FSR 24 (Eng.) (Lloyd, L.J.); Sherman, *supra* note 10 (discussing the concept of the copyright work more generally). *See generally* Jonathan Griffiths, *Dematerialization, Pragmatism and the European Copyright Revolution*, 33 OXFORD J. LEGAL STUD. 767 (2013), for an insight into the model of copyright protection in the United Kingdom.

⁵³ R. Polk Wagner & Thomas Jeitschko, *Why Amazon’s ‘1-Click’ Ordering Was a Game Changer*, KNOWLEDGE@WHARTON (Sept. 14, 2017), <https://knowledge.wharton.upenn.edu/article/amazons-1-click-goes-off-patent> [<https://perma.cc/WZ28-37R8>].

⁵⁴ Jones, *supra* note 21, at 601 (“Substantial similarity of original and creative expression is the standard for infringement.”). *See for*

magnifies the cyclical redundancy of a real property-oriented reference point. Here owing to a broader, tangibility-seeking pressure, the line-drawing task becomes inescapably delegated to this secondary test, lest the public-private continuum continue to trace its tautologous loop.⁵⁵

This inevitable deference towards tangibility can be observed in the UK House of Lords (HL) case of *Designers Guild v. Russell Williams (Textiles) Ltd.*, specifically in Lord Hoffmann’s elision of these stages where, by emphasizing that more “commonplace” ideas cannot be a “substantial part”⁵⁶ of the copyright work, he implicitly escapes the idea-expression tautology in pursuit of a later boundary.

However, this implicitly takes the justification of excessive monopolies by an illusory public domain but one step back, for the public-private divide remains subject to the cherry-picking⁵⁷ discretion of the judiciary. Here, the elided escape from the tautology—where the “more markedly creative” an expression is, “the less of it”⁵⁸ is required to constitute an infringement—now permits the burden of proof⁵⁹ of the substantial part test to fluctuate according to how flexibly the judge draws the public-private boundary when identifying the copyright work.⁶⁰

example, *Warner Bros. v. Am. Broad. Cos.* 720 F.2d 231, 238 (2d Cir. 1983), for the infringement standard.

⁵⁵ *Cf. Jones, supra* note 21, at 600–01 (highlighting the “first” and “second” tests that courts must employ in deciding infringement cases).

⁵⁶ *Designers Guild*, [2000] 1 WLR at 2423 (Hoffmann, L.J.).

⁵⁷ *Cf. Williams v. Gaye*, 895 F.3d 1106, 1138 (9th Cir. 2018) (Nguyen, J., dissenting) (discussing the risk of cherry-picking under the “substantial similarity” assessment).

⁵⁸ *Jones, supra* note 21, at 601–02.

⁵⁹ *Williams*, 895 F.3d at 1130 (M. Smith, J.).

⁶⁰ *Cf. Designers Guild*, [2000] 1 WLR at 2423 (Hoffmann, L.J.) (“Generally speaking, in cases of artistic copyright, the more abstract

Accordingly, in so building the secondary, infringement stage upon the discretionary, idea-expression continuum, these discourses permit a minimal, expression-type variation on the fact that “the pen is red”⁶¹—“the pen is as red as an apple,” for example—to be treated in a similar manner to a “red bouncy ball on black canvas”⁶²—both narrow examples of expression would demand a “virtually identical”⁶³ copy to constitute infringement, despite their being different media.

This therefore reinforces an unchecked judicial discretion, merely rephrasing the initial tautology.⁶⁴ For it has transitioned from an “if x, then not y” (and vice versa) configuration—“if the feature is an idea, then it is not an expression”—to an “if (almost) x, then z; and if (almost) y, then, not z” formula—“the more *perfect* the expression, the *easier* it will be to satisfy the substantial part test; and the more closely it approximates an idea, this infringement threshold will be harder to satisfy.” We thus encounter an unchecked potential for judicial discretion that encompasses both the primary, idea-expression tautology and now its amalgamated, hybrid-like existence with the secondary, infringement determination.

As such, the artificial tangibility quest assumes an imaginary concreteness to x, y, and z, ultimately cementing the justificatory emptiness of the public-private separation—the Jefferson monopoly now floats in public

and simple the copied idea, the less likely it is to constitute a substantial part.”).

⁶¹ Jones, *supra* note 21, at 574.

⁶² *Mattel, Inc. v. MGA Entm’t, Inc.*, 616 F.3d 904, 913–14 (9th Cir. 2010).

⁶³ *Id.* at 914.

⁶⁴ Cf. RAYMOND BRADLEY, *THE NATURE OF ALL BEING: A STUDY OF WITTGENSTEIN’S MODAL ATOMISM* 18 (1992). See generally *supra* note 48 and accompanying text.

domain air, capable of embracing a hot air balloon or a bubble with equal justification, depending on how broadly the judge construes “similarity.”⁶⁵ Therefore, in these real property-tinged discourses, the inevitable alienation of the intangible public domain permits its invocation to justify excessive, discretionary monopolies in the first sense.

In addition, this tangibility pursuit ironically comes full circle. For the elision of Jones’s two stages—as reflected in Lord Mummery’s equation of the “generalised”⁶⁶ nature of copied elements with their failure to satisfy the substantial part threshold in the Court of Appeal of England and Wales case of *Baigent v. Random House Group Ltd.*—ultimately hinges the infringement determination *purely* on the initial idea-expression tautology. This is because, although a larger quantity of the original “Central Themes” was copied in *Baigent*, the qualitative⁶⁷ determination that these were “too generalised” under the idea-expression distinction governed the substantial part⁶⁸ outcome—it was deemed *not* to be satisfied.

Therefore, it is hypothetically arguable that if the underlying “if x, then not y” tautology were taken to its logical extreme, the “vice versa” scenario would likewise ring true for Lord Mummery. It could thus be equally justifiable to hold that, although the copied elements may be quantitatively minimal vis-à-vis the original work, the qualitative determination that they constitute *protectible*

⁶⁵ See *Williams*, 895 F.3d at 1138–39 (Nguyen, J., dissenting).

⁶⁶ *Baigent v. Random House Grp. Ltd.* [2007] EWCA (Civ) 247, [2007] FSR 24 [154] (Eng.) (Mummery, L.J.) (quoting *Baigent v. Random House Grp. Ltd.* [2006] EWHC 719, [2006] EMLR 16, [242] (Peter Smith, J.)).

⁶⁷ *Designers Guild*, [2000] 1 WLR at 2426 (Millett, L.J.).

⁶⁸ *Baigent*, [2007] FSR 24, [154].

expressions would signify that a *substantial part* of it had been copied. The judicial location of the idea-expression boundary in defining the copyright work essentially becomes *all-determining*, rendering redundant the secondary, infringement stage.

This elision of both stages can be observed in Judge Perry’s “two-step” infringement analysis in *Harter v. Disney Enterprises Inc.* This is because, by formally separating the *intra-work* identification of “ideas” from the *inter-work* substantial similarity⁶⁹ question while substantively treating the originality of the former as completely determining the latter, she permits the unilateral presence of “*scènes à faire*”⁷⁰ to *wholly* govern the bilateral, infringement outcome.

This Article contends that, in the context of children’s entertainment—where hackneyed themes provide quick selling tools—this obfuscation facilitates an excessive monopoly in the second sense, as distributional marginalization. Here, by failing to reduce the burden of proof to account for one party’s access⁷¹ to another’s

⁶⁹ Mem. Op. & Order at 4, *Harter v. Disney Enters., Inc.*, No. 4:11CV2207 CDP, (E.D. Mo. Sept. 20, 2012); *see also* *Rottlund Co. v. Pinnacle Corp.*, 452 F.3d 726, 731 (8th Cir. 2006) (discussing the second part of a copyright infringement claim—the defendants’ copying of the protected material).

⁷⁰ Mem. Op. & Order at 8, *Harter*, No. 4:11CV2207 CDP; *see also* *Frye v. YMCA Camp Kitaki*, 617 F.3d 1005, 1008 (8th Cir. 2010) (“[T]he mere employment of *scènes à faire* . . . cannot amount to infringing conduct.”).

⁷¹ Mem. Op. & Order at 4, *Harter*, No. 4:11CV2207 CDP. *See generally* *Rottlund*, 452 F.3d at 731 (describing the second stage of a copyright infringement claim which may be satisfied “by showing that the defendants had access to the copyrighted materials and showing that substantial similarity of ideas and expression existed between the alleged infringing materials and the copyrighted materials.”).

material—such as through establishing a presumption⁷² in favor of substantial similarity—Judge Perry entrenches such ideas as “Christmas spirit,”⁷³ in the public domain. This therefore establishes an immunity haven in an industry where already powerful market players possess an unequal potential to financially exploit creativity, thereby hindering accessibility for new market entrants.⁷⁴ So the line-drawing fiction relating to an intangible public domain, having revealed itself as discretionary, may in fact justify excessive (because unequally distributed) monopolies, in the second sense.

This Article submits that the two-stage elision in these discourses, arguably alluding to a real property-influenced desire to grasp onto the more tangible, substantial part threshold, ironically entrenches the idea-expression tautology. Here, any attempt to slot an illusory (because ephemeral) public-private spectrum into either-or categories generates a fundamental incoherence. The intangible public domain is therefore doomed from the outset as capable of justifying excessive monopolies—discrete rights unchecked against judicial discretion.

⁷² Litman, *supra* note 1, at 1002.

⁷³ Mem. Op. & Order at 9, *Harter*, No. 4:11CV2207 CDP; *see also* *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985) (setting out, in the literary context, the objective characteristics of the works to be identified).

⁷⁴ *See generally* Daniel Roberts, *Disney is Utterly Dominating the 2019 Box Office*, YAHOO! FINANCE (July 29, 2019), <https://uk.finance.yahoo.com/news/disney-is-utterly-dominating-the-2019-box-office-194544087.html> [<https://perma.cc/Y9H5-4RMG>] (discussing this market power differential in the mergers and acquisitions context).

3. Embracing the Tangibility of Intangibility: The Lacanian Mask

Having elucidated the circular trap of a real property-type lens, this Article now pursues a dynamic⁷⁵ answer to the “relative to what” query—the fluidity⁷⁶ of Jefferson’s public domain must be embraced. The aim is to firstly assess the illusory-excessive correlation according to a more neutral reference point, without dooming the public domain from the outset, and to secondly subjectify⁷⁷ the public domain as one half of a mirrored, self-other relationship.

Firstly, by employing a movement-oriented norm of public-private balance,⁷⁸ this Article modifies the excessive determination, from a territorial model, to a qualitative spectrum. This new perspective is justified here on the basis of a changing, “socially embedded” context that colors the self-other nexus as culturally-dispersed, as opposed to rigidly separated.⁷⁹ Therefore, the justificatory ideal, according to which the excessive-illusory dynamic may be assessed, has shifted from a bottomless desire to demarcate a reference *point*, to the recognition of a

⁷⁵ Polk Wagner, *supra* note 9, at 997.

⁷⁶ See 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, 365 (1999) (highlighting the “free flow” of ideas and information).

⁷⁷ Cf. Schroeder, *supra* note 25, at 455 (discussing the “[l]egal subjectivity” created through Hegel’s intersubjective relationships of contract and property). See generally G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* (Allen W. Wood ed., H.B. Nisbet trans., 1991).

⁷⁸ See generally Biagioli, *supra* note 22.

⁷⁹ Cohen, *supra* note 19, at 123 (“The theoretical models of creativity that dominate copyright discourse do not adequately acknowledge the contingent, socially embedded nature of creative processes.”).

balanced “set of relations”⁸⁰ that seeks an optimal confluence of contextual values—the excessive question must now be evaluated relative to this *anti-stagnation* sentiment.

So, in this Article, this fluctuating dynamic provides an epicenter around which varying value-emphases in discourses may rotate. As such, an all-inclusive, comparative mapping of the excessive-illusory relation is made possible. For example, the excessive determination when assessed under Jefferson’s utilitarian, access-incentivization balance—here constituting the grant of a more than *de minimis* patent privilege⁸¹—may be contrasted with the normativity of a natural right⁸² lens, where an excessive monopoly would arguably be *de maximis*. The excessive threshold thus changes depending on the values that permeate each discourse—the justificatory reference point is in fact dispersed.

Secondly, by highlighting the shifting “publics” of public domain narratives,⁸³ the illusory-excessive inquiry now orients itself around the following question: “relative to the ideal movement between inclusivity and exclusivity, is an illusory (because normatively deceptive) public domain invoked to justify excessive (because movement-

⁸⁰ Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 U.C.L.A. L. REV. 621, 648 (2004).

⁸¹ Cf. Boyle, *supra* note 2, at 32 (proposing that “a limited privilege” accords with Jefferson’s utilitarian viewpoint); see also *supra* note 3 and accompanying text.

⁸² Fritz Machlup & Edith Penrose, *The Patent Controversy in the Nineteenth Century*, 10 J. OF ECON. HIST. 1, 9 (May 9, 1950).

⁸³ Cf. Boyle, *supra* note 2, at 39 (“The first axis along which definitions of the term ‘commons’ vary is the size of the group that has access rights.”). See generally Adam Fish et al., *Birds of the Internet*, 4 J. OF CULTURAL ECON. 157, 161 (2011), for the distinction between organizations and publics.

stagnating) monopolies?” The change in this justificatory reference point, from a real property-based tangibility, now engages the second dimension of an illusory public domain—its deceptive quality.

However, this shift in emphasis between the intangible and deceptive dimensions of illusory in itself calls for justification. For it invalidates the real property-oriented, causal correlation of an illusory (because *intangible*) public domain and excessive monopolies, in favor of exploring a *purely deceptive* construct of an illusory public domain. Nevertheless, this Article justifies this reconceptualization on its evasion of the circular emptiness that pervades such discourses. This is because their tendency to characterize the public-private distinction using demarcated, self-other islands immediately objectifies the public domain as a residual other, backhandedly rendering it capable of justifying *all* monopolies, including the excessive.

This can be observed in the definitional marginalization that afflicts prior art treatment of traditional knowledge—here defined as indigenous, intangible knowledge.⁸⁴ For the a priori application of a static, proprietary lens to the patent grant—arguably reflected in the UK law requirement that an invention be new⁸⁵ to prevent its monopolistic appropriation—

⁸⁴ Munzer & Raustiala, *supra* note 8, at 38 (“TK is the understanding or skill possessed by indigenous peoples pertaining to their culture and folklore, their technologies, and their use of native plants for medicinal purposes.”). For an overview of the public domain and legal protection of traditional knowledge, see generally Ruth L. Okediji, *Traditional Knowledge and the Public Domain*, (CIGI Papers No. 176, June 2018).

⁸⁵ The Patents Act, (1977) § 1(1)(1)(a) (Eng.).

necessarily alienates this custodianship⁸⁶ property from complete recognition.

In this context, the implicit imposition of a burden of disclosure upon traditional knowledge guardians—in the public availability⁸⁷ threshold—attributes to this cultural property a potentially insurmountable, default status of invisibility, and thus appropriability.⁸⁸ This is because the real property-reminiscent notion of *inter*-public boundaries, which separates the dispersed publics of traditional knowledge from the industry-oriented publics of the patent world, establishes a climate of otherization.⁸⁹ Here, the “made available to the public”⁹⁰ standard imposes a presumption in favor of propertization, unless traditional knowledge somehow succeeds in crossing into the boundaries of the *self*, boundaries which the latter has unilaterally drawn.

⁸⁶ See Munzer & Raustiala, *supra* note 8, at 65 (discussing the “stewardship” model of property, according to which indigenous peoples would be deemed the “proper stewards of their cultural property.”). See generally Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022, 1071–72 (2009) (exploring a “stewardship” account of “cultural property.”).

⁸⁷ See The Patents Act, (1977) § 2(1)(2) (Eng.) (“The state of the art in the case of an invention shall be taken to comprise all matter . . . which has at any time before the priority date of that invention been made available to the public (whether in the United Kingdom or elsewhere)”).

⁸⁸ For an insight into knowledge appropriation in the “biopiracy” context, see generally Bagley, *supra* note 39, at 724–27.

⁸⁹ For an exploration of the themes of self-determination and otherization in the context of traditional knowledge, see generally Jennifer Lynn Zweig, *A Globally Sustainable Right to Land: Utilizing Real Property to Protect the Traditional Knowledge of Indigenous Peoples and Local Communities*, 38 GA. J. INT’L & COMP. L. 769, 781–97 (2010).

⁹⁰ See The Patents Act, (1977) § 2(1)(2) (Eng.).

Further, the equally-accessible⁹¹ mantra that attaches to this otherized public domain only justifies excessive monopolies in the second, distributional sense, as unequal exploitation. Here, positional inequalities between the differing publics of a public domain permit greater appropriation by the more developed members,⁹² under the guise of equality. Therefore, the romanticism⁹³ that accompanies such real property-tinged, patent discourses estranges the public domain from its very public—it is attributed the identity of an equal self, but without a self-consciousness.

In the light of both the shift in this Article’s answer to the “relative to what” question and the call to subjectify an otherwise doomed public domain, this Article models the intangible-deceptive, illusory construct on a Lacanian “[m]asquerade.”⁹⁴ Here, the self-other characterization of the private-public continuum is retained, however, instead of entrenching the objectification of the other, this Article identifies it as one side of an Hegelian-inspired, reciprocal recognition⁹⁵—self and other recognize each other as equals in a dynamic mediated by intellectual property.

⁹¹ See Chander & Sunder, *supra* note 23, at 1338 (“Central to most definitions of the public domain is the notion that resources therein are available broadly for access and use.”).

⁹² Fish et al., *supra* note 83, at 162.

⁹³ Cf. Chander & Sunder, *supra* note 23, at 1373 (“[T]o the extent that law affirmatively creates or preserves a public domain, it is appropriate to ask who this public domain will likely serve.”). For the “romantic model of authorship” in the copyright law context, see generally Litman, *supra* note 1.

⁹⁴ Schroeder, *supra* note 25.

⁹⁵ Arthur J. Jacobson, *Hegel’s Legal Plenum*, 10 CARDOZO L. REV. 877, 900 (1989). See generally G.W.F. HEGEL, THE PHENOMENOLOGY OF SPIRIT ¶¶ 178–85 (Michael Inwood trans., OUP 2018) (1807) (discussing the development of self-consciousness through the self-other, lord-bondsman dynamic).

The justification for this public domain concept, which embraces the tangibility of its own intangibility, ultimately lies in the need for a coherent foundation in assessing the illusory-excessive correlation—the public domain must not be doomed from the outset.⁹⁶ So, the intangible nature of the changing faces (publics) of the public domain in each discourse may be subjectified as the movement of a contextual mask. As such, this Article now justifies its object of attention with respect to the illusory-excessive correlation—the potentially deceptive “*persona*”⁹⁷ beneath the mask.

Therefore, by recognizing the *sui generis, res universitatis*⁹⁸ potential of traditional knowledge without seeking to conform it to—and hence implicitly objectify it beneath—the sword⁹⁹-like, “right that x” template of the *self*, cultural property in the public domain retains its own essence.

However, it becomes apparent that the public domain’s deceptive promise of distributional equality nevertheless permits its invocation to justify excessive monopolies. Thus, when assessing the illusory-excessive, public-private nexus in the traditional knowledge context, the self-other spectrum reveals a deceptively romantic other that legitimates a marginalizing (because unequally distributed) self.

⁹⁶ Cf. Chander & Sunder, *supra* note 23, at 1346 (“[T]he public domain steps in just where the romantic author ceases to deliver property rights to the powerful.”).

⁹⁷ Schroeder, *supra* note 25.

⁹⁸ Rose, *supra* note 20, at 105.

⁹⁹ Polk Wagner & Jeitschko, *supra* note 53.

**C. *Unmasking the Deception: Defining the
Public Domain***

Having escaped the real property-infused, tangibility trap, through the subjectification of the public domain mask, this Article now examines the illusory-excessive correlation using a self-other continuum motif. Here, by examining the shifting normativity that underpins patent and copyright discourses, this Article emphasizes balanced movement as its justificatory reference point. For it is argued that a unifying theme in these discourses, relating to the illusory determination, is the deception of an apparently equally-accessible public domain that promises to optimally harmonize those creative and innovative values which fluctuate within an individual-community dynamic. Along this same continuum, this Article submits that these discourses reveal an excessive monopoly to arise whenever this moving symbiosis may be stagnated.

Therefore, in the light of this irreducible, public-private “dynamism,”¹⁰⁰ this Article employs a conceptual kaleidoscope to map the illusory-excessive correlation according to these different discourses. It will ultimately be contended that a contextual “paradigm shift”¹⁰¹ demands the redefinition of the public domain—from a non-proprietary¹⁰² forum of non-exclusivity¹⁰³ to a *sui generis* layering of inclusivity—lest its illusory (because

¹⁰⁰ Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183, 184 (2004).

¹⁰¹ Cohen, *supra* note 19, at 150. For an explanation of the “paradigm shift” concept, see generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

¹⁰² *Cf.* YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 60 (2006) (highlighting “[c]ommons” as “the opposite of ‘property’.”). See generally Cohen, *supra* note 19, at 121 (discussing the proprietary-public “inverse relation” of anti-commodificationist rhetoric).

¹⁰³ Dusollier, *supra* note 6.

contextually-estranged) nature be invoked to justify excessive monopolies.

1. A Kaleidoscopic Mapping of Intellectual Property Discourses: The Symbiotic Epicenter

An inverted narrative underlies the transition in patent bargain discourses from the utilitarian default against propertization in the “Jefferson Warning”¹⁰⁴—which imposes a high threshold of progressive, communal benefit *before* a monopoly will be cost-justified¹⁰⁵—to the romantic individualism of inventive genius¹⁰⁶—which implicitly shifts the burden of proof to the public domain to establish why a patent should *not* be granted.

We therefore encounter two conceptions of the ideal, nature-artifact¹⁰⁷ balance. The former prioritizes the socially-oriented value of the natural disclosure of informational, public goods over artificial incentivization through commodification¹⁰⁸—the balance is distorted in favor of the natural freedom of the public domain. By contrast, the latter prioritizes desert¹⁰⁹-based enclosure over

¹⁰⁴ Boyle, *supra* note 2, at 21.

¹⁰⁵ See Polk Wagner, *supra* note 9, at 1002 (“Intellectual property laws . . . allow for the creators of intellectual property to individually capture value associated with the information they present to the world; this is, after all, the fundamental utilitarian bargain, a reward for the creativity or innovation that society wants.”).

¹⁰⁶ Litman, *supra* note 1, at 966.

¹⁰⁷ See Mario Biagioli, *Nature and the Commons: The Vegetable Roots of Intellectual Property*, in *LIVING PROPERTIES: MAKING KNOWLEDGE AND CONTROLLING OWNERSHIP IN THE HISTORY OF BIOLOGY* 241 (Jean-Paul Gaudillière et al. eds., 2009).

¹⁰⁸ Bracha, *supra* note 3, at 177.

¹⁰⁹ Munzer & Raustiala, *supra* note 8, at 64. See generally John Locke, *SECOND TREATISE OF GOVERNMENT* §§ 25–51, in *TWO TREATISES OF GOVERNMENT* 303–20 (Peter Laslett 2d ed., 1967).

the implications for democratic access¹¹⁰—the balance shifts to emphasize human artifact. As such, the values of individual property and communal accessibility encircle contrasting, unevenly balanced epicenters.

When employing these justificatory reference points as lenses through which to explore the kaleidoscopic, public-private relation, this Article submits that Jefferson’s utilitarianism initially reveals a public domain as neither deceptive, nor invoked to justify excessive patent rights. Rather, its default prioritization of the public domain—which promises unimpeded, democratic access to information resources—invokes it as a “bulwark”¹¹¹ against those cost-unjustified monopolies that stagnate communal access. Therefore, a non-deceptive public domain counters excessive patent monopolies in the second and third senses.

This *prima facie*, moving symbiosis between the public and private dimensions of Jefferson’s patent bargain can now be modelled using a kaleidoscope—the surrounding thick perimeter—to assess the apparent inapplicability of the illusory-excessive correlation (Fig. 1.0). Here, its unevenly balanced, justificatory reference point can be observed in its preservation of the fluid, information disclosure of the public domain—the larger proportion of blank space—and the residual grant of thin privileges—represented by dispersed, filled triangles.

Following this mapping, it is arguable that Jefferson’s patent bargain achieves the dialectical

¹¹⁰ Cf. Boyle, *supra* note 2, at 35 (discussing Jefferson’s caution against the stagnation potential of the patent grant upon innovative progress). See generally Jefferson, *supra* note 2 (“Considering the exclusive right to invention as given not of natural right, but for the benefit of society”).

¹¹¹ Chander & Sunder, *supra* note 23, at 1343.

movement—circulating arrows—that normatively motivates its utilitarianism. This is because the “skeptical”¹¹² burden of proof it imposes on the patent grant encourages the social development that it associates with a public domain unimpeded by artificial scarcity¹¹³—it restricts communal access only when truly necessary to guarantee innovative progress.¹¹⁴ So, this discourse *prima facie* invokes a non-illusory (because self-regenerating) public domain to justify non-excessive (because progress-encouraging) monopolies.

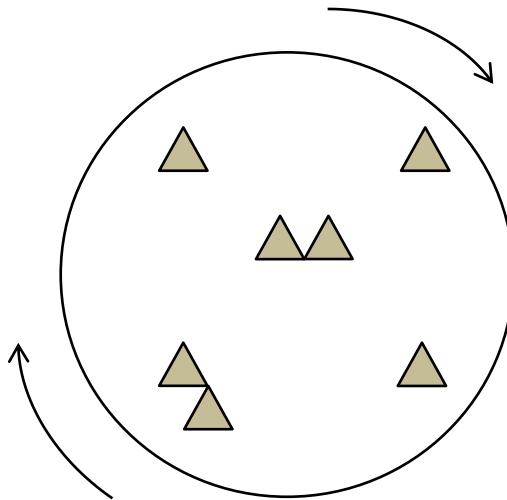


Fig. 1.0: The “Jefferson Warning”

However, this Article submits that Jefferson’s Enlightenment discourse is underpinned by a singular normativity—a linear public and sense of communal development—which undermines its application to an overlapping modern context. For example, its subordinated

¹¹² Boyle, *supra* note 2.

¹¹³ Mark A. Lemley, *IP In A World Without Scarcity*, 90 N.Y.U. L. REV. 460, 462 (2015).

¹¹⁴ Boyle, *supra* note 2, at 32.

individualism would alienate it from the pharmaceutical industry, where incentive-based propertization is the norm.¹¹⁵

Here, Jefferson's picture of the "benevolent"¹¹⁶ freedom of informational public goods would risk "market failure,"¹¹⁷ and therefore ironically the same competitive stagnation of the third, excessive monopoly. For just as a time-unlimited copyright would be anti-competitive in permitting the price of a work to be set at an artificial high,¹¹⁸ just so the absence of artificial scarcity amongst a fast-moving public of equally-developed, pharmaceutical entities would drive prices to zero.¹¹⁹

In the light of this, Jefferson's alienation of the self-other dynamic from the diversity of its context reproduces the ideal balance in Fig. 1.0, but *without* any symbiotic movement. For when applied to the pharmaceutical industry, the residual individualism would still be justified by a public domain, but one that is rendered deceptive by its promise of flowing, informational air—communal

¹¹⁵ See Lemley, *supra* note 113, at 506 ("There are some industries, like pharmaceuticals, that will need strong IP protection for the foreseeable future to encourage innovation despite the cost of government regulatory barriers.").

¹¹⁶ Boyle, *supra* note 2, at 21.

¹¹⁷ Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623, 632 (2012).

¹¹⁸ See Rose, *supra* note 15, at 82 (citing Lord Camden's discussion of the monopolistic dangers of perpetual copyright).

¹¹⁹ Johnson, *supra* note 117. See generally *Trends in the Pharmaceutical Sector*, THE LAWYER (Dec. 17, 2015), <https://www.thelawyer.com/trends-in-the-pharmaceutical-sector> [<https://perma.cc/X57B-LMPN>] (discussing the impact of going "off-patent" where "[t]he loss in sales may run into the billions as a result of loss of market share, competition with generic manufacturers, and a race to the bottom in relation to pricing practices").

access would become obsolete following eventual market extinction.¹²⁰

Likewise, the inverted justificatory balance of artifact-centered discourses—motivated by the prioritized individualism of a Lockean-type “labour theory”¹²¹—would produce similar market stagnation in the patent context, justified according to the public domain’s deceptively open “pastures.”¹²² This is because, in essentializing the informational “spillover” that accompanies the patent—in the form of new research potential, for example—to debunk the juxtaposition that is frequently posited between propertization and a free-moving market,¹²³ R. Polk Wagner conflates the quantity of informational movement with its quality. Therefore, rather than subvert the “patent thicket”¹²⁴ critique that equates additional control with a slowing of innovation, Polk Wagner’s individualism inadvertently invokes the incompletely-captured¹²⁵ promise of the public domain to justify similarly stagnating monopolies—the public-private, moving symbiosis is qualitatively reduced.

This can be observed if one employs a hypothetical of the color red as a microcosm for the quantity-quality

¹²⁰ Cf. Johnson, *supra* note 117, at 633 (“All that is important in reaching an efficient result is that the market system ensures that the [product] be produced if, and only if, its aggregate worth equals or exceeds its aggregate cost.”).

¹²¹ Dusollier, *supra* note 6, at 19. See generally Locke, *supra* note 109.

¹²² See Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE*, NEW SERIES 1243, 1244 (1968).

¹²³ Polk Wagner, *supra* note 9, at 1005.

¹²⁴ Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting*, 1 *INNOVATION POL’Y & ECON.* 119, 120 (2000).

¹²⁵ See Polk Wagner, *supra* note 9, at 1017–18 (discussing the three types of information produced by an invention).

distinction in the context of information disclosure. If we analogize the patent grant with the monopolization of the use of this color, for example, Polk Wagner's incomplete commodification of information would seem to promote an inventing-around¹²⁶ tendency, thereby increasing information quantity which would combat patent thicket stagnation—so, in the color red example, social progress would be diversified by encouraging others to use the color pink, for instance.

However, it soon becomes apparent that the isolation of the color red, then pink, then maroon, and so on, from use, while stimulating an increased quantity of information disclosure regarding the varying shades of red, would artificially elevate the cost for those who desire to paint a red apple—they are forced to settle for an *almost-red* alternative.

We therefore observe Polk Wagner's transition from a quantity-based, "tragedy of the anticommons,"¹²⁷ to a quality-oriented stagnation, where the information-flow promise of the public domain is invoked to justify increased patents.¹²⁸ Here, the market is rendered qualitatively inefficient by increased costs in patent evasion that outweigh the benefits¹²⁹ in knowledge disclosure, for sometimes it would just be preferable to use red instead of pink.

¹²⁶ Polk Wagner, *supra* note 9, at 1009.

¹²⁷ Polk Wagner, *supra* note 9, at 996.

¹²⁸ See Polk Wagner, *supra* note 9, at 1033–34 (suggesting "that additional control [conferred by intellectual property rights] may in many cases actually increase open information or the public domain," thereby generating "even stronger justifications for intellectual property.").

¹²⁹ Cf. Biagioli, *supra* note 22, at 161 (discussing whether the social costs and benefits of the patent grant can be balanced).

Using the kaleidoscope to depict this illusory-excessive correlation—in the form of qualitative progress-stagnation—this Article models the inventing-around tendency of increased propertization—represented by interlocking filled triangles—with the deceptive freedom of informational disclosure in the public domain. The public-private, movement ideal of social progress is therefore unaccomplished (Fig. 1.1).

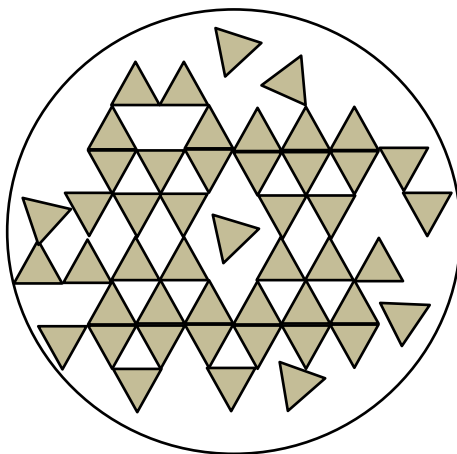


Fig. 1.1: Patent thickets and anti-commons stagnation

2. The Contextually-Situated Self and Other: Exploring “Post-Scarcity”¹³⁰ Discourses

Thus far, these patent bargain discourses have employed a unitary model of cost-benefit incentivization as their currency for mediating the public-private balance, thereby intertwining the intangibility of intrinsic motivation¹³¹ with the rationality of profit-maximization.¹³²

¹³⁰ Lemley, *supra* note 113, at 506.

¹³¹ See Johnson, *supra* note 117, at 640.

However, this Article submits that this paradigm risks alienating the self-other continuum from its justificatory context, ultimately estranging the inquiry into the illusory-excessive link from the overlapping narratives that fundamentally challenge this market-centered¹³³ presumption.

Therefore, in the light of the Internet revolution,¹³⁴ which has dispersed the discrete singularity of the creative process, this Article explores a personality-driven model of the public-private nexus. This recognizes a changed, normative balance that is now oriented towards the capture of the intangible motivation¹³⁵ of love,¹³⁶ for example, and the recognition of identities of the self and other as intimately layered—the kaleidoscopic movement must now be reconceived in this post-scarcity paradigm.

Following the transition in the “open access movement”¹³⁷ from an economically-motivated, public-private separation to a network-driven¹³⁸ encouragement of

¹³² See Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQ. L. 29, 31 (2011).

¹³³ See Trosow, *supra* note 34, at 219 (“[T]he traditional philosophical justifications for copyright all fall short of providing plausible or adequate justification for the expansionary trends we are now witnessing.”).

¹³⁴ Johnson, *supra* note 117, at 647.

¹³⁵ See Trosow, *supra* note 34, at 239 (“Non-monetary motivations include altruism, the propagation of political, ethical or religious ideas as well as the desire for recognition and ultimately promotion and security.”).

¹³⁶ Zimmerman, *supra* note 132, at 38.

¹³⁷ Dusollier, *supra* note 6, at 52.

¹³⁸ See Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 LAW & CONTEMP. PROBS. 147, 152 (2003) (highlighting the prevalence of “digital networks”).

free-riding,¹³⁹ this Article argues that the justificatory reference point for the illusory-excessive assessment demands a shift away from an extrinsic incentivization model to the more inclusive value of participation,¹⁴⁰ for example.

Given the development of the GNU/Linux¹⁴¹ operating system, which structures its communal openness around an in personam, viral¹⁴² license, it is contended that the exclusivity-oriented emphasis on market stagnation must be adapted to embrace the nuanced private initiatives that contract around intellectual property.¹⁴³ For the model of market optimization has been replaced with a more collaborative context of cultural progress—the illusory-excessive balance now emphasizes the normativity of creative processes, as opposed to their outputs.¹⁴⁴

Furthermore, Mark Lemley’s observation of the democratization of access to informational content online, thereby rendering a scarcity-creating intellectual property

¹³⁹ Polk Wagner, *supra* note 9, at 1029 (“[O]pen source software invites a form of free-riding whereby open software is taken, improved or altered, and then distributed under the more typical closed commercial model.”).

¹⁴⁰ See Fish et al., *supra* note 83, at 157.

¹⁴¹ Chander & Sunder, *supra* note 23, at 1358. For an overview of the GNU/Linux operating system, see generally *What is Gnu?*, GNU OPERATING SYSTEM, <https://www.gnu.org> [<https://perma.cc/MR23-CQ4C>] (last visited Aug. 8, 2019).

¹⁴² Chander & Sunder, *supra* note 23, at 1359. For more information on the GNU General Public License, see *Licenses*, GNU OPERATING SYSTEM, <https://www.gnu.org/licenses/licenses.en.html#GPL> [<https://perma.cc/MQM3-33G5>] (last visited Aug. 8, 2019).

¹⁴³ See Merges, *supra* note 100, at 191 (“Private parties are working around the proliferation of property rights to maintain open channels of commerce and exchange.”).

¹⁴⁴ Cohen, *supra* note 19, at 149.

the exception¹⁴⁵ to a rule of dispersed freedom, arguably signifies the inapplicability of a singular public to this virtual public domain—rather, its inhabitants reflect the changing publics of a Lacanian mask. This is because, while they may be connected temporally, they are disaggregated both geographically and more fundamentally as content creators, thereby symbolizing mere data bytes that commodify their own creative potential, not necessarily out of a desire for money,¹⁴⁶ but often purely for the sake of commodification itself.¹⁴⁷

Therefore, this Article argues that the illusory-excessive correlation demands a reconceptualization of the public domain, away from the market transferability¹⁴⁸ model of incentivization discourses to a cultural forum of flexible inclusivity. This is because the give-or-take exchange rubric underpinning the patent bargain fails to capture the collaborative synthesis that can occur when the intangible value of non-economic motivation is acknowledged.¹⁴⁹

¹⁴⁵ Lemley, *supra* note 113, at 506.

¹⁴⁶ See generally Zimmerman, *supra* note 132 (discussing the more intangible motivations behind the creativity process).

¹⁴⁷ For an example of this in the context of peer production of information, see generally Benkler, *supra* note 102, at 70.

¹⁴⁸ Bracha, *supra* note 3, at 178.

¹⁴⁹ See Zimmerman, *supra* note 132, at 44 (“[T]hose who study the collaborative, nonproprietary production of public goods may be closer to an accurate view of what prompts humans to behave creatively than those who attribute these activities largely to the attainment of traditional monetizable extrinsic objectives.”); see also Eric von Hippel & Georg von Krogh, *Open Source Software and the “Private-Collective” Innovation Model*, 14 *ORG. SCI.* 208, 216 (2003) (discussing the private benefits acquired by group participants in open source development, which derive from a sense of communal cooperation).

This Article now submits that, unless our understanding of the public domain is extended to incorporate those quasi-proprietary initiatives that contract around intellectual property exclusivity in favor of network-based inclusivity, the purely market-centered paradigm posits a public domain estranged from its context. This ultimately legitimates its movement in the wrong direction, as invoked to justify discrete, right-based monopolies in a climate that requires elastic, public-private collaboration.

The application of a post-scarcity, kaleidoscopic lens maps this reconceived public domain. Here, it echoes Lemley’s “exception”-type use of intellectual property to facilitate high-cost¹⁵⁰ industries, like pharmaceuticals, that require traditional economic incentivization—represented by residual, filled triangles—while embracing dominant creativity networks that use intellectual property to facilitate a “commons”¹⁵¹—blank triangles of inclusivity within their filled, proprietary frameworks. The resulting balanced movement therefore reflects its collaborative context in combining both market- and personality-centered values (Fig. 1.2).

¹⁵⁰ Lemley, *supra* note 113, at 506. For an insight into the “external rewards” that are demanded to incentivize the production of “[v]aluable intellectual assets,” see Johnson, *supra* note 117, at 672.

¹⁵¹ Benkler, *supra* note 102, at 24.

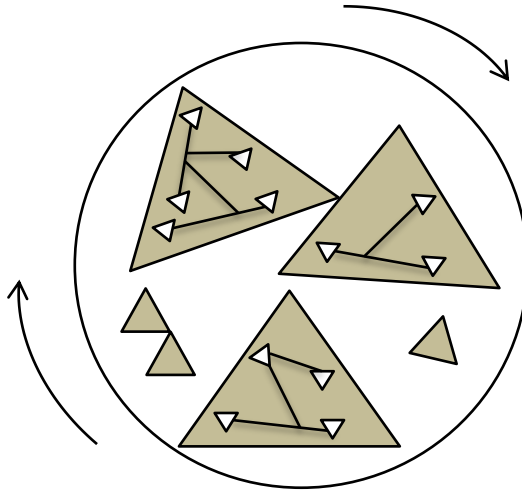


Fig. 1.2: A post-scarcity paradigm

D. Conclusion

This Article explores the illusory-excessive correlation in discourses that fall under two umbrella lenses. Under the first, real property-type lens, copyright discourses tautologously invoke an illusory (because intangible) public domain to justify excessive monopolies—both discretionary and distributionally marginalizing. Likewise, traditional knowledge discourses legitimate excessive patents of the latter type.

Regarding the second, non-real property lens, market-based patent disclosure discourses invoke an illusory (because deceptive) public domain to justify market-stagnating monopolies, while post-scarcity narratives redefine its inclusivity to escape this illusory-excessive correlation.

III. THE FETISHIZATION OF “THINGNESS” AND “NOTHINGNESS”

A. *Introduction*

In trademark and copyright discourses, this Article submits that there is a general fetishization¹⁵² of intangibility—specifically, of “thingness” in the former and of “nothingness” in the latter. By “fetishization,” this Article invokes the legitimacy concern that underpins Margaret Radin’s “‘bad’ object-relations,”¹⁵³ thereby exploring the coherence of the public-private, justificatory nexus upon which the excessive-illusory correlation is based. For it is argued that, in reifying trademark and copyright, these discourses embed this normative link beneath, respectively, a “floating,” brand mystique¹⁵⁴ (thingness), and corrosive incoherence (nothingness).

In examining the public-private relation, this Article retains its justificatory reference point of an ideal, movement-type balance between inclusivity and exclusivity. However, in trademark it focuses on a public domain of consumers, structuring its excessive-illusory inquiry around a context of fluctuating “co-creation”¹⁵⁵ and

¹⁵² See generally John Holloway, *Change the World without Taking Power*, Chapter 5 – Fetishism and Fetishisation, LIBCOM.ORG (Apr. 29, 2011), <https://libcom.org/library/chapter-5-fetishism-fetishisation> [https://perma.cc/9E26-7D4Y].

¹⁵³ Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 968 (1982).

¹⁵⁴ Thomas D. Drescher, *The Transformation and Evolution of Trademarks—From Signals to Symbols to Myth*, 82 TRADEMARK REP. 301, 306 (1992). For an interesting, feminist account of brand mystique, see generally Christine Haight Farley, *The Feminine Mystique of the Brand in Trademark Law Today* (Am. U. Working Paper, 2013).

¹⁵⁵ See Gangjee, *supra* note 17, at 19 (“Brand image is negotiated, context-sensitive and constantly reproduced. As the symbolic, social

brand “positioning”¹⁵⁶—the ideal, seller-consumer dynamic thus acknowledges this mutually active production of value.¹⁵⁷ On the other hand, in copyright, the balanced movement according to which this Article assesses these discourses relates to the preservation of a healthy cycle of creative input and output—it is about reconciling intergenerational “authorship”¹⁵⁸ claims.

B. The Fetishization of “Thingness”

This Article explores the excessive-illusory dynamic in trademark discourses, specifically concerning distinctiveness and unfair advantage.¹⁵⁹ It is submitted that Frank Schechter’s active trademark conception—as bearing selling power¹⁶⁰—provides a template upon which to observe its possession of an existence beyond the “signified” (the communicative “meaning” of the mark) and “referent” (the goods or services to which the mark

and cultural aspects of consumption have come to be better understood, the consumer’s investment of time, creativity and effort into this process of negotiation is better appreciated.”). For an overview of the co-creation dialogue between consumers and sellers, see generally C. K. Prahalad & Venkat Ramaswamy, *Co-Creation Experiences: The Next Practice in Value Creation*, 18 J. INT’L MKTG. 5, 5 (2004).

¹⁵⁶ Alain Pottage, *No (More) Logo: Plain Packaging and Communicative Agency*, 47 U.C. DAVIS L. REV. 515, 516 (2013).

¹⁵⁷ Gangjee, *supra* note 17, at 5.

¹⁵⁸ Litman, *supra* note 1, at 966. For a conception of “authorship” in the copyright context, see generally Christopher Buccafusco, *A Theory of Copyright Authorship*, 102 VA. L. REV. 1229 (2016).

¹⁵⁹ Case C-487/07, *L’Oréal v. Bellure*, 2009 E.C.R. I-5185, ¶ 44; see also Directive 2008/95/EC art. 5(2), of the European Parliament and of the Council of Oct. 22, 2008, for the trademark dilution cause of action in the EU law context to which *L’Oréal*, 2009 E.C.R. I-5185 refers. See generally Beebe *supra* note 80, for a discussion of trademark “dilution.”

¹⁶⁰ Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 819 (1927).

refers).¹⁶¹ For the trademark arguably sustains self-momentum, both as an ultimate identifier of its distinctiveness from other “signifiers” (the form of the mark itself),¹⁶² and of its own mythical association.

1. A Self-Propelling Trademark

Schechter’s emphasis on the preservation of the “uniqueness” of a trademark, without specifying the object of comparison, risks subordinating the seller-consumer “link”¹⁶³ to an unchecked, self-identifying species—an *inter*-trademark distinctiveness. This is because, in leaving uncontested the potential for a signifier to bear distinctiveness vis-à-vis its own kind, he facilitates a more rounded identity to the trademark itself as not only positively communicative of source,¹⁶⁴ but also as negatively separate from its neighbor—it becomes a something that simultaneously *is* and *is not*.

In the light of this discourse, it is submitted that the traditional, public-private nexus between consumer and seller, as mediated by a sign¹⁶⁵ that merely embodies the communicative agency of the latter, now encounters a third party—the trademark itself. This self-sustaining nature of the trademark is reflected in *Audi AG v. OHIM*, in the European Court of Justice’s (CJEU) embrace of “advertising slogans” as registrable. In this case, although it was held that a dual-purpose mark, indicating both the commercial origin of the product and any promotional connotations, must include the former to be sufficiently distinctive, the imposition of a *de minimis* requirement—

¹⁶¹ Beebe, *supra* note 80, at 625.

¹⁶² Beebe, *supra* note 80, at 625.

¹⁶³ Schechter, *supra* note 160, at 833.

¹⁶⁴ Beebe, *supra* note 80, at 646. *See generally* Drescher, *supra* note 154 (discussing the evolution of the trademark).

¹⁶⁵ Beebe, *supra* note 80, at 630 (discussing the “sign-form” in the semiotic tradition).

where the latter may be the mark's primary feature¹⁶⁶—arguably legitimates a self-propelling trademark. This is further supported by the brand magnetism that is created through advertisement,¹⁶⁷ thereby cementing a self-positioning mystique to the trademark—it now becomes its own advocate.

This Article further submits that both the referent anti-fetishization sentiment of some discourses, and the elision by others of referent-signified distinctiveness, elevates the trademark as its own entity—it now floats¹⁶⁸ as *both* negatively distinguished from other signifiers and positively capable of identifying its own self.

Firstly, the product immunity which arguably facilitates this transition is observable in *Louis Vuitton Malletier v. OHIM* where, in imposing a higher distinctiveness burden the more closely a three-dimensional mark approximates the referent's shape,¹⁶⁹ the CJEU implies a preference for a material separation between

¹⁶⁶ See Case C-398/08 P, Audi AG v. OHIM, 2010 E.C.R. I-535, ¶ 45 (“[I]n so far as the public perceives the mark as an indication of [the commercial origin of the goods] . . . the fact that the mark is at the same time understood—perhaps even primarily understood—as a promotional formula has no bearing on its distinctive character.”).

¹⁶⁷ See Pottage, *supra* note 156, at 527 (discussing the role of advertising in “[t]he process of forging brands as communicational artifacts”).

¹⁶⁸ See Beebe, *supra* note 80, at 667 (describing the “floating signifier”); see also ROLAND BARTHES, *IMAGE-MUSIC-TEXT* 39 (Stephen Heath trans., 1977) (introducing the idea of “a ‘floating chain’ of signifieds”).

¹⁶⁹ See Case T-359/12, *Louis Vuitton Malletier v. OHIM*, (Apr. 21, 2015) (“[C]onsumers are not in the habit of making assumptions about the origin of products on the basis of their shape . . . in the absence of any graphic or word element and it could therefore prove more difficult to establish distinctiveness in relation to such a three-dimensional mark”).

referent and signifier. Although it would be a logical flaw to extend this to endorse a “referentless trademark”¹⁷⁰—since this would equate the presumption *against* a mark’s distinctive character the more closely it resembled its referent with a sanction of its possible distinctiveness *without* an accompanying product—it is arguable that *Société Des Produits Nestlé SA v. Cadbury UK Ltd. (No. 2)* employs such reasoning. For, in asserting that consumers do not rely on a composite, word mark-referent to identify product origin, but depend *only* on the mark itself,¹⁷¹ the Court of Appeal of England and Wales disaggregated the two, deeming the mark to be sufficient on its own. The trademark, now detachable from its product, attains autonomy.¹⁷²

Secondly, the elision of referent and signified contributes to this autonomy by ostensibly rearranging the latter element to adopt the signifier’s previous position, as product-dependent.¹⁷³ Here, in equating the identification of the source with “*thus*” distinguishing its referent from others,¹⁷⁴ the three-pronged, consumer-trademark-seller relation is now such that a signifier may float freely of its

¹⁷⁰ Beebe, *supra* note 80, at 657.

¹⁷¹ See *Société Des Produits Nestlé SA v. Cadbury UK Ltd. (No. 2)* [2016] EWHC 50 (Ch) [62], [2016] Bus. L.R. 354, (Arnold, J.) (appeal taken from Eng.) (quoting *Société Des Produits Nestlé SA v. Cadbury UK Ltd.* [2014] ETMR 17, ¶ 49) (“[C]onsumers do not rely on the [composite word mark-shape] . . . rather what they rely upon is the trade mark [itself].”), *aff’d*, [2017] EWCA (Civ) 358.

¹⁷² See Beebe, *supra* note 80, at 683 (“The signified and referent having been thrown over, all that was left was the signifier itself”).

¹⁷³ Cf. Drescher, *supra* note 154, at 323 (“[T]he [modern brand mark] . . . identifies the product, a product which may possess an identity entirely independent from that of the maker.”).

¹⁷⁴ Case T-128/01, *DaimlerChrysler Corp. v. OHIM*, 2003 E.C.R. II-701, ¶ 48 (emphasis added).

product, while the seller has become necessarily intertwined with it.

In relation to the excessive-illusory correlation, this Article therefore submits that these discourses perpetuate the fiction of a consumer-based public domain oriented around source-identification, thereby alluding to the seller as an active self. However, given that factors influencing the distinctiveness of a mark include its “market share,”¹⁷⁵ it is apparent that the trademark has attained its own self-hood, at the expense of an objectified signified.

Therefore, the kaleidoscopic lens in this context reveals the excessive monopolies that this illusory public domain is invoked to justify as trademarks that reach outwards to the consumer beyond their signified. This is resembled by the planetary rings that extend past their right-holders—filled triangles—which are excessive, in the first sense, owing to their discretionary-like existence. Here, unlimited by the seller’s identity, they embrace identities of their own (Fig. 2.0).

¹⁷⁵ Joined cases C-108/97 & C-109/97, *Windsurfing Chiemsee v. Attenberger*, 1999 E.C.R. I-2779, ¶ 51.

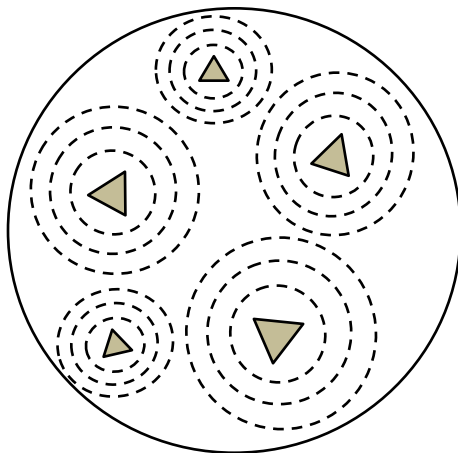


Fig. 2.0: Trademarks as ringed planets

2. The Fetishized “Thingness” of Brand Aura

In relation to the EU law-specific, “free-riding” dilution of *inter*-mark distinctiveness,¹⁷⁶ this Article argues that the competitive curbing of the success of another’s mark—by virtue of its mere similarity to yours—through essentializing the “advertising” and “communication”¹⁷⁷ potential of trademark mystique, facilitates excessive monopolies in the second, distributional inequality, sense. This is because, the invocation of the pre-established, mythical power of a brand to substantiate a claim that another’s comparative advertising is sufficiently exploitative, creates a presumption in favor of reinforcing the market positions of stronger players—an invisible

¹⁷⁶ Beebe, *supra* note 80, at 676.

¹⁷⁷ Case C-487/07, *L’Oréal v. Bellure*, 2009 E.C.R. I-5185, ¶ 63.

“thingness” is attributed to fame¹⁷⁸ in the form of varying “coat-tails”¹⁷⁹ that must be carefully traversed.

This is arguably justified in *L’Oréal v. Bellure* by a deceptive, unidirectional model of the public domain, which portrays its consumers as static recipients of pre-determined brand identities. Therefore, in failing to recognize the parasitism of brands, which co-opt and are co-opted by consumers in a continually adapting¹⁸⁰ conversation, the CJEU fetishizes the concept of “value” as possessed by a separate market, rather than as inextricably intertwined with “everyday life.”¹⁸¹

However, it is further submitted that, in so entrenching the market positions of current power-players, *L’Oréal* inadvertently undermines their future adaptability, thereby limiting the potential for excessive monopolies in the third sense, as market-stagnation. For in omitting the co-creative potential of consumers, this static value concept may struggle to capture its later movements—any directional change in the consumer narrative may be impossible to accommodate in a paradigm that looks to the brand first in ascertaining its identity.¹⁸²

By contrast, the recognition of consumer creative agency in the US case of *Louis Vuitton Malletier v. Haute*

¹⁷⁸ Cf. *L’Oréal v. Bellure* (No. 2) [2010] EWCA (Civ) 535, [29]-[30] (Jacob, L.J.) (discussing the separation of the “functions of communication, investment or advertising” from the “origin function.”).

¹⁷⁹ *Id.* ¶ 41.

¹⁸⁰ Cf. Pottage, *supra* note 156, at 531 (discussing the “self-constituting” temporality of news).

¹⁸¹ Gangjee, *supra* note 17, at 24.

¹⁸² Cf. Prahalad & Ramaswamy, *supra* note 155 (“Informed, networked, empowered, and active consumers are increasingly cocreating value with the firm.”).

Diggity Dog, while inverting the presumption in favor of protecting the distributionally unequal monopolies of “famous marks,” may nevertheless justify excessive trademark protection in the third sense. This is because, in holding that a parody *entirely* defeated the dilution claim, *ex ante*¹⁸³—as opposed to using it as an *ex post* defense, with distinction by blurring already established—the court legitimated the potential for qualitative market-stagnation. For in acknowledging the co-creative, consumer-brand dynamic pertaining to powerful trademarks, the court deceptively alluded to the diversity of new market entrants, but only in the repetition of a *single*, mythical image.¹⁸⁴ We thus observe an increased, yet qualitatively stagnant market that encircles variations on a unitary, trademark theme.

If, however, the court had employed parody as a secondary defense—dilution having been presumed a priori—it would have arguably avoided the charge of invoking an illusory (because *diversely* co-creative) public domain to justify excessive (because qualitatively stagnant) market-based monopolies. For this bipartite test would provide flexibility in defending the blurring of less famous marks—to diversify the market—while curbing that of more established marks—to prevent qualitative stagnation.

Using the kaleidoscope, this Article depicts the excessive-illusory correlation of these discourses, where a

¹⁸³ See *Louis Vuitton Malletier v. Haute Diggity Dog*, 507 F.3d 252, 267 (4th Cir. 2007) (“[A]s Haute Diggity Dog’s ‘Chewy Vuitton’ marks are a successful parody, we conclude that they will not blur the distinctiveness of the famous mark as a unique identifier of its source.”).

¹⁸⁴ *Cf. id.* (“While a parody intentionally creates an association with the famous mark . . . it also intentionally communicates, if it is successful, that it is *not* the famous mark, but rather a satire of the famous mark.”).

deceptive public domain—as comprised of either passive or diversely co-creative consumers—is invoked to justify excessive trademark protection. As such, the market is stagnated either quantitatively or qualitatively. The lens therefore reveals a public domain deluged by an all-encompassing trademark (Fig. 2.1).

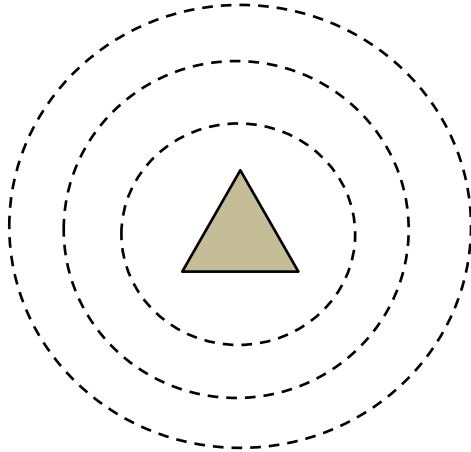


Fig. 2.1: The free-riding trademark

C. The Fetishization of “Nothingness”

In discourses identifying the copyright work, this Article observes a fetishization of “nothingness”—a dematerialized¹⁸⁵ essence estranged from its own creator. This consists of two parts: firstly, the romanticized author,¹⁸⁶ which is rendered coherent only by appealing to a justification outside of the author himself; and secondly,

¹⁸⁵ Cf. Griffiths, *supra* note 52, at 767 (“[I]n the UK . . . the law’s attention is directed towards an immaterial, malleable essence (identified as, amongst other things, ‘originality’, ‘labour and skill’ or ‘creativity’).”).

¹⁸⁶ Case C-5/08, *Infopaq International A/S v. Danske Dagblades Forening*, 2009 E.C.R. I-6569, ¶ 39.

the expansive potential of *Infopaq International A/S v. Danske Dagblades Forening*, which yields a copyright work that “transcends”¹⁸⁷ material restraints.

In combining this observation with the general elision of both the idea-expression dichotomy and infringement stages discussed in Part II, this Article contends that these romantic copyright discourses perpetuate the deception of a naturally-appropriable public domain as raw material for original “authorship,”¹⁸⁸ thereby justifying excessive monopolies in the first and third senses—an unchecked judicial discretion features alongside a creativity-stagnating copyright. This ultimately erodes the coherence of the illusory-excessive, justificatory link.

1. A Romantic Self, Other, and Derrida’s Cat¹⁸⁹: Self-Estrangement

Firstly, the cyclical conceit¹⁹⁰ of an author creating something “entirely *new*,” without drawing upon the creative expressions of other, similarly romanticized authors, implicitly underpins the “original expression”¹⁹¹ perimeter of the copyright work, echoing a desert-based justification for the immediate attachment of copyright to the creation.

Here, building upon Jessica Litman’s suggestion of the public domain as necessary fuel for this illusion—because it permits consecutive creators to maintain the same originality claim, despite using the ideas of creators before them—this Article submits that this public domain

¹⁸⁷ Sherman, *supra* note 10, at 108.

¹⁸⁸ Boyle, *supra* note 2, at 33.

¹⁸⁹ See Jacques Derrida, *The Animal That Therefore I Am (More to Follow)*, 28 CRITICAL INQUIRY 369, 372 (David Wills trans., 2002).

¹⁹⁰ Litman, *supra* note 1, at 1019.

¹⁹¹ Boyle, *supra* note 2, at 32.

notion embraces a natural nothingness. Essentially, the author creates something “from nothing”¹⁹²—we observe the “reification”¹⁹³ of genius which creates from, and is hence justified by, the naturalness of raw material. It is thus argued that an accompaniment to the romanticism of this *self* (copyright) is provided by the necessarily romantic *other* (the public domain), both of which encircle a fictional symbiosis that evades any search for “provenance”¹⁹⁴ beneath the mask.

However, this Article contends that, in so pulling itself up by its own bootstraps,¹⁹⁵ this utopian discourse of the public-private relation is rendered incoherent, thereby facilitating the justification of any monopoly, including the excessive. For using Biagioli’s observation of the inevitable reducibility of creative genius to nature, and not to artifact—given that, to sustain competing claims of originality, respective genii cannot be legitimated according to themselves, lest they invalidate one another¹⁹⁶—it is apparent that the *self* invariably becomes estranged from its own *face*,¹⁹⁷ in the form of self-estrangement.

¹⁹² Litman, *supra* note 1, at 1023.

¹⁹³ Griffiths, *supra* note 52, at 771; *see also* INTELLECTUAL PROPERTY RIGHTS: CRITICAL CONCEPTS IN LAW 43 (David Vaver ed., 2006).

¹⁹⁴ Litman, *supra* note 1, at 1012.

¹⁹⁵ *See* INTELLECTUAL PROPERTY RIGHTS: CRITICAL CONCEPTS IN LAW, *supra* note 193, at 283.

¹⁹⁶ *Cf.* Biagioli, *supra* note 107, at 247 (“Being consciousness-free, genius may hold other authors’ work somewhere within itself and still be categorically unaware . . . of that work”). *See generally* Litman, *supra* note 1, at 1011 (“All works of authorship . . . include some elements adapted from raw material that the author first encountered in someone else’s works.”).

¹⁹⁷ Biagioli, *supra* note 107, at 248 (“[W]hile Young saves genius by casting it as a vegetable, he also kills it with . . . the very same discursive move. He saves genius as a vegetable or a natural face, but

It is therefore submitted that a justificatory incoherence, and hence emptiness, arises in this discourse. This is because, to be legitimated, a copyright must subordinate either its *current self* so as to preserve the romantic entitlements of subsequent authors—by basing its normativity on a public domain foundation that ultimately escapes itself—or its *future self*—by attributing its legitimacy to human artifact.¹⁹⁸ In either case, something has to give, which this Article contends is the coherence of the justificatory, public-private connection. As such, an illusory public domain may be invoked to justify excessive monopolies, under the deceptively romantic guise of a normative link.

An additional conceptual layer may be introduced through Jacques Derrida’s encounter, which provokes in the self an awareness of his own passivity (as the other) upon being viewed, naked, by his own cat.¹⁹⁹ This is because, through the stimulation of both “embarrassment”²⁰⁰ and additional questions concerning the nature of the self, it is arguable that this reversal in the Hegelian, subject-object dynamic—which characterizes the romantic, copyright-public domain relation—reveals the justificatory deception of this copyright discourse. Here, the romanticism of human creativity ironically depends for its own preservation on the natural public domain—it

the logic of copyright would require a genius that is human, not vegetable . . .”).

¹⁹⁸ Cf. Biagioli, *supra* note 107, at 246 (“An early modern legal fiction, genius managed to achieve a crucial double effect: to cast an original composition as an uniquely original artifact different from anything available in the public domain, and to do so in a way that minimized the visibility of what the author was actually borrowing from the public domain.”).

¹⁹⁹ Derrida, *supra* note 189.

²⁰⁰ Gerald L. Bruns, *Derrida’s Cat (Who Am I?)*, 38 RESEARCH IN PHENOMENOLOGY 404, 406 (2008).

invariably becomes subordinated²⁰¹ beneath the gaze of Derrida’s cat.

Therefore, this Article’s double entrenchment of the justificatory emptiness of this discourse emphasizes the illusory nature of its public domain concept as the deceptively passive “field”²⁰² from which the author molds her “own”²⁰³ creativity, for it simultaneously deprives her of her subjectivity—her self-ownership. Furthermore, it is apparent that this self-defeating, normative link may expose any discretionary, originality determination to potential justification by mere judicial “impression,”²⁰⁴ under the guise of a coherently romantic, public-private nexus.

This can arguably be noted in the contrasting treatment in the UK of the originality of a copy under the “skill, labour and judgment”²⁰⁵ criteria in *Walter v. Lane*²⁰⁶ and *Interlego AG v. Tyco Industries Inc.*, the former accepting as sufficient the labor expended in the mere act of copying,²⁰⁷ unlike the latter which required an additional element of material change.²⁰⁸ Accordingly, the same

²⁰¹ For the self-other dynamic that inspired this curious observation, see generally Hegel, *supra* note 95.

²⁰² Biagioli, *supra* note 107, at 244; see also EDWARD YOUNG, CONJECTURES ON ORIGINAL COMPOSITION 9 (1759) (“[T]he mind of a man of genius is a fertile and pleasant field.”).

²⁰³ Case C-5/08, *Infopaq International A/S v. Danske Dagblades Forening*, 2009 E.C.R. I-6569, ¶ 48 (emphasis added).

²⁰⁴ *Designers Guild Ltd. v. Russell Williams (Textiles) Ltd.* [2000] 1 WLR 2416 (HL) at 2426 (Millett, L.J.) (appeal taken from Eng.).

²⁰⁵ *Hyperion Records Ltd v. Sawkins* [2005] EWCA (Civ) 565 [82], [2005] RPC 32 (Jacob, L.J.) (appeal taken from Eng.).

²⁰⁶ *Walter v. Lane* [1900] AC 539 (HL) (appeal taken from Eng.).

²⁰⁷ *Sawkins*, [2005] EWCA (Civ) 565, ¶ 33 (Mummery, L.J.) (citing *Walter*, [1900] AC 539).

²⁰⁸ See *Interlego AG v. Tyco Industries Inc.* [1989] AC 217 (PC) 263 (Oliver, L.J.) (appeal taken from Hong Kong) (“There must in addition [to the application of skill and labor] be some element of material

“labor”-based rationale of a deceptively romantic public domain may justify *both* the presence *and* the absence of copyright, here rendered excessive by an unchecked judicial discretion.

2. The Dematerialized Copyright Work

In expanding the circumference of the protected work, from its bounded “material form”²⁰⁹ to encapsulate an arguable creative potential, this Article submits that *Infopaq* promotes a fetishization of the intangible *idea* of creativity itself—this ultimately defers the identification of the copyright work to the unilateral author. Such discretion therefore eats into the public domain, under the illusory guise of its own romantic freedom, invoking it to justify excessive monopolies in the third sense, as creatively-stagnating copyright.

This dematerialization is initially established in the transition from a simple, “desert”-based romanticism in the decision of the Court of Appeal of England and Wales in *Hyperion Records Ltd v. Sawkins*—which ostensibly retains a minimal connection to the work’s “recorded form”—to the CJEU’s *droit morale*-infused, *hyper-romanticism* in *Interlego AG v. Tyco Industries Inc.*—which purely essentializes its “immaterial essence.” For in the former, the stronger “impression” of the tangibility of “labour and skill”²¹⁰ can be contrasted with the complete ephemerality of the latter, where the subtle deference to the author—her “personal touch,”²¹¹ for example—permits the scope of protection to escape the material work.²¹²

alteration or embellishment which suffices to make the totality of the work an original work.”).

²⁰⁹ Griffiths, *supra* note 52, at 771.

²¹⁰ Griffiths, *supra* note 52, at 775.

²¹¹ Griffiths, *supra* note 52, at 781 (“It is now clear . . . that the criterion of creativity will be satisfied whenever an author expresses his or her creative ability in an original manner by making free and creative

In addition, the expansive incorporation of creative potential within the creativity rubric further dematerializes the object of copyright—it becomes fetishized as an invisible nothingness, tending towards the subjectivity of an author’s “choices.”²¹³ This is arguably entrenched by the additional possibility of segmenting the work into smaller “parts,” provided that they express the author’s creativity,²¹⁴ thereby enabling the circumvention of the substantial part test through the arbitrary dissection of a larger work²¹⁵—a “constellation”²¹⁶ of insufficient features could potentially be sliced to reveal a single, expressive star.

Therefore, the combination of both this deference to unilateral genius and the elision of the two stages discussed in Part II firstly reveals the invocation of a romanticized public domain—as a natural resource for creative freedom—to justify excessive, creativity-halting monopolies. This is because the establishment of an implicit presumption in favor of an author’s creativity depletes any notion of an accessible preserve of ideas—the public domain ironically justifies its own stagnation. In addition, this secondly facilitates an unchecked judicial discretion in recognizing copyright—an excessive

choices and thereby stamping his or her personal touch in creating a work.”).

²¹² Cf. Griffiths, *supra* note 52, at 784 (“[T]he principles approved in *Infopaq* would appear to require the adoption of a more completely dematerialized model of copyright law than has hitherto been applied in [the UK]”).

²¹³ Case C-145/10, *Painer v. Standard Verlags GmbH*, 2011 E.C.R. I-12533, ¶ 92.

²¹⁴ See Case C-5/08, *Infopaq International A/S v. Danske Dagblades Forening*, 2009 E.C.R. I-6569, ¶ 45.

²¹⁵ *Sawkins*, [2005] EWCA (Civ) 565, ¶ 49.

²¹⁶ *Williams v. Gaye*, 885 F.3d 1150, 1183 (9th Cir. 2018) (Nguyen, J., dissenting).

monopoly in the first sense. For the dematerialized essence of the copyright work, coupled with the consequent redundancy of the substantial part test, permits the justification of *any* copyright under the illusion of a cleanly demarcated, public-private boundary.

It is now arguable that, in combination, these excessive monopolies produce a corrosive incoherence to the illusory-excessive, justificatory reference point in copyright discourses, because they bear an unpredictable potential to cancel one another out. Here, the submitted, *de minimis* standard for identifying a protectible work—the third, creativity-stagnating monopoly—may be lowered or raised with equal judicial obfuscation—it becomes a “zero sum game”²¹⁷ of justificatory emptiness.

In possible recognition of this waxing and waning between monopolistic deference and an unlimited, judicial discretion, it is submitted that Mr. Justice Mann’s resort to “artistic purpose” in the English case of *Lucasfilm Ltd. v. Ainsworth* epitomizes the resultant incoherence that afflicts the public-private nexus. Here, in essentializing the intangible “essence” of a sculpture and then deeming the presence of a “utilitarian” function to be all-determining—thereby invalidating an underlying “mixture”²¹⁸ of artistic values—he perpetuates the ultimate “fiction”²¹⁹ of a rationalized copyright work.

This is because, the former identification of the work’s dematerialized existence implicitly legitimates an

²¹⁷ VAN LINDBERG, INTELLECTUAL PROPERTY AND OPEN SOURCE 166 (2008).

²¹⁸ *Lucasfilm Ltd. v. Ainsworth* [2008] EWHC 1878 (Ch) [121] (Eng.), *overruled by Lucasfilm Ltd. v. Ainsworth*, [2009] EWCA (Civ) 1328 (appeal taken from Eng.).

²¹⁹ Sherman, *supra* note 10, at 120.

unchecked deference to the author's mere artistic potential—in *merely asserting* the helmet to be a sculpture, for example—as being sufficiently creative. Whereas the latter fabrication of an all-or-nothing, “artistic purpose” concept permits an unconstrained judicial discretion to block this expansion.

As such, the public-private correlation is rendered unpredictable, which defeats, a priori, the normative significance of positing any illusory-excessive, justificatory link—Jefferson's romanticized, all-encompassing balloon floats in mid-air, “untethered”²²⁰ to public land.

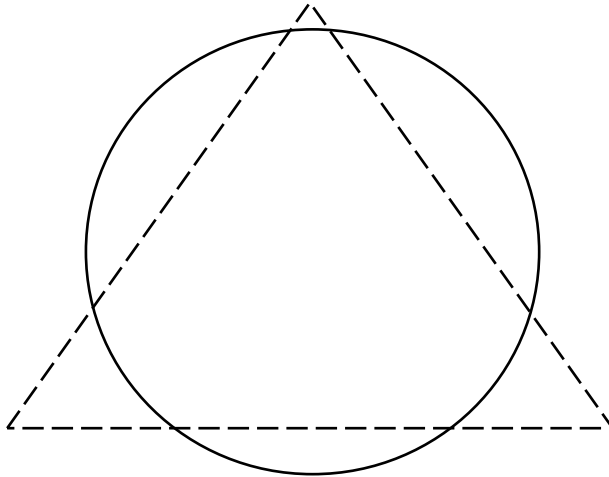


Fig. 2.2: Zero-sum incoherence

Using the kaleidoscope, this Article maps the deceptive incoherence that afflicts the public-private, justificatory nexus when its romantic symbiosis is exposed as empty in these discourses. Here, the dematerialization of the copyright work permits an all-embracing, monopolistic potential—the triangle extending beyond the

²²⁰ Beebe, *supra* note 80, at 683.

kaleidoscope. However, a similarly unchecked judicial discretion renders its boundaries unpredictable—the triangular copyright perimeter becomes dashed (Fig. 2.2).

D. Conclusion

Ultimately, this Article contends that the fetishization of the mythical trademark has a twofold consequence: firstly, it elevates the agency²²¹ of the signifier in “distinctiveness” discourses, thereby rendering passive the other two dimensions of the seller-trademark-consumer nexus; and secondly, through “dilution,”²²² it expands the trademark as all-encompassing, reducing to invisibility the active consumer role. This arguably invokes a deceptively one-sided, public domain notion to backhandedly justify excessive trademark potential, embracing all three monopoly concepts.

Furthermore, in romanticized copyright discourses, the incoherence of the public domain-copyright, justificatory link facilitates the invocation of a deceptively utopian public domain to justify excessive monopolies—copyright that is both creativity-stagnating (in the third sense) and discretionarily unlimited (in the first).

IV. CONCLUSION

Taking the skeptical, residual privatization of the “Jefferson Warning” in the patent law context as our starting point, this Article has explored the illusory-

²²¹ Cf. Schechter, *supra* note 160, at 818 (recognizing the trademark as an active form of communication).

²²² Beebe, *supra* note 80, at 676. See generally Graeme B. Dinwoodie, *Dilution as Unfair Competition: European Echoes* 5–8 (University of Oxford, Legal Research Paper Series No. 37, 2013), <http://ssrn.com/abstract=2249044> [<https://perma.cc/TZ3P-YJU5>], for a comparison of the US and European approaches to trademark dilution.

excessive, public domain-monopoly correlation through the changeable patterns of a kaleidoscope across US, UK, and EU law discourses of intellectual property.

In Part II, this Article highlighted the inevitably illusory (because intangible) public domain of real property-based discourses which, in copyright and traditional knowledge contexts, was fundamentally doomed to justify both discretionarily unchecked and distributionally unequal monopolies—thus excessive in the first and second understandings.

In the light of this tangibility trap, this Article then centered its assessment of the illusory (because deceptive) public domain according to a contextual, movement-based ideal. Later in Part II, this reconceived, justificatory reference point revealed monolithic discourses to invoke a deceptively open public domain to justify market-stagnating patents—excessive monopolies in the third sense. In Part III, the fetishized thingness and nothingness discourses reflected, in the former, all-encompassing trademarks justified by an illusion of seller activity and consumer passivity, and in the latter, an incoherently romantic public domain that legitimated excessively discretionary and creativity-stagnating copyright—excessive monopolies in the first and third senses.

It has ultimately been argued that in some discourses an illusory (because deceptive) public domain is invoked to justify excessive monopolies in all three understandings—in these contexts we therefore encounter, as a modification of Jefferson's utilitarian balloon, a discretionarily shape-shifting monopoly that hovers above us, bearing false promises.