

## OPENING DIALOGUE ON INTELLECTUAL PROPERTY

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*For decades Ejan Mackaay has been a friend generous with his hospitality and insights. In gratitude and following his lead, I here start a dialogue in search of openings that lead from the economic analysis of law into a conceptual critique of intellectual property.*

## **I. May the Law Enhance Culture?**

*On a plane, one person turns to speak to another next to him.*

*Lew:* Aren't these flights across the Atlantic long?

*Phyl:* Yes. And I soon tire of reading. My name's Phyllis. What's yours?

*Lew:* Lewis. You're not going to London for a vacation in mid-winter?

*Phyl:* No, for a conference. But I am on sabbatical for the semester.

*Lew:* Do you teach? Philosophy? I saw you reading one of Plato's dialogues.

*Phyl:* Yes. I have to teach Plato on my return. You read facts well. Are you an attorney?

*Lew:* Yes. I'm a lawyer. How is old Plato doing? I remember reading him as a student.

*Phyl:* The more I read Plato, the more troubling I find him, above all because he taught that we could secure truth and beauty if only we had rational laws.

*Lew:* Plato's laws, as I recall, were suspect. Weren't his philosopher-kings supposed to rule the state, for example, banishing or censoring poets, musicians and artists?<sup>1</sup>

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<sup>1</sup> See PLATO, *Republic*, 376–403 *passim*, G. M. A. Grebe & C. D. C. Reeve, trans., in John M. COOPER, ed., *Complete Works* (Indianapolis: Hackett Publishing Co., 1997) 971 at 1015–40 *passim*.



*Phyl:* Yes. Plato sought to enhance culture with rational laws to govern, not just censorship, but educating the philosopher-kings. He wanted to inculcate them with reason.

*Lew:* That's circular. Plato needed rational laws to bring reason to his lawmakers. Who is to educate the educators? Following what laws, before reason is inculcated?

*Phyl:* Good questions! By the way, Lewis, in what field of law do you practice?

*Lew:* Intellectual property.

*Phyl:* Isn't the law of intellectual property also supposed to enhance culture?

*Lew:* Yes, but differently than Plato's laws. Rather than trusting an elite to rule culture, it gives individuals control over the fate of their products of mind on the marketplace.

*Phyl:* I fear that such law might turn on notions as troublesome as many used in my field.

*Lew:* Justice Joseph Story, the intellectual star on the early U.S. Supreme Court, seemed to agree. He spoke of intellectual property as approaching the "metaphysics of the law".<sup>2</sup>

*Phyl:* At the start of philosophy, Socrates asked us to define our terms. Perhaps we can thus clear up metaphysics in your field. How to define what intellectual property protects?

*Lew:* Let me venture some key examples. Copyright law recognizes rights in literary and artistic works, and patent law assures rights in technological inventions.<sup>3</sup>

<sup>2</sup> *Folsom v. Marsh*, 9 F. Cases 342, 344 (C.C.D. Mass. 1841).

<sup>3</sup> See, e.g., Berne Convention (Paris Act, 1971), art. 2(1) ("literary and artistic works"); Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPs Agreement] (1994), art. 27(1) ("inventions [...] in all fields of technology").



*Phyl:* Would I find instances of works in books or drawings? Or of inventions in machines?

*Lew:* Think rather of texts that books or musical scores embody, of images that drawings or paintings embody or of techniques that machines or other such devices embody.

*Phyl:* I detect the scent of metaphysics. Can't the same text appear in varying type fonts? The same technique in machines with varying specifications but the same functions?

*Lew:* Your philosopher's sense went right to Justice Story's concern that courts often have to draw "evanescent" distinctions between similar products of mind in hard cases.

*Phyl:* For example, in the case in which Justice Story spoke of "metaphysics"?

*Lew:* A publisher had compiled George Washington's letters without the copyright owners' consent. Justice Story had to discern whether this use violated copyright or not.

*Phyl:* What did the good judge decide in this case?

*Lew:* He found infringement and barred publication of the compilation.<sup>4</sup>

*Phyl:* After this decision, did subsequent lawmakers, including judges, follow its reasoning?

*Lew:* They've only complicated what Justice Story called "evanescent" distinctions.

*Phyl:* Isn't some principle needed to help courts decide cases more cogently and simply?

*Lew:* Perhaps. But the law arises less out of principles than it does out of compromises.

*Phyl:* Shall we still seek some principle to guide such compromises and, thus, the law?

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<sup>4</sup> *Folsom v. Marsh*, 9 F. Cases 342, 349 (C.C.D. Mass. 1841).



*Lew:* If I stuck to principles, I'd risk malpractice, missing caveats key to hard cases.

*Phyl:* I'm asking you to engage in a thought experiment, not to change how you practice.

## II. How Does Property Itself Operate?

*The flight attendant comes by to get orders for drinks.*

*Lew:* I'll play this philosopher's game, but only if we account for cases.

*Phyl:* Agreed. How must property law be formulated? Its terms defined?

*Lew:* Good question! Property law has to tell us who holds property rights, in what such rights may be exercised and how they allow certain acts to be restrained.<sup>5</sup>

*Phyl:* I'd propose this nomenclature: whoever has a property right is the "subject" who may exercise the right, and whatever the right applies to is the "object" of the right.

*Lew:* My European colleagues use such terms: a property right entitles the subject who holds the right to restrain certain acts of others relative to the object of the right.

*Phyl:* You wanted to keep to cases. Have you any to illustrate intellectual property?

*Lew:* Must we start there? You just saw my difficulties in defining works and inventions.

*Phyl:* Let's start with more familiar property. I think of having property in some thing I can get my hands on or in land I can stomp my feet on, not in mental figments.

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<sup>5</sup> See, e.g., Wesley N. HOHFELD, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (Part 2), (1917) 26 Yale L.J. 710 at 733 (speaking of a "patentee's right" to stop a set of "articles" from being made).



*Lew:* Agreed. Tangible things present easier points of departure for analysis. Once we see how such things come under property rights, we can turn to intellectual property.

*Phyl:* How about my wrist watch? Suppose that I get tired of wearing it, put it down on the armrest between us and you take it. Will property law help me recover it?

*Lew:* You'd then be the subject holding property rights in the object, your watch. You may assert your rights to control this object against all other subjects for most purposes.

*Phyl:* But don't we often speak of things we own as our "property"? This turn of phrase suggests that I alone may decide what could be done with my watch altogether.

*Lew:* If you say your watch is your "property," you're using only "suggestive short-hand".<sup>6</sup>

*Phyl:* What if I said that I had some such right or a bundle of such rights "in" the watch?

*Lew:* Better! Law has to adjust such bundles to each other and into larger social relations.<sup>7</sup>

*Phyl:* What if such relations break down, for example, if we start fighting over my watch?

*Lew:* In this airplane, especially if we risk disturbing other passengers, the captain may intervene to stop our fighting. A court may have the watch returned to you.

*Phyl:* I question whether a right may be fashioned without regard for any theory of how one subject's exercise of the right has to be calibrated with other subjects' interests.

<sup>6</sup> Ysolde GENDREAU, "À la recherche d'une propriété perdue", (2005) 17 Cahiers de Propriété Intellectuelle 551 at 575.

<sup>7</sup> See Felix S. COHEN, "Dialogue on Private Property", (1954) 9 Rutgers L. Rev. 357 at 361-63 and 378-79.



*Lew:* Why don't we look at practice to start, before speculating about such matters?

*Phyl:* Alright. Let's continue with my watch. May I sell it to you or to anyone else?

*Lew:* Property may usually be transferred to others. You may sell or give me your watch.<sup>8</sup>

*Phyl:* But, to be clear, am I selling or giving away rights or the watch itself? Or both?

*Lew:* Good question! Here your philosopher's mind is moving in pace with the law. If you transfer all rights in the watch, by sale or gift, you effectively part with it altogether.

*Phyl:* May I transfer only some of my entire bundle of rights in my watch to you?

*Lew:* Yes. For example, you could rent it to me, transferring rights in it for a limited time.

*Phyl:* However I transfer rights to you, would yours be subject to the same caveats as mine?

*Lew:* Almost always. For example, if I bought your watch, I'd not use violence to take it back from someone who took it from me, especially in a crowded airplane.

*Phyl:* Perhaps I've a case without caveats. I own my home and the land under and around it.

*Lew:* Even then, you may only keep most people off your land most of the time.

*Phyl:* I sought no caveats, but got more. Why only "most" people "most" of the time?

*Lew:* Let me illustrate. Suppose that I owned land right behind yours, without access to the road in front. A court may order you to let me cross your land to get to the road.

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<sup>8</sup> For caveats, see Felix S. COHEN, "Dialogue on Private Property", (1954) 9 Rutgers L. Rev. 357 at 369-74 *passim*.





*Phyl:* What if your passage on my land inconvenienced me, for example, by unpredictably intruding on my privacy? Or if the court order reduced the value of my property?

*Lew:* The court may equitably tailor its order to take account of such burdens, perhaps limiting my passage to specified times and making me pay for it, say, monthly.

*Phyl:* Property law then not only operates within a tangle of existing social relations, but it weaves complex relations among subjects relative to objects, the things we own.

*Lew:* Don't get carried away with any metaphor of a "seamless web" of such relations.<sup>9</sup> People are constantly pulling and tearing at the law. That's what law suits are about.

*Phyl:* With all this pulling and tearing, does the law tell us who holds rights, what is protected and how rights operate, at least reliably enough for most of our dealings?

*Lew:* It does so reliably enough for people to trade in property regularly. But hard cases do give them reason to squabble and, negotiation failing, to take some cases to court.

*Phyl:* When we apply your property notions to products of mind, won't hard cases multiply? Recall the trouble you had defining what intellectual property protects.

*Lew:* Indeed, such hard cases do keep me and my fellow lawyers busy and often handsomely paid, especially in the field of intellectual property.

*Phyl:* I still hanker after some principle to make sense of hard cases.

### III. A Prototype of Intellectual Property

*The flight attendant comes with drinks and asks for orders for dinner.*

*Lew:* Good! Drinks are here. I need one. Where were we?

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<sup>9</sup> For this metaphor, see Frederic William MAITLAND, "A Prologue to a History of English Law", (1898) 14 Law Quarterly Rev. 13 at 13.



*Phyl:* We were talking about property. I had asked you for some principle to guide the law in your field. How about a principle of justice such as Plato sought?

*Lew:* Plato's principles are suspect, justifying censorship. Besides, it becomes easier to allocate goods "justly", as each of us sees it, to the extent we have more goods.

*Phyl:* Ah, I sense that old metaphor of goods all in some "cake" getting larger and larger. Don't we tend to think: the bigger that cake, the easier to share goods satisfactorily?

*Lew:* Yes. Indeed, let's focus on enlarging the cake. Here's my hypothesis: property functions to increase our wealth. We can then put off fine-tuning criteria of justice.

*Phyl:* Provisionally, if you like. But how do you propose to define the term "wealth"?

*Lew:* It means whatever goods help us on the whole to satisfy our own preferences.

*Phyl:* This definition seems a bit tricky. It slips from wealth "on the whole" to whatever we each strive after in particular. But how does all our wealth get down to each of us?

*Lew:* It is a matter of allocation. Some of us are better at producing some goods than others. We have to get the surplus we each have, but do not use, to others who want it.

*Phyl:* Plato anticipated your hypothesis. He speculated that society arose out of the division of labor. For example, a farmer best raises crops to eat, a herder best raises sheep for meat and wool, and a weaver best transforms wool into cloth to keep us warm.<sup>10</sup>

*Lew:* Would you farm if others stole your crops, or herd if others rustled your livestock, with impunity? Would you take your crops,

<sup>10</sup> See PLATO, *Republic*, 369b-71d, G. M. A. Grebe & C. D. C. Reeve, trans., in John M. COOPER, ed., *Complete Works* (Indianapolis: Hackett Publishing Co., 1997) 971 at 1008-11.





livestock or cloth to market to trade with others if it was easily filched there? These sorry events represent market failures.

*Phyl:* Of course, I'd not produce goods for a failing market nor take them there. But, as we've seen in our example of my watch, the law protects my property in goods I hold from being, as John Locke put it, "exposed to the invasion of others".<sup>11</sup>

*Lew:* Exactly. On that basis, we each produce and take our different goods to market. Then we each profit from exchanges in obtaining other goods we want but do not furnish well on our own. We're all then prompted to make and market more and more goods.

*Phyl:* Do you mean that some "invisible hand", to use Adam Smith's phrase, thus guides us in increasing our wealth as we sell our surplus goods and buy others' goods?<sup>12</sup>

*Lew:* Yes but, like any "seamless web" of the law, this phrase indicates only a metaphor. To start, as we noted, well-delineated property is needed to help the market function.

*Phyl:* Are you arguing that the law, in assuring intellectual property, should help the market, say, for texts and images or techniques, to function and thus increase cultural wealth?

*Lew:* You've again second-guessed my thinking, but we need examples. Did the Classical Greeks try to govern culture with law? Their attempts might shed light on the matter.

*Phyl:* Perhaps. For example, the Athenians organized drama festivals. Playwrights put on new plays at these festivals, competing for awards. Juries picked winners.<sup>13</sup>

<sup>11</sup> John LOCKE, *Second Treatise of Government*, § 123, C. B. MACPHERSON, ed. (1698, 1764; Indianapolis: Hackett Publishing Co., 1980) at 66.

<sup>12</sup> For this metaphor, see Adam SMITH, *The Theory of Moral Sentiments*, IV.i.10, D. D. RAPHAEL & A. L. MACFIE, eds. (1790; Indianapolis: Liberty Fund, 1982) at 184.

<sup>13</sup> See H. C. BALDRY, *The Greek Tragic Theatre* (New York: W.W. Norton & Co., 1971), ch. 4.





*Lew:* These contests come closer than old Plato to our modern laws of intellectual property. Once armed with property, creators may compete for money and fame on the market.

*Phyl:* There is a report from classical times of a still-closer example, namely from Sybaris, a Greek city-state in Southern Italy, some two and half millennia ago.

*Lew:* All I know about the Sybarites is that they still have the reputation of having been great lovers of their pleasures.<sup>14</sup> Does their law back that up?

*Phyl:* Yes. A Sybarite law entitled a creator of a tasty dish exclusively to make and use the dish for a year. This law was intended to promote competition in the culinary art.<sup>15</sup>

*Lew:* The Sybarites' rationale for this right seems much like ours for intellectual property.

*Phyl:* Our rationale? You mean your purported property-to-wealth function?

*Lew:* Yes. Adam Smith himself contemplated granting a right in "a new book to its author" or in "a new machine [...] to its inventor" as we might to any entrepreneur who undertook any "experiment, of which the publick is afterwards to reap the benefit".<sup>16</sup>

*Phyl:* But why? Wouldn't such rights help authors or inventors monopolize any market for their texts or techniques and thus frustrate the very competition that Smith favored?

*Lew:* Not necessarily. To see why, let's start with the Sybarite rights in dishes.

<sup>14</sup> See HERODOTUS, *The History*, bk. VI, para. 127, David Grene, trans. (Chicago: University of Chicago Press, 1987) at 459.

<sup>15</sup> ATHENAEUS, *The Deipnosophists*, 521c-d, Charles Burton GULICK, ed. and trans. (Cambridge, Mass: Harvard University Press, 1963), vol. 5 at 348-49.

<sup>16</sup> ADAM SMITH, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, Vi.e.30, Edwin CANNAN, R. H. CAMPBELL, A. S. SKINNER & W. B. TODD, eds. (1791; Indianapolis: Liberty Fund, 1981), vol. 2 at 754.



*Phyl:* How would the Sybarite culinary right increase cultural wealth?

*Lew:* Before I can respond, I need to distinguish between private and public goods.

*Phyl:* Is a private good something like my watch which I alone hold? Is a public good something like city squares and state highways that we all enjoy and use?

*Lew:* Yes. But let's consider another type. Only one of us can wear your watch at a time: it's a private good. Anyone in sight of its dial or of any clock can read the time of day and tell this time to others. The time of day tends to become a public good.<sup>17</sup>

*Phyl:* Could you state criteria for a public good?

*Lew:* A good is public to the extent that it's non-excludable and non-rival.

*Phyl:* Could you explain this pair of technical terms?

*Lew:* On the one hand, it is hard for me to exclude others from learning the time; on the other hand, we are not rivals for using this information, since we can each guide our conduct by it, while others do not then lose the chance to do so as well.

*Phyl:* I don't see how the first criterion, non-excludability, clearly applies to the time on my watch. I could put a cover on its dial to stop people from reading the time from it.

*Lew:* True. Let's stick to the second criterion here. The mere fact that I learned the time of day, from your watch or elsewhere, wouldn't preclude others from learning it.<sup>18</sup>

<sup>17</sup> For the historical trend making the time of day publicly accessible, see Lewis MUMFORD, *Technics and Civilization* (1934; San Diego: Harcourt Brace Jovanovich, 1963) at 12–18.

<sup>18</sup> See Harold DEMSETZ, "The Private Production of Public Goods", (1970) 13 J. Law & Economics 293 at 295.



*Phyl:* Agreed. Are you arguing that, insofar as cultural goods like texts and images or techniques become public goods, we ought to institute intellectual property?

*Lew:* Yes. To illustrate, go back to dishes created in Sybaris before any right protected them. Suppose that Alpha, with a taverna in Sybaris, developed a new and tasty dish.

*Phyl:* Alright. Let's say that Alpha came up with a new dish: fish-cakes with certain spices. But each meal of fish-cakes is a private good: once it is eaten, no one else can eat it.

*Lew:* Alpha's know-how for making this dish can be a public good: other cooks can learn how to make the fish-cakes and market them, without using up such knowledge.

*Phyl:* I stick with my question: why would Alpha need any intellectual property, like the Sybarite culinary right, to develop some way of making a new and tasty dish?

*Lew:* Without any such right, why work long hours over a hot stove, tinkering with ingredients and modes of preparation, to give a dish a taste to please a fickle public?

*Phyl:* If Alpha hits upon a way of making something extraordinary to eat, he can sell meals of it in his taverna. If the Sybarites like it, they will flock there to buy and eat it.

*Lew:* Suppose that other cooks learn how to make the dish as well. Why would consumers pay Alpha's price for fish-cakes if they could get them at prices falling with the increasing supply that others provided? What would Alpha get for all his efforts?<sup>19</sup>

*Phyl:* Why couldn't Alpha keep his know-how secret? He could then sell the fish-cakes in his taverna, meal by meal, at his prices. These'd be limited only by what Sybarites would pay for especially choice fare, notably for other comparably tasty dishes.

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<sup>19</sup> See Kenneth J. ARROW, "Economic Welfare and the Allocation of Resources for Invention" in Richard R. NELSON, ed., *The Rate and Direction of Inventive Activity: Economic and Social Factors* (Cambridge, Mass.: National Bureau of Economic Research, 1962) 609 at 615-19.



*Lew:* Suppose that Alpha keeps everyone out of his kitchen, except his trusted assistant Beta, when he develops new dishes. Suppose, too, that another cook, Gamma, bribes Beta into telling him the secret for making the fish-cakes and, in turn, prepares and sells the dish more cheaply in his taverna. Alpha starts losing customers to Gamma.

*Phyl:* That's not fair! Alpha's trusted assistant Beta is made into a spy in Alpha's own workplace. How could a judge let Gamma turn around and compete with Alpha?

*Lew:* Under modern law, Alpha may have a court order Beta not to tell Gamma his secret know-how or, if Beta had already done so, order Gamma to stop making or marketing fish-cakes based on the secret he took or order him to pay Alpha for such uses.<sup>20</sup>

*Phyl:* But couldn't Alpha's secret know-how for making the dish get out in other ways?

*Lew:* Sure. Imagine that Delta, a skilled cook, goes to Alpha's taverna. Delta orders Alpha's fish-cakes and inspects and eats them, carefully savoring their taste. Delta returns to his kitchen and recreates Alpha's dish. Or Epsilon, a virtuoso cook, works alone in her kitchen, without knowing of Alpha's dish. She comes up with the same dish.

*Phyl:* Neither is stealing any secret. Nor is he or she doing anything manifestly unfair.

*Lew:* Correct. Delta reverse-engineers the fish-cakes; Epsilon independently develops the dish. The law of trade secrets does not empower courts to stop such other originators.

*Phyl:* Let's posit Zeta, an honest cook, but not too bright. He's not up to spying to learn Alpha's secret for making the dish, and he's

<sup>20</sup> See TRIPs Agreement (1994), art. 39. For analysis in terms of property, see François DESSEMONTET, *The Legal Protection of Know-How in the United States of America*, H. W. Clarke, trans., 2nd ed. (South Hackensack: Rothman & Co., 1976) at 323-53 *passim*.



unable to recreate it. Couldn't he offer Alpha money to disclose the secret to him and to let him make and market the dish?

*Lew:* Excellent! The philosopher has anticipated modern lawyers. We call that "licensing" trade secrets. If Alpha teaches only Zeta his know-how and allows only Zeta to use the dish on that basis, Zeta gets an exclusive license to that know-how. Or Alpha may disclose and license his secret know-how to a number of cooks, each nonexclusively.

*Phyl:* How, in negotiating any such license, could Alpha show anyone what he proposed to license without starting to reveal his secret? Another market failure?<sup>21</sup>

*Lew:* You've put your finger on a key dilemma of public goods that one tries to keep secret: how to deal in them without losing control of them? Alpha could so deal with Zeta if he could sue Zeta for using his secret before he granted Zeta any license to do so or if he got Zeta's promise not to use his secret before accepting license terms.<sup>22</sup>

*Phyl:* We know nothing about any Sybarite law of trade secrets. Let's go on to the Sybarite law granting Alpha a right in his dish. Would it protect him while he negotiated?

*Lew:* Yes. Armed with this right, Alpha could stop Zeta from making the dish after learning of it from him, but before he'd granted any license, indeed without any deal at all.

*Phyl:* I see. The Sybarite right would allow Alpha to license his know-how more securely.

<sup>21</sup> See Kenneth J. ARROW, "Economic Welfare and the Allocation of Resources for Invention" in Richard R. NELSON, ed., *The Rate and Direction of Inventive Activity: Economic and Social Factors* (Cambridge, Mass.: National Bureau of Economic Research, 1962) 609 at 614-16.

<sup>22</sup> For these and alternative approaches, see Michael J. MADISON, "Open Secrets" in Rochelle C. DREYFUSS, Pauline NEWMAN & Katherine J. STRANDBURG, eds., *The Law and Theory of Trade Secrecy: A Handbook of Contemporary Research* (Cheltenham: Edward Elgar Publishing, 2011), ch. 10.





*Lew:* Exactly, but I don't know whether, in Sybaris many millennia ago, cooks licensed their culinary rights. However, today, intellectual property is extensively licensed.

*Phyl:* Are we back to your working hypothesis: property rights function to increase wealth?

*Lew:* Yes. Didn't the Sybarites assure such rights in dishes in order to have more dishes?

*Phyl:* Yes. But it seems to me that you want to have your fish-cakes and eat them too.

*Lew:* What is that supposed to mean? Too much of a good thing? To wit, tasty dishes?

*Phyl:* Yes. Suppose that the Sybarites had too many fish-cakes, a surfeit of them.

*Lew:* A surfeit doesn't seem to be what was intended here. Ostensibly, the Sybarites instituted their culinary right, not to have more food, but rather distinctly tasty dishes.

*Phyl:* Are you arguing that lawmakers assure intellectual property so that we enjoy or use, not only more cultural goods generally, but a greater variety of such goods?

*Lew:* Both. Cultural goods we enjoy or use would have to become at the same time more readily available and more variegated in order for our cultural wealth to be increased.

*Phyl:* Is it a matter only of disposing of these cultural goods or both of accessing them and of providing bases for creating and disseminating still more varied cultural goods?

*Lew:* Both. Cultural goods do give us delight or prove useful, and they also lead to further cultural goods in providing such bases for them as new insights and information.<sup>23</sup>

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<sup>23</sup> See Ejan MACKAAY & Stéphane ROUSSEAU, *Analyse économique du droit*, 2nd ed. (Montréal: Éditions Thémis, 2008) at 266–268.

*Phyl*: If I understand you right, to enhance culture, you'd substitute, for Plato's philosopher-kings, the invisible hand of the marketplace allocating property and guided by prices.

*Lew*: No. Unlike philosopher-kings who'd censor creators, lawmakers wouldn't institute property to pick out cultural goods to impose or suppress. Rather, property allows market-players to choose freely which goods to make and market and which to get.

*Phyl*: Alright, but what options did the Sybarite lawmakers have? In their city-state, apparently, the culinary art had advanced relatively far.<sup>24</sup> Their cooks could have been developing new dishes hand over fist, often soon duplicating or elaborating on each others' new dishes. Each cook would then have had decreasing lead time to market a new dish before others came out with a similar or otherwise competitive dish.<sup>25</sup>

*Lew*: As in our copyright law, the Sybarite lawmakers could have entitled all cooks originating the same dish, say, Alpha and Epsilon in our example, to make and market that dish. Or else, as in our patent law, the lawmakers could have entitled the cook initially bringing the dish out in Sybaris, namely Alpha, to have all subsequently developed instances, including Epsilon's, barred from being made or marketed there.

*Phyl*: As lawmakers strengthened such a right, couldn't any cook asserting it increasingly control the culinary art? Could Alpha, a bit like Plato's philosopher-kings, given a strong enough right, stop others from experimenting in their private kitchens? Could he stop them from offering his dish, or even new dishes based on his, to the public?

*Lew*: We're still far from Plato's state censorship. But we may ask: how far would such rights extend the control that each creator could

<sup>24</sup> See James N. DAVIDSON, *Courtesans and Fishcakes: The Consuming Passions of Classical Athens* (New York: St. Martin's Press, 1997) at 4-5.

<sup>25</sup> See Jerome H. REICHMAN, "Legal Hybrids Between the Patent and Copyright Paradigms", (1994) 94 Columbia L. Rev. 2432 at 2504-27 *passim*.



exercise over others?<sup>26</sup> For example, should Alpha, with his right in spiced fish-cakes, be entitled to have another cook, say, Eta, stopped from improvising on his dish to make spiced rabbit-cakes?

*Phyl:* The report of the Sybarite law doesn't say in so many words how the law was to apply to a case in which one cook's dish was elaborated by another into a distinct dish.

*Lew:* I'd not then venture to guess how a Sybarite court would have decided a case where Alpha, with a right in spiced fish-cakes, sued Eta for making spiced rabbit-cakes.

*Phyl:* But aren't such cases exactly those in which culture is enhanced, where from one text or image another is derived or where one technique is improved in another?

*Lew:* Yes. Here intellectual property is like medicine. If taken in carefully dosed amounts, it keeps competition and, accordingly, culture thriving. Otherwise, if doses are too large, it might poison us by concentrating control of information in too few of us.<sup>27</sup>

*Phyl:* For example, in our hypothetical case of Alpha and Eta?

*Lew:* Normally, intellectual property entitles creators to control only their own creations. On that premise, the Sybarite law would not have allowed Alpha to have Eta stopped from using culinary procedures, for example, spicing, already well known in Sybaris.

*Phyl:* Wouldn't the Sybarites' culinary wealth have suffered if their right protected such procedures? Or if it were otherwise stronger than the culinary art called for?

<sup>26</sup> See Tim Wu, "Intellectual Property, Innovation, and Decentralized Decisions", (2006) 92 Virginia L. Rev. 101.

<sup>27</sup> See Michael LEHMANN, "Property and Intellectual Property — Property Rights as Restrictions on Competition in Furtherance of Competition", (1989) 20 International Rev. Indus. Prop. & Copyr. Law 1; Ejan MACKAAY & Stéphane ROUSSEAU, *Analyse économique du droit*, 2nd ed. (Montréal: Éditions Thémis, 2008) at 320-25.



*Lew:* Yes. Their lawmakers should have considered diverse conditions, like the state of the culinary art and the market for dishes, in fashioning rights or in tailoring relief.

*Phyl:* Generally, don't lawmakers have to decide how, in the light of material conditions, to meet formal conditions of property, that is, in specifying subjects, objects and rights?

*Lew:* Yes. Especially, in my field of intellectual property, to avoid counter-productive consequences, the lawmakers have to be quite specific in dosing rights, as I just noted.

*Phyl:* But how, like good doctors, are they to diagnose material conditions in order to formulate the law optimally? How to find the right dosage to enhance culture?

*Lew:* Trial and error over time?

*Phyl:* Do I detect a note of puzzlement in your voice?

*Lew:* Perhaps. But the problem is endemic throughout the law.

*Phyl:* Turn to a simple question to illustrate it. Sybarite rights lasted only one year. Why?

*Lew:* That was a short term, compared to those set by modern laws. Copyright now lasts at least for an author's lifetime plus fifty years; patents, for twenty years from filing.<sup>28</sup>

*Phyl:* Whatever the term for a given right, it has to be specified in a given amount of time: a year is a year. On what grounds may and do lawmakers set such terms?

*Lew:* Whatever, for example, they may assess as useful or fair for a given type of right.

*Phyl:* "Useful"? "Fair"? What could such terms have meant for the Sybarites?

<sup>28</sup> See, respectively, Berne Convention (1971), art. 7; TRIPs Agreement (1994), art. 33.



*Lew:* Sybaris was a small city-state. It might have been hard to keep a secret there. As you noted, its culinary art was advanced. New dishes might have been frequently tried.

*Phyl:* Yes, but why set a term of only one year? Why not twenty years or more, like now?

*Lew:* Perhaps a year seemed as good a period as any for giving cooks a chance to recover their costs and turn a fair profit. With too long a period, cooks would feel so safe against competitors that they'd slack off in coming up with new dishes.<sup>29</sup>

*Phyl:* All these “perhaps” and “mights” make lawmaking in your field of law, intellectual property, sound more speculative than metaphysics.

#### IV. Can Intellectual Property be Optimized?

*The flight attendant brings and serves dinner.*

*Lew:* This food we just got wouldn't have satisfied the Sybarites. Not tasty!

*Phyl:* Let's continue our discussion, if only to distract ourselves from this dull fare.

*Lew:* I'm sorry to have insisted on the complexity of my field of law and pestered you with caveats. Now the complexities and caveats are going to be used against me.

*Phyl:* Lawyer's paranoia! Of course, material facts are going to be complicated and the law formally hedged. Let's consider how facts and law come together in your field.

*Lew:* Gladly. But how to cope with the complexities and caveats?

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<sup>29</sup> See Fritz MACHLUP, *An Economic Review of the Patent System* (Washington, D.C.: US Government Printing Office, 1958) at 39-40.



*Phyl:* You spoke of a property-to-wealth function.<sup>30</sup> In any function, are there variables?

*Lew:* Of course.

*Phyl:* And in your property-to-wealth function?

*Lew:* There are many types of variables in my field, not only in the law, as we've seen, but in the subjects whom the law governs and in the objective world where law applies.

*Phyl:* To increase cultural wealth, of what variables do lawmakers have to take account in subjects like creators? And of what variables objectively on the marketplace?

*Lew:* There are motives in creators, notably desires for monetary gain and for glory, that rights have to arouse as incentives to create and to disseminate products of mind, as well as market conditions and positions that might affect prospects of gain or of glory.

*Phyl:* Do you propose to optimize intellectual property, itself complex, as we've just seen, with an eye to so many variables?

*Lew:* Yes, so that the law best enhances culture.

*Phyl:* Let's start with variables in creators. How about their incentives?

*Lew:* Why would I burn the midnight oil to write an entertaining or edifying text if anyone could redisseminate it without paying me? Or go through trials and errors to get a technique to run effectively if anyone could use it, still without paying me?

*Phyl:* For reasons besides expectations of gain or of glory. Otherwise, why would Van Gogh have kept at his art, despite repeated failures of his brother, an art dealer, to sell his paintings?<sup>31</sup> Or why

<sup>30</sup> See Part III above.

<sup>31</sup> See, e.g., Vincent VAN GOGH, *The Letters*, Leo JANSEN, Hans LUIJTEN & Nienke BAKKER, eds. (Amsterdam: Van Gogh Museum & Huygens Institute, 2009), n° 645, 663 and 885, at <http://www.vangoghletters.org/vg/> (drive to paint as well as he can).



would Dr. Semmelweis have doggedly researched disinfection techniques, in the face of hostile resistance, ultimately ostracism, in his profession?<sup>32</sup>

*Lew:* Van Gogh and Dr. Semmelweis represent rare cases from the nineteenth century. Why should they provide any basis for law-making now?

*Phyl:* These cases dramatize how creators have been driven by cultural tensions at specific junctures all through history, challenging them to reach breakthroughs.

*Lew:* What do you mean by “cultural tensions”?

*Phyl:* I can only give you examples. Such tensions vary from historical juncture to juncture.

*Lew:* To start, let’s outline some tensions taking hold of Van Gogh and of Dr. Semmelweis.

*Phyl:* Van Gogh had to assimilate, and indeed synthesized, at least three movements in his art world: his early Dutch art training; what he learned in Paris from Impressionists and their followers, for example, color palettes and brush strokes; and compositional schemes that European artists were discovering in recently imported Japanese prints.<sup>33</sup>

*Lew:* And Dr. Semmelweis?

*Phyl:* Dr. Semmelweis was caught between his data and the medical establishment. On the one hand, he discovered higher death rates in hospital maternity wards than in his own, where he required doctors to disinfect their hands before delivery. On the other, his

<sup>32</sup> See, e.g., Louis-Ferdinand CÉLINE, *Semmelweis*, Jean-Pierre DAUPHIN & Henri GODARD, eds., Philippe Sollers, preface (1924, 1936; Paris: Gallimard, 1999) at 55–56 (sense of destiny to pursue truth).

<sup>33</sup> See John REWALD, *Post-Impressionism from Van Gogh to Gauguin*, 3rd ed. (New York: Museum of Modern Art, 1979), esp. ch. 1 *passim*; Klaus BERGER, *Japonisme in Western Painting from Whistler to Matisse*, David Britt, trans. (Cambridge: Cambridge University Press, 1992) at 6–189 *passim*.



colleagues rejected his research, which Pasteur and others later easily confirmed.<sup>34</sup>

*Lew:* Perhaps many creators are driven by cultural tensions, and exceptional creators resolve them in breakthroughs. But lawmakers most easily focus only on the lowest common denominators among creators' potential incentives. The law assures rights on the marketplace which can address creators with prospects of gain and of glory.

*Phyl:* Wouldn't lawmakers then only trivially enhance culture? They'd not take account of the full gamut of creators' motives, encompassing drives to reach breakthroughs, as well as impulses to play or tinker with one's surroundings incrementally.<sup>35</sup>

*Lew:* You're right. I could only write and edit competently in my field of law by remaining sensitive to tensions in the field. But this sensitivity works in tandem with my desires to earn copyright royalties and to acquire renown among my colleagues.

*Phyl:* Good! You're an author? You're then a source of data for our inquiry.

*Lew:* Yes. I write and update the lead chapter for a legal treatise which I used to edit.<sup>36</sup> This has always been hard work, which wouldn't have been done without recompense. My publisher couldn't safely market the book, and pay me, without copyright protection.

*Phyl:* I'm impressed, especially by your responsiveness as an author to tensions in your field. But it doesn't follow that, because the

<sup>34</sup> See Bruno LATOUR, *Pasteur: guerre et paix des microbes* (1984; Paris: La Découverte, 2001), ch. 1 *passim*.

<sup>35</sup> See, e.g., Julie E. COHEN, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* (New Haven: Yale University Press, 2012), ch. 4 (improvisation in one's own milieu); Eric VON HIPPEL, *Democratizing Innovation* (Cambridge, Mass.: The MIT Press, 2006), ch. 1 (innovation by end-users).

<sup>36</sup> Paul Edward GELLER, "International Copyright: The Introduction", at <http://www.internationalcopyrightguide.com/>, and in Lionel BENTLY, ed., *International Copyright Law and Practice*, 26th release (Newark: LexisNexis, 2015), vol. 1.



law provides incentives for some types of works, such as your reference work, it does so for the full range of creations. Let's move on to inventors to see how far market forces might lead them to innovate.

*Lew:* Consider the light bulb we now take for granted. In the nineteenth century, it became known that running an electric current through resistant filaments gave light. Edison followed parallel lines of research to develop a filament cheap and durable enough for mass production and use. Patents, pending or granted, helped him finance research.<sup>37</sup>

*Phyl:* In your property-to-wealth function, motivations seem to vary along what we might call the "creative spectrum". They run, for example, from Van Gogh's passion for painting to whatever keeps you methodically updating your legal treatise. They also run from the humanitarian and scientific concerns of Dr. Semmelweis to the financial interests of Edison. How can lawmakers furnish incentives all along this spectrum?

*Lew:* With compromises. In such compromises, lawmakers can address greed and vanity, common motives satisfied on the marketplace. They can also take account of the fact that many breakthroughs call for capital investment to be recaptured on the market.

*Phyl:* Most breakthroughs seem to me to call for little capital investment. Van Gogh's paintings called only for enough cash to pay for canvas, paints, food and rent. Could you cite a literary or artistic breakthrough that called for greater capital investment?

*Lew:* D.W. Griffith made breakthrough motion pictures with increasingly bigger casts and expensive sets. His masterpiece "Intolerance", as production proceeded, took more and more capital that he could only raise by mortgaging his prior copyright interests.

<sup>37</sup> See Charles BAZERMAN, *The Languages of Edison's Light* (Cambridge, Mass.: The MIT Press, 1999), chs. 2-7 *passim*. See also Lisa GITELMAN, *Scripts, Grooves, and Writing Machines: Representing Technology in the Edison Era* (Stanford: Stanford University Press, 2000), ch. 3 *passim* (Edison's patent for the phonograph).



*Phyl:* That example illustrates my point. D.W. Griffith did not act like a rational market-player. He completed his masterpiece according to his own vision, but deluded himself into expecting it to succeed as did his prior films. Afterwards, he admitted that his vision of the film drove him to ignore the realities of the marketplace.<sup>38</sup>

*Lew:* Again, we're stuck at the top of the creative spectrum. Let me give you some further examples of creation organized from the point of view of the marketplace.

*Phyl:* Please do.

*Lew:* Film studios, in the twentieth century, began to industrialize the production of motion pictures, financing both their own growth and films themselves with copyrights.<sup>39</sup>

*Phyl:* But these are not flesh-and-blood creators, for whom the law is to provide incentives. They're business enterprises or other organizations, whose incentives might differ.

*Lew:* How else could flesh-and-blood creators work together but in such organizations?

*Phyl:* In small groups held together by elective affinities. For example, Igor Stravinsky and Nijinsky thus coordinated the music and choreography for "The Rite of Spring", and jazz musicians thus met to improvise in jam sessions, coming up with be-bop.<sup>40</sup>

*Lew:* But as such groups get bigger, their members find it more costly to work together, especially on the marketplace. For large-scale

<sup>38</sup> See Lillian GISH, *The Movies, Mr. Griffith and Me*, with Ann PINCHOT (Englewood Cliffs: Prentice-Hall, 1969) at 176-87 *passim*.

<sup>39</sup> See Douglas GOMERY, *The Hollywood Studio System: A History* (London: British Film Institute, 2005), pt. 1 *passim*.

<sup>40</sup> See, respectively, Igor STRAVINSKY & Robert CRAFT, *Conversations with Igor Stravinsky* (Berkeley: University of California Press, 1959) at 45-47; Scott DEVEAUX, *The Birth of Bebop* (Berkeley: University of California Press, 1997), chs. 4-6 *passim*.



projects, firms offer cheaper frameworks for organizing creators and front capital for resources they need.<sup>41</sup>

*Phyl:* With better media, notably by way of the internet, creators can network into larger and more far-flung collaborative groups at lower costs and without central direction.<sup>42</sup>

*Lew:* Good point! But I still doubt that the elective affinities that would hold such groups together would eclipse bottom-line incentives of market gain they share with firms.

*Phyl:* Even on that level, creators' and firms' motives need not coincide. Did your interests always converge with your publisher's interests with regard to your legal treatise?

*Lew:* No. I'd have marketed the treatise at lower prices than my publisher did. Lower prices would have helped sell more copies, increasing my royalties as well as my renown.<sup>43</sup>

*Phyl:* Aren't media firms, armed with copyrights, tempted to take their money and run? That is, to market those works in which they've sunk costs but that turn good profits?

*Lew:* Yes. They'd rather stick with best-sellers than risk capital on diversified repertoires.<sup>44</sup>

*Phyl:* What about researchers, potential inventors, and the firms that employ them?

<sup>41</sup> See R. H. COASE, "The Nature of the Firm", (1937) 4 [new ser.] *Economica* 386, reprinted in *The Firm, the Market, and the Law* (Chicago: University of Chicago Press: 1988), ch. 1.

<sup>42</sup> See Yochai BENKLER, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven: Yale Univ. Press, 2006), chs. 2-4 *passim*.

<sup>43</sup> See Arnold PLANT, "The Economic Aspects of Copyright in Books", (1934) 1 [new ser.] *Economica* 167 at 184-85.

<sup>44</sup> See, e.g., Richard A. PETERSON & David G. BERGER, "Cycles in Symbol Production: The Case of Popular Music", (1975) 40 *Am. Sociological Rev.* 158 (noting that firms' stronger competitive positions correspond to less diversified repertoires).



*Lew:* Researchers may look to human needs and scientific progress; firms look to profits.<sup>45</sup> We saw Dr. Semmelweis try disinfection techniques to reduce deaths in maternity wards, and Sir Fleming tested the antibiotic effects of a mold he had the wit to note. But firms only invested in bringing such drugs to market as they foresaw profits.<sup>46</sup>

*Phyl:* Why treat variables for all these diverse creators as if they were all entrepreneurs?<sup>47</sup>

*Lew:* We need not. Shall we go on to market variables? Hopefully, they'll prove simpler.

*Phyl:* Here I'll quote Adam Smith on point. He noted that "[t]he desire of food is limited in every man by the narrow capacity of the human stomach; but the desire of [...] conveniencies and ornaments [...] seems to have no limit or certain boundary".<sup>48</sup>

*Lew:* To use current economic terms, demands have varying elasticities relative to prices.

*Phyl:* What does this metaphor of "elasticity" mean?

*Lew:* It refers to ranges within which demands for goods vary with prices.

*Phyl:* Could you illustrate it with some examples of such ranges for cultural goods?

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<sup>45</sup> See Arnold PLANT, "The Economic Theory Concerning Patents for Inventions", (1934) 1 [new ser.] *Economica* 30 at 42.

<sup>46</sup> See William KINGSTON, "Antibiotics, invention and innovation", (2000) 29 *Research Policy* 679.

<sup>47</sup> See, e.g., William M. LANDES & Richard A. POSNER, *The Economic Structure of Intellectual Property Law* (Cambridge, Mass.: Harvard University Press, 2003) at 38 (treating authors and publishers together for purposes of analysis).

<sup>48</sup> Adam SMITH, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, I.xi.c.7, Edwin CANNAN, R. H. CAMPBELL, A. S. SKINNER & W. B. TODD, eds. (1791; Indianapolis: Liberty Fund, 1981), vol. 1 at 181.



*Lew:* Demands can be more elastic for music than for tools. As a jazz fan, I often buy more than one rendition of the same tune, even if the price is high for an exciting version. By contrast, most artisans buy one hand tool for each job, say, one hammer to pound in nails and one for tacks. They'll buy only what they need even if prices rise or fall.

*Phyl:* You may buy a dozen jazz variations of a tune to satisfy your musical tastes. But would you buy a dozen dictionaries of the same language to help you in your writing and editing? Or a dozen automobiles to enjoy the art of industrial design?

*Lew:* No. I only need a few dictionaries, one per task. Too many at hand could lead me to waste time in picking one while focusing on a text. I've long wanted to collect beautifully designed automobiles. For awhile I indulged this fantasy with used Italian sports cars. But only one at a time: that's all I could afford or drive at a time.

*Phyl:* In what we might call the "market spectrum", more or less elastic demands are then variables. But I don't see how fashioning intellectual property more or less narrowly would impact prices of cultural goods predictably, for example, of texts that go from fanciful to utilitarian or of techniques that differ in specs or forms but not functions.<sup>49</sup>

*Lew:* You've a point there. Neither creators nor enterprises, in marketing cultural goods, are always competing with each other by undercutting each others' prices for the same or similar goods. They are often appealing to variably elastic demands for congeries of some similarly, and some differently, entertaining, edifying or useful goods.<sup>50</sup>

<sup>49</sup> See Jerome H. REICHMAN, "Charting the Collapse of the Patent-Copyright Dichotomy: Premises for a Restructured International Intellectual Property System", (1995) 13 Cardozo Arts & Entertainment L.J. 475 at 489-514 *passim*.

<sup>50</sup> See, e.g., Christopher S. Yoo, "Copyright and Product Differentiation", 79 (2004) N.Y.U. L. Rev. 212 (also citing comparable analyses of how patents impact markets).



*Phyl:* Along creative and market spectrums, complex variables are then material to enhancing culture. How to account for them all in formulating intellectual property?

*Lew:* It's not yet clear! Let me try to restate this problem in more comprehensive terms.

## V. Is Analysis Premised on a Vicious Circle?

*The flight attendant takes the dinner plates and offers coffee and after-dinner drinks.*

*Phyl:* I didn't get what you said. Maybe the coffee will clear my mind of cobwebs.

*Lew:* I thought that you philosophers liked to play with the cobwebs of your minds.

*Phyl:* We have to fight that temptation. Aren't lawyers paid to spin silky arguments?

*Lew:* Perhaps cognac will help me spin new arguments, if only to discount market risks.

*Phyl:* Haven't you, till now, premised your arguments at least on the risk that, as cultural goods become public goods, they might be taken and shared more easily?<sup>51</sup>

*Lew:* Yes. Without rights, creators and firms would shy away from bearing the costs of making and marketing such goods, from which others could benefit without paying.

*Phyl:* How, in fashioning intellectual property, to disentangle creators' risks specific to public goods from entrepreneurial risks endemic to market investments generally?

*Lew:* I don't see why we have to.

*Phyl:* Now it's my turn to ask you for concrete examples.

<sup>51</sup> See Part III above.



*Lew:* Here's one from my job. A small firm comes to me with ideas for articulating old film clips with standard software modules into new videogames. It faces diverse risks, for example, of investing in research and development that could fail to realize its ideas cost-effectively or of having its games fail to appeal to buyers on the marketplace. Or competitors might imitate its games with marginal variations to usurp its market.

*Phyl:* I can now put my question in terms of your example. How to distinguish between your client's risks of having its creation taken as a public good without payment, on the one hand, and its risks of investment in research or marketing, on the other?<sup>52</sup>

*Lew:* I need to see all my client's risks in its business context. As a small firm, it's not in as good a position as might be a big firm to hedge all these risks. The bigger a firm, the more capital it might have and the more risky the creative projects it might undertake. With more risk-taking, the chances of having more successful creations increase.<sup>53</sup>

*Phyl:* You said that your client, though small, is ready to take on all these risks. Focusing on developing its own ideas for a new type of videogame, wouldn't it be as likely to succeed in its project as a big firm whose efforts were scattered over many projects?

*Lew:* Suppose that the big firm takes on such risks. Relative to my client, not only might it start its research and development with a better technological base, but it is likely to have economies of scale to make its products more cheaply, a dominant market position to sell these at higher profits and more legal resources to enforce its rights.

<sup>52</sup> See, e.g., Fritz MACHLUP, *An Economic Review of the Patent System* (Washington, D.C.: US Government Printing Office, 1958) at 36–39 (sifting such types of risks).

<sup>53</sup> See Kenneth J. ARROW, "Economic Welfare and the Allocation of Resources for Invention" in Richard R. NELSON, ed., *The Rate and Direction of Inventive Activity: Economic and Social Factors* (Cambridge, Mass.: National Bureau of Economic Research, 1962) 609 at 616.

*Phyl:* But we found big firms ready to rest on their laurels. Often enough, they are reluctant to stray from reliable profit centers, notably those secured by intellectual property.<sup>54</sup>

*Lew:* In that event, big firms could find their markets taken by small ones with new ideas. History abounds in great old firms creatively destroyed by upstart enterprises.<sup>55</sup>

*Phyl:* Wouldn't a small firm, starting from behind on the marketplace, be all the more motivated to hire you to clear its rights to use prior works and inventions and to assert intellectual property in its creations if these were taken by others without consent?

*Lew:* Yes! Such small and adventurous firms often make good clients. If they don't have the resources of bigger firms to control markets, they need intellectual property all the more to protect their creations from misappropriation, especially by bigger firms.<sup>56</sup>

*Phyl:* Your property-to-wealth function is even more complex than I'd imagined. We now have to reckon, not only with variable incentives for creators and variable elasticities of demands for cultural goods, but with market-players' varying positions and risks.

*Lew:* You're right. To start, I focused on incentives, hoping to keep matters simple. To respond to you now, I have to reconsider the property-to-wealth function in more comprehensive terms: how to internalize the costs and benefits of creative projects?

*Phyl:* To whom or what are these costs and benefits "external"? Why "internalize" them?

*Lew:* Return to Alpha. He has costs, and others benefits, that we may call "externalities" relative to the marketplace insofar as he does not recoup them there. His costs arise out of his toils in his kitchen

<sup>54</sup> See Part IV above.

<sup>55</sup> See Joseph A. SCHUMPETER, *Capitalism, Socialism and Democracy*, 3rd ed. (New York: Harper & Row, 1950), ch. 7.

<sup>56</sup> See Jonathan M. BARNETT, "Is Intellectual Property Trivial", 157 (2009) Univ. Pennsylvania L. Rev. 1691 at 1725-37.



to develop his dish, while other cooks benefit from his example to learn how to make the dish and their customers benefit in enjoying it.<sup>57</sup>

*Phyl:* Eta goes on from Alpha's fish-cakes to make rabbit-cakes, benefitting from this further dish, as do his customers. Is Alpha to recoup all these benefits on the market?

*Lew:* Economic analysis supports rights that lead to internalizing costs and benefits.

*Phyl:* That's said rather glibly. Could you explain this succinct aim in greater detail?

*Lew:* If you seek to sell goods on the marketplace, don't you try to get prices both to recoup your costs of making and marketing the goods and to turn a profit from benefits you provide in the goods? Or if you buy goods, don't you try to pay only prices commensurate with the benefits that the goods you're getting are to bring you?

*Phyl:* Of course.

*Lew:* Hence, prices serve as data indicating costs and benefits. As sellers and buyers take account of prices, they better allocate labor and resources. The more goods, including cultural goods, find sure market prices, the more efficiently we deal with them.<sup>58</sup>

*Phyl:* But haven't we determined that, in the default position, without intellectual property, cultural goods, as public goods easy to take and share, would have uncertain markets?

*Lew:* Yes. Indeed, we illustrated such market failure with Alpha's fish-cakes. Absent any culinary right, others like Delta or Epsilon could also come up with the same dish and sell it, and Alpha would then lose control of the prices that his dish could fetch.

<sup>57</sup> See Part III above.

<sup>58</sup> See Friedrich A. HAYEK, "The Use of Knowledge in Society", (1945) 35 Am. Economic Rev. 519.

*Phyl:* How would lawmakers know what rights would have creations attract prices that help creators to recoup their investments and to profit enough to venture on to the market? That is, what rights would help internalize their costs and enough of others' benefits?

*Lew:* In any default position without rights, lawmakers would know nothing precise. We can only speculate about how they'd initially weigh the costs against the benefits both of getting hold of scarce goods and of imposing rights to allocate such goods.<sup>59</sup>

*Phyl:* But wouldn't prices vary with the scope of rights? Consider not just prices for fish-cakes subject to Alpha's rights, but for licensing these rights. Wouldn't prices go up if the rights covered, not only his spiced fish-cakes, but also Eta's spiced rabbit-cakes?

*Lew:* Yes.

*Phyl:* I fear that your analysis is caught in a vicious circle. You'd base "legal protection upon economic value, when, as a matter of actual fact, the economic value" of any public good "depends upon the extent to which it will be legally protected".<sup>60</sup>

*Lew:* I don't quite get that last point: the dependence of economic value on legal protection.

*Phyl:* In any default position, absent rights protecting them, how would cultural goods, as public goods, find any sure market? Before imposing such rights, where would lawmakers find market data, to wit, prices, on which to base fashioning these rights?

*Lew:* Good question! But I never argued that lawmakers can from the get-go deduce the scope of property from set facts. They

<sup>59</sup> See Harold DEMSETZ, "Toward a Theory of Property Rights", (1967) 57 Am. Economic Rev. 347 at 350-53.

<sup>60</sup> Felix COHEN, "Transcendental Nonsense and the Functional Approach", (1935) 35 Columbia L. Rev. 809 at 815.



rather need to refine rules and rights over time to reframe boundaries in the marketplace in the light of overall factual trends.<sup>61</sup>

*Phyl:* Are you arguing that, to start, lawmakers need only draw lines in the sand, for example, as the Sybarites seemed to do in stipulating a one-year term for their rights?

*Lew:* Whatever lines lawmakers draw have more or less agreed edges, leaving rights with core meanings on which we rely and penumbral meanings to settle in hard cases.<sup>62</sup>

*Phyl:* Let's focus on the hard cases, perhaps many or most cases, depending on how tightly we're still caught in our vicious circle. How to clarify meanings in such cases?

*Lew:* Market-players can negotiate in most cases, internalizing externalities in contracts.<sup>63</sup>

*Phyl:* Could you give me an example of such a deal internalizing externalities here?

*Lew:* Suppose that I keep bees in hives for honey and you grow crops on nearby land. My bees spillover onto your land to pollinate your crops, which then flourish all the more.

*Phyl:* Tangible property protects discrete things, like bee hives. Intellectual property protects cultural creations as public goods. Would you compare them? How?

<sup>61</sup> See Friedrich A. HAYEK, *Law, Legislation and Liberty: 1. Rules and Order* (Chicago: University of Chicago Press, 1973) at 109, and *Law, Legislation and Liberty: 2. The Mirage of Social Justice* (Chicago: University of Chicago Press, 1976) at 24–30.

<sup>62</sup> See H. L. A. HART, “Postscript” in *The Concept of Law*, Penelope A. BULLOCK & Joseph RAZ, eds., 2nd ed. (Oxford: Clarendon Press, 1994) 238 at 250–54 and 272–76; Ejan MACKAAY, “Les notions floues en droit ou l'économie de l'imprécision”, (1979) 53 *Langages* 33 at 41–50 *passim*.

<sup>63</sup> See R. H. COASE, “The Problem of Social Costs”, (1960) 3 *J. Law & Economics* 1, reprinted in *The Firm, the Market, and the Law* (Chicago: University of Chicago Press: 1988), ch. 5.





*Lew:* Yes. We see spillovers of benefits both from bee hives and from cultural creations. Our inquiry: how to optimize the property-to-wealth function with each?

*Phyl:* Would you propose that the law entitle you to charge me for any pollination by the bees spilling over from your hives on to my land, causing my crops to increase?

*Lew:* No need for the law to meddle here. My bees will home back to my hives wherever I place them. If you don't pay me to have bees nearby to pollinate your crops, someone else will want them. I can then negotiate prices for moving my hives here or there.<sup>64</sup>

*Phyl:* Unlike bees swarming back to their hives predictably, aren't cultural goods harder to control, erratically and often subtly spilling over from prior into later creations? For example, when Alpha's fish-cakes lead or inspire Eta to make rabbit-cakes?

*Lew:* Yes. And we do need such spillovers for culture to move forward. But it can be hard to sort them out from case to case, whether with legal rules or in contracts.<sup>65</sup>



## VI. A Somewhat Goldilockean Dilemma

*The flight attendant brings coffee and cognac.*

*Phyl:* Good! The coffee is here! Just in time.

*Lew:* With the cognac I ordered. We'll need both, I fear.

*Phyl:* Your hard cases are multiplying as we apply property notions to products of mind.

<sup>64</sup> See Steven N. S. CHEUNG, "The Fable of the Bees: An Economic Investigation", (1973) 16 J. Law and Economics 11.

<sup>65</sup> See Brett M. FRISCHMANN, "Spillovers Theory and its Conceptual Boundaries", (2009) 51 William & Mary L. Rev. 801 at 815-24 *passim*.



*Lew:* I admit it's hard to "parcel up a stream of creative thought into [...] distinct claims".<sup>66</sup>

*Phyl:* Would you, like a sophist, try a new argument to do so in one hard case after another?

*Lew:* Excuse me! I'm not trying out any argument that pops into my mind. Nor am I arguing, like some, that stronger intellectual property always enhances culture.

*Phyl:* As if each side of the equation, intellectual property and culture, were so simple! Not to mention the only term, the marketplace, which some would put in the middle.

*Lew:* Would you take the marketplace out of the equation? It does provide a forum in which to get information, notably prices, for decisions to allocate labor and resources.

*Phyl:* No, I'd not ignore the marketplace, but I do dispute that economic analysis suffices for fully fashioning rights of intellectual property in order to enhance culture.<sup>67</sup>

*Lew:* How else should lawmakers govern creators' claims to cultural goods that tend to spill over, out of control, as public goods that are hard to fence and easily shared?

*Phyl:* I fear that lawmakers here face a dilemma harder than Goldilocks did with dishes too hot and too cold to choose. At least she found another dish which was just right.

*Lew:* Speaking of dishes, let's go back to Alpha's dish. It's a simple example, which might help us understand, and perhaps critique, your supposed Goldilockean dilemma.

*Phyl:* To clarify our dilemma, let's jump ahead to the advent of print. More and more cookbooks have since been published, with

<sup>66</sup> Michael POLANYI, "Patent Reform", (1944) 11 Rev. Economic Studies 61 at 70.

<sup>67</sup> See Horacio M. SPECTOR, "An Outline of a Theory Justifying Intellectual and Industrial Property Rights", [1989] Euro. Intell. Prop. Rev. 270.



more and increasingly diverse recipes.<sup>68</sup> Wouldn't dishes then become more fully public goods, calling for clearer rights?

*Lew:* We've an anomaly here. We moderns have no clearly enforceable right in dishes.<sup>69</sup> Copyright does not easily protect recipes, much less dishes themselves.<sup>70</sup> Processes or products aren't normally patentable if their sole utility lies in yielding tastes.<sup>71</sup>

*Phyl:* Assume, contrary to historical fact, that, since the Sybarite law, we've always had rights in dishes, whether the rights protected recipes, culinary techniques or tastes. Couldn't any holder of such a right stop cooks from refining old into new dishes?

*Lew:* We here return full circle to Justice Story's "evanescent" distinctions for sorting out what to protect in prior products of mind and what to let spillover into later ones.<sup>72</sup>

*Phyl:* You've said that later lawmakers amplified on such distinctions. Could you briefly say how they've done so? Any differently for texts and images than for techniques?

*Lew:* Courts bar "substantially similar" or "essential" elements or aspects created in protected works or inventions from being taken

<sup>68</sup> See Jack GOODY, *The Domestication of the Savage Mind* (Cambridge: Cambridge University Press, 1977), ch. 7 *passim*.

<sup>69</sup> But see, e.g., Emmanuelle FAUCHART & Eric VON HIPPEL, "Norms-Based Intellectual Property Systems: The Case of French Chefs", (2008) 19 *Organization Science* 187 (indicating threats of non-cooperation, dishonor, etc., among French cooks for the unauthorized disclosure of culinary secrets, duplicative uses of new recipes, etc.).

<sup>70</sup> See, e.g., *Publications Intern., Ltd. v. Meredith Corp.*, 88 F.3d 473 (7th Cir. 1996) (U.S.) (while refusing to apply any *per se* rule, declining to protect copyright in the recipes at issue); *N. Darchambeau c. SA Editions du Perron*, Comm. Liège (Belgium), Nov. 26, 2009, [2010] 33 *Jurisprudence de Liège, Mons et Bruxelles* 1581 (not protecting mere lists of ingredients and instructions found in recipes).

<sup>71</sup> See, e.g., Convention on the Grant of European Patents (Nov. 29, 2000), art. 52.2(b) (excluding "aesthetic creations").

<sup>72</sup> See Part I above.



into others, while above all letting “ideas” in works, or “abstract ideas” in inventions, spill over into new creations.

*Phyl:* We philosophers have spilled much ink in long arguing over such metaphysical notions as “substance” and “essence”, as well as over our diverse notions of “ideas”!

*Lew:* Perhaps you can then help us clarify such notions to help resolve your dilemma?

*Phyl:* You’d resist my abstract analysis. Stick with your concrete anomaly: more dishes in more cookbooks, but no rights in dishes. Does it leave us with more hard cases?

*Lew:* It seems so. Courts have vacillated about protecting fleeting sensory qualities, for example, scents, akin to tastes.<sup>73</sup> Enforcement would perhaps meddle too privately in kitchens, bringing in legal agents as more “cooks” to spoil the proverbial “stew”.<sup>74</sup>

*Phyl:* Do judges, even lawmakers generally, feel the horns of our dilemma too acutely here?

*Lew:* I fear so. It’s a matter of avoiding both over- and underprotection. On the one hand, it’s hard to filter out what to protect from what to let spill over in these cases. On the other, it’s hard to enforce remedies that risk intruding on users’ privacy.

*Phyl:* Is there no way out, such as Goldilocks was said to find, that’d turn out “just right”?

<sup>73</sup> Compare the *Lancôme* judgment, Cass. com. (France), appeal n° 11-19.872, Dec. 10, 2013, [2014] Com. com. électr. n° 13 (declining to protect copyright in a perfume with a scent not “identifiable with sufficient precision to allow its communication”), with the *Kecofa/Lancôme* judgment, Hoge Raad (Netherlands), June 16, 2006, [2006] 5 AMI, Informatierecht, Tijdschrift voor auteurs-, media- en informatierecht 161 (admitting, in principle, the protection by copyright of such a scent).

<sup>74</sup> See, e.g., Mario FABIANI, “Diritto di autore gastronomico”, (1987) 58 Il Diritto di Autore 116 (waxing ironic about the difficulties of administering any eventual regime of intellectual property in culinary creations).

*Lew:* We're back to the lawmakers' problem of getting variables, to wit, those material to enhancing culture, right enough to formulate intellectual property optimally.<sup>75</sup>

*Phyl:* Assume, for the sake of argument, that we've solved this problem well enough to avoid both over- and underprotection, so that the law increasingly enhanced culture.

*Lew:* When we started, I presumed that lawmakers could progressively solve this problem. Now I find it utopian to target any such solution! Only to humor you will I assume it.

*Phyl:* As with more diverse dishes accessible in more cookbooks, wouldn't more enhanced culture bring more creations harder to sort out, leaving rights harder to enforce?

*Lew:* I fear so. In our case of dishes, it is hard to disentangle tastes that arise from know-how. Such mixed cases keep proliferating, notably in software texts functioning as technical processes, design images forming products and sundry other hybrids.<sup>76</sup>

*Phyl:* Take each side here: texts and images, on the one hand, and techniques, on the other.

*Lew:* With more global media, more works are recast. For example, Japanese prints were imported into Europe, and Van Gogh made studies of them. Copyright is now often claimed to be infringed by ensuing derivative works, despite creativity these show.<sup>77</sup>

*Phyl:* What consequences of more rapid technological progress for our dilemma?

*Lew:* Such progress leads to developing and improving more inventions. Often, a resulting technique becomes key to a single device

<sup>75</sup> See Parts IV-V above.

<sup>76</sup> See Jerome H. REICHMAN, "Legal Hybrids Between the Patent and Copyright Paradigms", (1994) 94 Columbia L. Rev. 2432 at 2448-504 *passim*.

<sup>77</sup> See Paul Edward GELLER, "*Hiroshige vs. Van Gogh: Resolving the Dilemma of Copyright Scope in Remediating Infringement*", (1998) 46 J. Copyright Society USA 39.



incorporating many techniques. Patent claimants are increasingly able to hold up manifold uses, even lines of research.<sup>78</sup>

*Phyl:* Out of all such multiplying claims, could those duly vindicated be easily enforced?

*Lew:* Less and less feasibly, as more users more easily access or simulate cultural goods.<sup>79</sup>

*Phyl:* Flourishing, doesn't culture then drive intellectual property deeper into its dilemma?<sup>80</sup>

*Lew:* There's talk of crisis in my field of law. Maybe it's at a hard juncture in its history.<sup>81</sup>

## VII. No Portion "Just Right" for Now

*The flight attendant picks up the coffee cups and cognac glasses.*

*Phyl:* I fear that we haven't time to pursue this inquiry further. For now we'll have to settle for our few points of agreement, though these might not be clear to any eavesdropper.

*Lew:* Do you now admit at least some need for the law to enable creators to recoup, in the marketplace, most or all of their costs and some of the benefits they impart to others?

<sup>78</sup> See Carl SHAPIRO, "Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard-Setting" in Adam B. JAFFE, Josh LERNER & Stern SCOTT, eds., *Innovation Policy and the Economy 1* (Cambridge, Mass.: The MIT Press & National Bureau of Economic Research, 2001) 119 at 124-26.

<sup>79</sup> See Gordon HULL, "Digital Copyright and the Possibility of Pure Law", (2003) 14 *Qui Parle* 21; Harry SURDEN, "Technological Cost as Law in Intellectual Property", (2013) 27 *Harvard J. Law & Technology* 135; Mark A. LEMLEY, "IP in a World Without Scarcity", 90 (2015) *N.Y.U. L. Rev.* 460.

<sup>80</sup> For a quite different analysis, see Barton BEEBE, "Intellectual Property Law and the Sumptuary Code", (2010) 123 *Harvard L. Rev.* 809 at 878-87.

<sup>81</sup> See Paul Edward GELLER, "Dissolving Intellectual Property", [2006] *Euro. Intell. Prop. Rev.* 139, and in Ysolde GENDREAU, ed., *Intellectual Property: Bridging Aesthetics and Economics* (Montreal: Éditions Thémis, 2006) 1.

*Phyl:* Yes. It's a necessary aim for lawmaking in your field. Do you still think that purely economic analysis suffices to ascertain what to protect or not? Or how to protect it?

*Lew:* I'm not sure that I ever thought so, but I don't now. Such analysis seems to leave us caught in the dilemma of over- and underprotection. We need to find another way out.

*Phyl:* Look at the land beneath us. It's England: we're near London.

*Lew:* We'll be landing soon. Our talk has been fascinating.

*Phyl:* Will you be staying in London for awhile?

*Lew:* Yes. A month. Shall we meet again?

*Phyl:* Yes. Here's my telephone number.

*Lew:* Good. I'll call you.