

Overcoming the dualism: how metaphorically-driven
conceptions of the public domain can be a barrier to
determining what intellectual property law is and ought
to be

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ABSTRACT

It has been said that intellectual property and the public domain are 'paired together in a perpetual dance'. Yet while expressions like this portray the impression that intellectual property and the public domain are on an equal footing, it does not take long to discover that this is not the case. While intellectual property has been positively defined through centuries of legislation and case law, the public domain has witnessed no such equal treatment. Often lacking in positive definition, the public domain has also been poorly represented in the public debate. In an attempt to strengthen its position, scholars and judges have turned to the use of metaphors in order to capture and define the wealth of information and raw material from which we create, and to depict the function of the public domain in relation to intellectual property. However, the metaphors that have been used all share a common flaw: they obscure the fact that a literary device cannot adequately substitute for the lack of a clearly defined public domain in the first place. Therefore, to proactively safeguard the welfare of the public domain, we need to elevate the discussion beyond the limiting imagery and associations that metaphors offer and focus on the role that the public domain needs to play in a democratic society with a free market economy.

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INTRODUCTION

It has been said that intellectual property and the public domain are ‘paired together in a perpetual dance’.¹ Yet while expressions like this portray the impression that intellectual property and the public domain are on an equal footing, it does not take long to discover that this is not the case. While intellectual property has been positively defined through centuries of legislation and case law, the public domain has witnessed no such equal treatment. Often lacking in positive definition, the public domain has also been poorly represented in the public debate. In an attempt to strengthen its position, scholars and judges have turned to the use of metaphors in order to capture and define the wealth of information and raw material from which we create to depict the function of the public domain in relation to intellectual property. However, the metaphors that have been used all share a common flaw: they obscure the fact that a literary device cannot adequately substitute for the lack of a clearly defined public domain in the first place. Therefore, if we want to proactively safeguard the welfare of the public domain and the intellectual coherence of the law, we need to elevate the discussion beyond the limiting imagery and associations that metaphors offer. We must look beyond them to focus on the role that the public domain needs to play in a democratic society with a free market economy.

This article will begin by giving a quick overview of what intellectual property law is. The public domain is then introduced in order to show how its surrounding discourse is characterised by disagreement. Following this, some metaphors will be introduced that have been coined in an attempt to understand the role of the public domain and a brief critique of the metaphors that relate to natural resources, wastelands, and the life sciences will be offered. A substantial part of the article will then focus on the territorial metaphor of the public domain, which depicts the public domain as land. This metaphor will serve as a focal point, for it has been the most influential in shaping our conception of the public domain and has perpetuated the unfortunate view that intellectual

¹ Anupam Chander and Madhavi Sunder, ‘The Romance of the Public Domain’ (2004) 92 *California Law Review* 1331, 1339.

property should be the rule to which the public domain is the exception.² The conceptual misrepresentations and assumptions associated with the territorial metaphor will then be unravelled to show how they incorrectly depict the public domain, and how this depiction has been used by pro-commodificationists³ to further their agenda of expanding the intellectual property law regime. My argument follows in two parts.

In the first part, it is argued that the territorial metaphor poses a barrier to determining what intellectual property law is by oversimplifying and obscuring our understanding of the public domain. This will be shown by examining four misconceptions in our thinking on the public domain, triggered by the literal perception of a territory. The consequences of this metaphor for the way we conceptualise intellectual property law will then be discussed. First, the territorial metaphor triggers associations with the regulation of rivalrous and excludable goods. This is a barrier to determining what intellectual property law is because intellectual property law is our mechanism for assigning ownership and exclusive rights to non-rivalrous and non-excludable goods. Second, the territorial metaphor and our experiences with land prompt us to believe that the public domain has clear and tangible borders, which poses a barrier to the realisation that the barriers between intellectual property and the public domain are disputed, intangible, and constantly shifting. Third, the territorial metaphor depicts the public domain as static, which obscures the reality that intellectual property is dynamic and, most importantly, relational. Fourth, the territorial metaphor depicts a binary relationship between intellectual property rights and the public domain, which is a barrier to understanding that an intellectual creation of the human mind is capable of both being protected through intellectual property law and being part of the unprotected public domain simultaneously. This binary understanding of the public domain also legitimises the current distribution of intellectual property rights, masking the fact that this distribution inherently disadvantages indigenous and disempowered communities globally.

² Contrary to the position that ‘the public domain is the rule, copyright protection is the exception’ (COMMUNIA, ‘The Public Domain Manifesto’ (COMMUNIA) <<https://publicdomainmanifesto.org/>> accessed 10 February 2023).

³ A term coined by Cohen (Julie E Cohen, ‘Copyright , Commodification , and Culture: Locating the Public Domain’ from *The Future of Public Domain: Identifying the Commons in Information Law* (Kluwer Law International 2006) 121.).

In the second part of this article, it is argued that whether the territorial metaphor is a barrier to determining what intellectual property law *ought* to be is dependent on one's normative stance. The anti-commodificationist position is adopted, which seeks to limit the expansion of what is afforded intellectual property protection. It is submitted that here too the imagery and associations triggered by the territorial metaphor are a barrier to determining what the intellectual property regime ought to be. The territorial metaphor suggests that the intellectual property regime should continue to expand in order to safeguard the public domain. The case is made for why this should not be so.

The article concludes by bringing the discussion back to the multiple metaphors that have been used to describe the public domain in order to illustrate that while they might help to portray the public domain and intellectual property law in certain lights, the debate about what the public domain is will only continue as long as we continue to use metaphors. The suggestion is, therefore, made that the discussion be elevated beyond the use of metaphors to consider the central role that intellectual property law needs to play in promoting and safeguarding the sources of creative endeavour.

Throughout the article, reference will be made to a range of jurisdictions, including the United States, United Kingdom, and the European Union. This is done with the intention of depicting how different jurisdictions deal with the question of how the public domain should be defined. Moreover, it shows that the challenges of positively capturing what the public domain is and where its boundaries lie are common throughout.

I. A PRIMER ON INTELLECTUAL PROPERTY LAW

Intellectual property can be defined as 'the novel products of human intellectual endeavour'.⁴ Three principal branches of intellectual property will be discussed in this article: trademarks, copyright, and patents. Each branch differs with respect to what intellectual products it protects, why it assigns ownership to them, and under which circumstances it does so.

⁴Hector MacQueen and others, *Contemporary Intellectual Property, Law and Policy* (2nd edn, Oxford University Press 2010), 7.

Trademark law is concerned with signs capable of distinguishing goods or services⁵ and assigns ownership over a mark in order to ‘legally protect indications of commercial source’, letting a business profit from a ‘well-earned reputation for quality’.⁶ The exclusive right to a mark is provided when it can be shown that the mark has been used in the course of trade and that the public has come to recognize the mark as part of the producer’s signature.⁷ Copyright law is concerned with artistic or literary works⁸ and assigns ownership over a work in order to both incentivise the author to create more, and to compensate them for their creation.⁹ It does this when the author can demonstrate that the work is a product of their own intellectual creation. Finally, patent law is concerned with inventions¹⁰ and assigns ownership in order to incentivise the development and disclosure of inventions¹¹ (although this justification for patent law has been disputed).¹² The law grants a patent when an inventor can show that their invention is new, involves an inventive step (a formal requirement involving an improvement on the state of the art) and is capable of industrial application.

The regulation of these three branches form part of the umbrella term ‘intellectual property law’, which evolves in substance and scope over time. However, central to intellectual property is the notion that individuals do not just create out of thin air. The information that we draw on and the ideas that we have inevitably come from somewhere.

This general pool of knowledge, ideas, material and so forth, which are freely available to each and to all for use, constitute what is referred to as the

⁵ World Intellectual Property Organization, ‘Trademarks’ (*WIPO*) <<https://www.wipo.int/trademarks/en/>> accessed 10 February 2023.

⁶ Eric E Johnson, ‘Intellectual Property and the Incentive Fallacy’ (2012) 39 Florida State University Law Review, 626.

⁷ Jessica Litman, ‘The Public Domain’ (1990) 39 Emory Law Journal, 973.

⁸ World Intellectual Property Organization, ‘Copyright’ (*WIPO*) <<https://www.wipo.int/copyright/en/>> accessed 10 February 2023.

⁹ Litman (n 7) 970.

¹⁰ World Intellectual Property Organization, ‘Patents’ (*WIPO*) <<https://www.wipo.int/patents/en/>> accessed 10 February 2023.

¹¹ Edith Penrose and Fritz Machlup, ‘The Patent Controversy in the the Nineteenth Century’ (1950) 10 The Journal of Economic History 1, 10.

¹² With reference to the 4 arguments for the creation of patent rights, see Machlup & Penrose (n 11) 10.

‘public domain’. The public domain has been labelled as the ‘basis of our self-understanding’ and ‘the raw material from which new knowledge is derived and new cultural works created’.¹³ It is intertwined with intellectual property because ‘innovation captured as private property depends upon the existence of a rich public domain’.¹⁴ Intellectual property and the public domain, therefore, are ‘two sides of the same coin’¹⁵ with one inevitably affecting the other as its substance grows or shrinks.

II. DEFINING THE PUBLIC DOMAIN

Though the public domain is often conceived of as consisting of creative works to which no exclusive intellectual property rights apply, this definition is far from being absolute. Defining the public domain has been a task characterised by much disagreement across multiple dimensions. Some definitions are broader than others, viewing the public domain as ‘a sphere in which contents are free from intellectual property rights’¹⁶ or ‘a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use’.¹⁷ Some are narrower and define the public domain in the context of a specific intellectual property branch, such as Ginsburg’s definition of the public domain as ‘copyright’s constraining counterpart’.¹⁸ Temporally the definitions differ as well – some include all past and future inventions, some are more selective.

There is also disagreement about the substance of the public domain. Some view its substance in a ‘strict’ sense, where the public domain is comprised only of works whose intellectual property protection has expired and is thus property-free.¹⁹ Others view it in a ‘traditional’ sense, where it encompasses both works whose protections have expired and works that are not

¹³ COMMUNIA (n 2).

¹⁴ Chander and Sunder (n 1) 1340.

¹⁵ *ibid.*

¹⁶ Pamela Samuelson, ‘Mapping the Digital Public Domain: Threats and Opportunities’ (2003) 66 *Law and Contemporary Problems* 147, 149.

¹⁷ Litman (n 7) 968.

¹⁸ Jane Ginsburg, ‘Une Chose Publique: The Author’s Domain and the Public Domain in Early British, French and US Copyright Law’ (2006) 65 *Cambridge Law Journal* 636, 637.

¹⁹ Séverine Dussolier, ‘Scoping Study on Copyright and Related Rights and the Public Domain’ [2010] *World Intellectual Property Organization* 1, 7.

protected by intellectual property law.²⁰ Then there are those like Ginsburg, who in the context of copyright argue that this division between ‘strict’ and ‘traditional’ is arbitrary, as ‘even the public domain, in the strict sense of [expired] works, is not absolutely property-free’ as intellectual property rights can be invoked to protect the integrity of the work whose protection has expired.²¹

A third layer of disagreement emerges in the attempts to define the public domain’s function in relation to intellectual property. Ginsburg defines the function of the public domain as ‘enabling productive practices and exempting them from the exercise of an exclusive proprietary right’.²² Macmillan has also highlighted a similar relationship between the public domain and intellectual property rights, labelling the two as ‘symbiotic’²³ in the sense that they depend on one another to exist. While additional views depict the public domain as the antithesis of intellectual property,²⁴ Chander & Sunder and Lange have argued that we should keep away from this binary approach, claiming that understanding the public domain as the ‘opposite of property’ is misleading,²⁵ and the public domain is rather ‘a matter of public right, rather than simply the negative or obverse of intellectual property’.²⁶

These disagreements serve to emphasise the lack of an agreed upon definition of the public domain – both in depth and in breadth. Therefore, amidst this disagreement it is no wonder that we have turned to metaphors to help us capture our conception of the public domain. However, the metaphors we pick determine the ways in which we think about both the public domain and intellectual property law.

²⁰ *ibid* 6.

²¹ Ginsburg (n 18) 654.

²² *ibid* 9.

²³ Fiona Macmillan, ‘Many Analogies, Some Metaphors, Little Imagination: The Public Domain in Intellectual Space’ [2010] *Pòlemos: Potere e legittimà* 1, 9.

²⁴ James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (Yale University Press 2008) 38.

²⁵ Chander and Sunder (n 1) 1343.

²⁶ Litman in reference to Lange (Litman (n 7) 132).

III. METAPHORS OF THE PUBLIC DOMAIN

One explanation for why we use metaphors is to understand and experience one kind of thing in terms of another.²⁷ They help us explain and understand a concept that is vague and unclear by substituting it with an image of something that is well-known and commonly experienced. Metaphors of the public domain have helped us construct a tangible understanding of it, which assists in illustrating where the dividing line lies between the proprietary and the public.²⁸ However, because of the inextricable link between the public domain and intellectual property, the way in which we conceptualise the public domain will inevitably impact our conception and decisions made with regard to intellectual property law.

This article will focus primarily on the territorial metaphor which portrays the public domain as a land. However, before this metaphor becomes the focus, some other metaphors that have been coined will be briefly acknowledged to explain how they can pose a barrier to determining what intellectual property law is and ought to be.

One set of metaphors depicts the public domain as a natural resource, such as water or air, in order to illustrate that resources in the public domain should remain public and available to all. These metaphors date back to nineteenth-century US intellectual property cases where common property in the public domain was expressly analogised with natural resources because it was believed that these types of resources were ‘incapable of private ownership’ and were owned by an ‘unorganised public at large’.²⁹ For instance, in *Holmes v Hurst*,³⁰ Justice Brown claimed that copyright did not entail the right to the use of certain words because words are ‘the common property of the human race and are as little susceptible of private appropriation as air or sunlight’.³¹ Similarly, Justice Brandeis claimed in his dissent in *International News Service v Associated*

²⁷ See George Lakoff and Mark Johnson, *Metaphors We Live By* (University of Chicago Press 1980) 4.

²⁸ Building on the definition given by Lakoff and Johnson on metaphors.

²⁹ Tyler Ochoa, ‘Origins and Meanings of the Public Domain’ (2002) 28 University of Dayton Law Review 215, 260.

³⁰ *Holmes v. Hurst*, 174 U.S. 82 (1899).

³¹ *ibid* [86].

*Press*³² that once the ‘noblest of human productions’ such as knowledge and ideas have been voluntarily communicated to others, they become ‘free as the air to common use’.³³

However, natural resources are depletable. And in Hardin’s view, the best way to protect a depletable resource is to privatise it in order to avoid a tragedy of the commons – a situation in which a public resource is depleted because of individuals acting in their own interest on that resource.³⁴ If we take the metaphor of the public domain as a natural resource too literally, we may fall prey to the assumption that the public domain is depletable and should be extensively privatised in order to safeguard it. In other words, the metaphor of a natural resource propagates the belief that the only way to ‘protect’ the ‘depletable’ nature of the public domain is through assigning property rights to individuals. However, this in itself limits our understanding of the nature of intellectual property law, insofar as it justifies the indefinite expansion of the intellectual property regime in order to safeguard the public domain. The danger with this is that it would lead to what Heller & Eisenberg deem a ‘tragedy of the anticommons’ scenario, where privatisation leads to the underuse of resources in the public domain through too many fragmented and overlapping intellectual property rights, stifling any kind of innovation and creation.³⁵

However, what the tragedy of the commons and anticommons scenarios have in common is that they both lead to the trap of associating the public domain with a natural resource. They both perpetuate a narrative that projects the characteristics of the metaphor onto our working definitions. This is problematic insofar as it constrains our thinking and understanding of the public domain to the parameters of the metaphor itself, which does not capture the reasons why we choose to assign ownership to intellectual property goods.

³² *International News Service v. Associated Press*, 248 U.S. 215 (1918).

³³ *ibid* per Justice Brandeis at 248 U.S. 250.

³⁴ Garrett Hardin, ‘The Tragedy of the Commons’ (1968) 162 (3859) *Science*, 1245.

³⁵ Michael A Heller and Rebecca S Eisenberg, ‘Can Patents Deter Innovation? The Anticommons in Biomedical Research’ (1998) 280(5364) *Science* 699.

A second set of metaphors view the public domain simply as a 'wasteland'.³⁶ This camp of metaphors includes expressions like the public domain as a 'fallow land'³⁷ or as 'gummy residue',³⁸ and normally portray the public domain as comprising only of works whose intellectual property protection has expired. However, an obvious shortcoming of these metaphors is that they fail to account for how the term 'public domain' has come to refer to all things in the public domain, including creations which have been deemed as not original enough to be awarded intellectual property protection, as opposed to only creations who have had their protections expire. Furthermore, the negative connotations associated with the metaphors 'fallow land' or 'wasteland' suggest that what is in the public domain is no longer useful. Yet this is incorrect, because our fundamental building blocks of knowledge and creation rest in the public domain, such as the English language or general plots and facts.³⁹ Thus, these metaphors constitute a barrier to determining what intellectual property law is as they implicitly suggest that everything 'valuable' and 'useful' is privatised, while in fact the things that are most valuable and useful to us all rest in the public domain.

A third set of metaphorically-driven conceptions of the public domain is constructed around the life sciences, and seeks to replace our thinking of the public domain with notions such as 'information ecology'⁴⁰ or 'cultural software'⁴¹ which seek to explain creative processes in a way that embraces complexity and interdependence. Though they better account for how information flows affect one another, Cohen points out that a common shortcoming to them is that they 'betray a worrisome tendency towards animism'⁴² in the sense that they elevate the role of information to being separate from human agency.

³⁶ Séverine Dusollier, 'The Public Domain in Intellectual Property: Beyond the Metaphor of a Domain' in PL Jayanthi Reddy (ed.), *Intellectual Property and Public Domain* (ICFAI University Press 2009) 3.

³⁷ *ibid.*

³⁸ Boyle (n 24) 40.

³⁹ *ibid.* 38.

⁴⁰ James Boyle, 'A Politics of Intellectual Property: Environmentalism for the Net?' (1997) 47 *Duke Law Journal* 87, 93.

⁴¹ JM Balkin, *Cultural Software: A Theory of Ideology* (Yale University Press 1998) Chapter 1.

⁴² Cohen (n 3) 142.

Although there are more ways to metaphorically describe the public domain, such as Cohen's understanding of a 'cultural landscape'⁴³ where the public domain is seen as a set of cultural and creative practices, attention is now shifted to the territorial metaphor.

IV. THE TERRITORIAL METAPHOR: PUBLIC DOMAIN AS LAND

4.1 Origins of the territorial metaphor

Expressions seeking to portray the public domain as territorial date back to early US intellectual property cases, in particular the decisions of *Webster's Dictionary*⁴⁴ and *Singer Manufacturing Co. v. June Manufacturing Co.*⁴⁵ In *Webster's Dictionary*, Supreme Court Justice Samuel Miller declared that once copyright had expired, works 'shall go to the public and become public property'.⁴⁶ Subsequently in the *Singer* case, the Supreme Court quoted Justice Miller's discussion of 'public property' to conclude that the name 'Singer', along with the public ownership of its sewing machines, had now fallen 'into the domain of things public'.⁴⁷ The term 'public domain' was then codified in the US 1909 Copyright Act, where Section 7 expressly excluded protection for 'works in the public domain'.⁴⁸

Moreover, the term 'public domain' was initially used in relation to the disposition of publicly owned lands, which were geographically separate places not subject to direct private appropriation. However, despite Ochoa pointing out that the phrase 'public domain' evokes the notion of public lands and in doing so 'mischaracterizes the public domain in intellectual property',⁴⁹ modern references to the public domain as land have persisted: Cohen has addressed the public domain as a 'geographically separate preserve',⁵⁰ and further contemporary scholarship has also referred to it as 'a landscape where each

⁴³ Cohen (n 3) 157.

⁴⁴ *Merriam v Holloway Publishing Co.*, 43 F. 450 (1890).

⁴⁵ *Singer Manufacturing Co. v. June Manufacturing Co.*, 163 U.S. 169 (1896).

⁴⁶ Cohen (n 3) 126.

⁴⁷ *Singer* (n 45) [185].

⁴⁸ Cohen (n 3) 126.

⁴⁹ Ochoa (n 29) 267.

⁵⁰ Cohen (n 3) 124.

person can reap the riches found in the common'.⁵¹

These early judicial, legislative and academic developments are significant because they depict how the public domain was seen as territorially separate and in opposition to intellectual property from early on.

However, as the following discussion will show, there are several distinguishing characteristics between land and the public domain that pose a barrier to determining what intellectual property law is and ought to be.

4.2 The territorial metaphor triggers an association with producing and safeguarding rivalrous and excludable goods

When one thinks of land, one thinks of the rivalrous and excludable goods it yields. In other words, one thinks of goods that are finite and limited. Thinking about the public domain through the lens of the land metaphor brings with it the experience of working hard to produce a finite number of goods that are grown from a limited number of resources. Yet, we have come to mistakenly equate the mechanism of producing and safeguarding tangible goods with the mechanism of producing and safeguarding intangible goods.

The territorial metaphor masks the crucial distinction between land as giving rise to rivalrous and excludable goods, and the public domain as giving rise to non-rivalrous and non-excludable goods. Consequently, it has also tempted us into mistakenly applying the logic behind regulating tangible goods to the logic for regulating intellectual goods.⁵²

Labour theory of property,⁵³ for instance, holds that a tangible property right is warranted because people have a natural right to the fruits of their labour. Moreover, it justifies the grant of such a property right in rivalrous goods 'in order to prevent the tragedy of the commons'.⁵⁴ Assigning people ownership over their tangible goods both stimulates them to produce more and

⁵¹ Chander and Sunder (n 1) 1332.

⁵² Brian L Frye, 'IP as Metaphor' (2015) 18(3) *Chapman Law Review* 735, 757.

⁵³ As intended by John Locke in *Second Treatise of Government* (edited by C. B. Macpherson, Hackett Publishing 1980) Section 6.

⁵⁴ Frye (n 52) 741.

simultaneously ensures that their resources will not become depleted by virtue of being exploited in common by all. Indeed, this was the logic behind the enclosure of the commons which took place in fifteenth century England, where it was thought that in order to most efficiently utilise the common land and stimulate production it must be privatised and converted into private property.⁵⁵

However, such a labour theory justification for property rights does not hold in the context of non-rivalrous goods, because there is no such tragedy of the commons in relation to intellectual goods.⁵⁶ While tangible goods might be depleted if they are exploited in common, conversely, intangible goods like ideas only *multiply* in quantity when they are exploited in common. Therefore, the idea here that the exploitation of intangible goods may lead to a tragedy of the commons scenario is in itself fallacious. Yet despite this, intellectual property law still ‘creates artificial scarcity so that the holder of the right can generate returns from’ their creation.⁵⁷ One can only question why this has been done, presumably in order to create an additional incentive to produce more intellectual fruits of labour, falsely using the economic rationality of labour theory as a justification.

Furthermore, we have transplanted the natural rights claim to ownership from the context of tangible goods onto our justification for assigning intellectual property rights. An example of this is the romantic version of authorship, which holds that an author has a claim to ownership and control over their work because of the ‘individualised act through which the personal genius of the author [was] brought to the world’.⁵⁸ This not only assumes that authors are *entitled* to rights for their creation, but also that in order to compensate them for their creation we should establish property rights in their

⁵⁵ Donald N McCloskey, ‘The Enclosure of Open Fields: Preface to a Study of Its Impact on the Efficiency of English Agriculture in the Eighteenth Century’ (2010) 32 *The Journal of Economic History* 15, 19.

⁵⁶ *ibid.*

⁵⁷ Siva Thambisetty, ‘It’s not just about patents on COVID vaccines: why I am not celebrating World Intellectual Property Day’ (*LSE*, 26 April 2021) <<https://blogs.lse.ac.uk/covid19/2021/04/26/its-not-just-about-patents-on-covid-vaccines-why-i-am-not-celebrating-world-intellectual-property-day/>> accessed 10 February 2023.

⁵⁸ Carys Craig and Ian Kerr, ‘The Death of the AI Author’ (2021) 52(1) *Ottawa Law Review* 31, 77.

work. But critics of this have been quick to object to assigning tangible property rights to intangible goods. Jefferson, for instance, thought that the ‘fugitive fermentation of an individual brain’ could not be the subject of a natural right to exclusive and stable property.⁵⁹ Similarly, Condorcet believed that property rights in a book ‘could not be compared to those in a field or piece of furniture which could only be occupied or used by one person at a time’.⁶⁰ Yet despite this, the natural rights approach to intellectual property is still very much alive: the investment function of the trademark is ‘framed around the idea that since the trademark owner invested in the mark ... [they] ought to reap the rewards of this investment and should be allowed to prevent others from misappropriating the value which results’.⁶¹

The continued use of the territorial metaphor only further perpetuates this natural rights/labour justification for intellectual property rights. This has been exploited by those looking to expand the intellectual property regime. Unfortunately, the other prominent justification for intellectual property rights — the economic justification theory, otherwise known as incentive theory — is also arguably flawed.⁶² The consequence of this is that it leaves those who are looking to safeguard the public domain with almost no ground to stand on, as they are unable to point to a justification that advocates for the limited granting of intellectual property rights.

The economic justification for intellectual property holds that because artistic works and technological innovations are non-rivalrous and non-excludable goods, they are vulnerable to free riding.⁶³ As a consequence, people will be disincentivised from engaging and investing in intellectual labour and will consume the innovations created by others, leading to market failure. Thus, intellectual property rights provide the external rewards needed to

⁵⁹ Thomas Jefferson, ‘The Founders’ Constitution, Article 1, Section 8, Clause 8. Thomas Jefferson to Isaac McPherson’ <https://press-pubs.uchicago.edu/founders/documents/a1_8_8s12.html> accessed 10 February 2023.

⁶⁰ Boyle (n 24) 31.

⁶¹ Luke McDonagh, ‘From Brand Performance to Consumer Performativity: Assessing European Trade Mark Law After the Rise of Anthropological Marketing’ (2015) 42 *Journal of Law and Society* 611, 618.

⁶² Lionel Bently and others, *Intellectual Property Law* (5th edn, Oxford University Press 2018) 5.

⁶³ *ibid.*

incentivise people to create and invest in intellectual goods, which remedy the free rider problem and reduce transaction costs.⁶⁴ Under this theory, intellectual property is a temporary, state-created monopoly given to encourage innovation⁶⁵ and is justified only to the extent that ‘each grant of rights provides the necessary incentive to cause its recipient to provide a social benefit and no more, and only if the social benefit is larger than the social cost of the right’.⁶⁶

Intellectual property’s need to encourage invention and artistic production has been referred to as its ‘*raison d’être*’.⁶⁷ However, this incentive theory is coming under fire as new behavioural economics research reveals that not only is incentive not necessary to encourage individuals to create, but that ‘external rewards can also actually *disincentivize* creative labourers’.⁶⁸ The digital revolution, for instance, has led to an increase in the means available to individuals to create. An example of such a means is ‘commons-based peer production’, which is a model of social innovation based on collaborative production.⁶⁹ Significantly commons-based peer production confirms that individuals will create without any external incentive or expectation of compensation. Patent law, for instance, is too often justified on the grounds of incentive theory, yet empirical data is revealing that ‘many patented inventions would have been developed even in the absence of the patent system’.⁷⁰ Cohen has also criticised the application of incentive theory to copyright law, arguing that economic modelling and markets insufficiently understand creativity, as ‘creativity is a social phenomenon that is both broader than and antecedent to the market exchange of goods and services’.⁷¹

Returning to the discussion of the territorial metaphor, our current economic approach to intellectual property law reveals the conviction that propertization incentivises productivity. It is therefore no wonder that we find ourselves on the path to what Boyle refers to as ‘the second enclosure

⁶⁴ Frye (n 52) 737.

⁶⁵ Boyle (n 24) 20.

⁶⁶ Frye (n 52) 747.

⁶⁷ Johnson (n 6) 635.

⁶⁸ *ibid* 643.

⁶⁹ Yochai Benkler and Helen Nissenbaum, ‘Commons-Based Peer Production and Virtue’ (2006) 14 *Journal of Political Philosophy* 394, 394.

⁷⁰ Johnson (n 6) 665.

⁷¹ Cohen (n 3) 137.

movement,⁷² privatising that which was previously part of the public domain under the false pretence that this best encourages creativity and prevents the public domain from depletion. However, this is a mistaken view, because an increased use of the public domain will not lead to less creativity, as the economic approach would suggest. Instead, it could be that individuals will increasingly find inspiration to create ideas from that which already exists. This view that we ought to privatise the public domain to best protect it obscures the reality that the public domain is expanded by the sharing, combining, and paraphrasing of ideas.

However, because the economic narrative that propertization incentivises productivity is so strong, it is difficult to garner support for the opposing view: that not affording intellectual property rights to that which is in the public domain can actually lead to more creation. This idea will be explored in the section that deals with the question of what intellectual property law ought to be; however, for now, focus will be shifted to the second characteristic associated with the metaphor of land.

4.3 The territorial metaphor triggers the image of clear and tangible boundaries

A second conceptual characteristic associated with a territory is that it has clear and tangible boundaries, allowing us to distinguish between what is part of it and what is not. However, this image of the public domain masks the fact that there is no clear and tangible border around the public domain that can be invoked to protect it. Because intellectual property is intangible, the law must supply alternative concepts that can assume the role of physical boundaries to divide it from the public domain. Yet, as will be demonstrated with reference to copyright law, there are no such clearly defined boundaries, and the current boundaries are poorly defined and continuously shifting. One consequence of this is that pro-commodificationists have been able to assert the boundaries of the law broadly in order to further their agenda that the law ought to continue to expand the intellectual property regime.

In European copyright law, what was relied upon in the place of physical borders (prior to the case of *Infopaq International A/S v Danske Dagblades*

⁷² Boyle (n 24).

*Forening*⁷³) was the concept of originality.⁷⁴ Yet, as Litman has pointed out, the threshold of originality was ‘inherently unascertainable’⁷⁵ and was a poor substitute for tangible boundaries. Since authors ‘necessarily reshape the prior works of others, a vision of authorship as original creation from nothing ... is both flawed and misleading’,⁷⁶ says Litman. However, the law has since moved on from the standard of originality and has now adopted a new threshold for protected works, which is the ‘author’s own intellectual creation’.⁷⁷

This has been part of what Griffiths labelled a shift towards a ‘dematerialised model’ of copyright, in which the law looks at the ‘immaterial, malleable essence’ of a work in order to determine the scope and attribution of rights instead of the boundaries of the material form within which the work was first recorded.⁷⁸ While this ‘immaterial essence’ used to be measured by the thresholds of ‘labour and skill’,⁷⁹ ‘expression’,⁸⁰ and ‘originality’,⁸¹ *Infopaq* has shifted this standard. *Infopaq* concerned an action for copyright infringement of an eleven word extract of a newspaper. The aspect of the judgment which drew the most attention was the Court’s decision that the ‘author’s own intellectual creation’ (or the ‘creativity’ standard) applied to all forms of copyright work protected under the Information Society Directive, rather than only works such as computer programmes, databases or photographs.⁸²

The fact that the Court never defined what an ‘author’s own intellectual creation’ is further blurs this distinction between what is to be afforded copyright protection and what is not.⁸³ This has the potential to pose a serious threat to the safeguarding of the public domain, especially because following *Infopaq* the standard for infringement has also been lowered.

⁷³ Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569.

⁷⁴ Litman (n 7) 1000.

⁷⁵ *ibid* 969.

⁷⁶ *ibid*.

⁷⁷ *Infopaq* (n 73).

⁷⁸ Jonathan Griffiths, ‘Dematerialization, Pragmatism and the European Copyright Revolution’ (2013) 33 *Oxford Journal of Legal Studies* 767, 767-768.

⁷⁹ *Sawkins v Hyperion Records Ltd* [2005] EWCv Civ 565 [85].

⁸⁰ *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416 (HL) 2431.

⁸¹ Copyright Design and Patents Act 1988, s 21; *Sillitoe v McGraw-Hill Book Co (UK) Ltd* [1983] FSR 545 (Ch).

⁸² *Infopaq* (n 73) [35].

⁸³ Griffiths (n 78) 789.

For instance, in the United Kingdom, under the CDPA 1988,⁸⁴ infringement takes place whenever an act is committed in relation to the whole or a 'substantial part' of the work that is restricted by the copyright.⁸⁵ No liability used to arise for the reproduction of an 'insubstantial' part of the work. However, following *Infopaq*, the standard for infringement had become stricter, and infringement arises whenever 'elements which are the expression of the intellectual creation of the author of the work' are reproduced.⁸⁶ This seems to leave 'no apparent scope for a defendant to reproduce any of a work's 'creativity' without infringing copyright'.⁸⁷ McDonagh has commented that this has been particularly burdensome for the music industry, as now it is 'more difficult than ever to determine when a case of musical infringement has occurred', since it seems that 'even a short progression of chords could be protected' by copyright if it is deemed to be part of the intellectual creation of the author.⁸⁸

Whether this blurred border between copyright and the public domain is desirable depends on whose interests are under consideration. For pro-commodificationists, it is extremely advantageous that the *Infopaq* decision keeps the romantic notion of the author alive by suggesting that authors should have a claim to ownership over anything that is their own creation, as it can be used to expand the regime of copyrighted works.

Trademark and patent law too have witnessed a similar blurring of the boundary between what is protected by intellectual property law and what is not. This consequently has also made it harder to positively assert a division between the private and the public in order to protect the public domain. For instance, in trademark law the boundary for what could be protected as a trademark used to be set at signs that were capable of being visually represented. This graphic representation requirement⁸⁹ was a way to resolve 'the apparently

⁸⁴ Copyright Design and Patents Act 1988.

⁸⁵ *ibid* s16(3)(a).

⁸⁶ *Infopaq* (n 73) [39].

⁸⁷ Griffiths (n 78) 787.

⁸⁸ Luke McDonagh, 'Is the Creative Use of Musical Works without a Licence Acceptable under Copyright Law?' (2012) 4 *International Review of Intellectual Property and Competition Law* 401, 419.

⁸⁹ First Council Directive 89/104/EEC to approximate the laws of the Member States relating to trade marks [1988] OJ L40/1.

intractable problem of identifying and demarcating the boundaries of intellectual property law'.⁹⁰ However, *Sieckmann v Deutsches Patent*⁹¹ made it clear that it is no longer necessary for a sign to be capable of graphic representation in itself in order to constitute a trademark. In other words, a non-visual sign can now be a trademark too.

Sieckmann indicated that a sign not capable of visual perception might still meet the standard of graphic representation as long as it could be represented in a way that was 'clear, precise, self-contained, easily accessible, intelligible, durable and objective'.⁹² This latter list of requirements, known as the *Sieckmann* criteria, was then used in *Libertel v Benelux*⁹³ to conclude that a single colour mark could also be a trademark. It was also used by Advocate General Ruiz-Jarabo Colomer in *Shield Mark v Joost Kist*⁹⁴ to determine that a series of sounds could be trademarks if they could be represented by musical notation. This has blurred the boundaries of the law because it can no longer be said 'that representation alone determines the precise subject of protection'.⁹⁵

Similarly, the boundary between invention and discovery has been 'blurred to a dangerous point'⁹⁶ in patent law. For instance, Article 3(2) of the European Directive on Biotechnology states that 'biological material which is isolated from its natural environment or produced by means of a technical process may be the subject of an invention even if it previously occurred in nature'.⁹⁷ This isolation test blurs the border between invention and discovery because it is questionable whether 'the act of isolation and characterization of a naturally occurring substance is really that different from the mere finding of the substance'.⁹⁸

Thus, the metaphor of the public domain as land as currently

⁹⁰ Robert Burrell and Michael Handler, 'Making Sense of Trademark Law' (2003) 4 Intellectual Property Quarterly 388, 388.

⁹¹ Case C-273/00 *Sieckmann v Deutsches Patent* [2002].

⁹² *ibid* [55].

⁹³ Case C-104/01 *Libertel Groep BV v Benelux-Merkenbureau* [2003].

⁹⁴ Case C-283/01 *Shield Mark BV v Joost Kist* [2003].

⁹⁵ Burrell and Handler (n 90), 408.

⁹⁶ Dusollier (n 36) 11.

⁹⁷ Council Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions [1998] OJ L 213/13.

⁹⁸ Bently and others (n 62) 495.

constructed obstructs the understanding that, in reality, there is no clear and tangible border around the public domain that can be invoked to protect it. The consequence of the lack of a positively asserted border is that it is hard to fight back against the encroaching intellectual property regime.

4.4 The territorial metaphor elicits the image of a static construct

The third characteristic associated with a territory is its static nature. However, this is deceptive insofar as it falsely suggests that the public domain and intellectual property law are static too. Unlike territory or land, the public domain is not fixed; rather, it is dynamic and relational, growing and shrinking in size at different times and in different countries. Sometimes the public domain grows, for instance when copyright or patented works expire, or following decisions like *Feist Publications, Inc. v. Rural Telephone Service*⁹⁹ in the United States, where it is held that uncreative compilations of facts cannot be protected by US copyright law. At other times the public domain shrinks, such as when the EU enacted its EU Database Directive¹⁰⁰ which required that Member States protect the contents of databases, or when the US Courts ruled that business methods could in fact be patented.¹⁰¹ However, the consequence of adopting a static interpretation of the public domain is that one can remain blissfully ignorant of the fact that whenever the intellectual property regime grows, the public domain shrinks. The static understanding of the public domain thus poses a barrier to determining that intellectual property law should expand only when necessary, in order to prevent the public domain from unduly shrinking.

An example of how the intellectual property regime has grown at the cost of the public domain is the growth of trademark law to protect brand dimension associated with a successful trademark.¹⁰² This happened in the case *L'Oréal v Bellure*,¹⁰³ where the Court of Justice of the European Union declared that the functions of a trademark included not only its origin function, 'but also

⁹⁹ *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) 363-64.

¹⁰⁰ Council Directive 96/9 of 11 March 1996 on the Legal Protection of Databases [1996] OJ L77.

¹⁰¹ *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*, 149 F.3d (Fed. Cir. 1998) 1368, 1375.

¹⁰² Dev S Gangjee, 'Property in Brands' (2013) 8 LSE Legal Studies Working Paper 2.

¹⁰³ Case C-487/07 *L'Oréal SA v Bellure NV* [2009] ECR I-5185.

its other functions, in particular that of guaranteeing the quality of the goods or services in question and those of communication, investment or advertising'.¹⁰⁴ These additional functions are now also capable of being protected even where the origin function of the trademark remains unaffected.¹⁰⁵ This is problematic because it has been suggested that these functions are so prominent largely due to the consumer's engagement with the mark;¹⁰⁶ indeed, 'consumers who participate and amplify different meanings contribute enormously to the success of a brand'.¹⁰⁷

Previously, the brand value and image generated by consumer engagement with a mark would have rested in the public domain. Now, the brand owner enjoys all of the rights associated with the consumer's labour. Not only is this appropriating hidden labour, but it also goes to show how unpredictable the growth of trademark law is. The consequence of this is that the public domain has shrunk again simply because consumers effectively engaged with a brand.

4.5 The territorial metaphor depicts a binary relationship between intellectual property right and the public domain

The public domain is also not in binary opposition to intellectual property as the territorial metaphor would suggest. As academics like Samuelson have pointed out, there are intellectual creations 'that have been treated as part of the public domain for some but not all purposes'.¹⁰⁸ The ability of a private resource to be part of the function of the public domain, because it can be freely used in some circumstances, is reflective of what Dusollier calls a 'functional public domain', where the availability of the material in the public domain depends on the circumstance.¹⁰⁹ This can be best illustrated with reference to how copyright and patent law allow free use of a protected work or invention in certain situations.

¹⁰⁴ *ibid* [58].

¹⁰⁵ McDonagh (n 61) 612.

¹⁰⁶ Gangjee (n 102) 8.

¹⁰⁷ Thambisetty (n 57).

¹⁰⁸ Samuelson (n 16) 149.

¹⁰⁹ Dusollier (n 36) 7.

For instance, the exceptions in copyright law are an example of how the public domain is embedded in the proprietary regime itself. There are a number of fair dealing purposes under the CDPA 1988, which include the right to use a copyrighted work for caricature, parody or pastiche purposes¹¹⁰ and for criticism or review purposes.¹¹¹ In *Pro Sieben Media v Carlton Television*,¹¹² for instance, Carlton Television was able to claim fair dealing in order to use a 30-second extract from an interview broadcasted on ProSieben Media for the purposes of criticising chequebook journalism. This is an example of how a copyrighted work may be ‘freely’ used despite its proprietary status, depicting how the intellectual property regime is also dynamic rather than static.

In patent law too, there are exceptions that allow the use of a patented invention in certain instances. In the UK, Section 60(5)(a) and 60(5)(b) of the UK Patents Act 1977 (as amended), state that acts that are done for private and non-commercial purposes or experimental purposes will not constitute infringement of a patent. This is another example of how an intellectual property right is relational depending on the instance in which it is being used. This can be further illustrated by reference to Article 31 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (1994), under which a government can issue a compulsory licence which gives producers the right to manufacture a patented product or process without the consent of the patent holder.

Indeed, compulsory licences exemplify how patented products may become temporarily part of the public domain, thus attesting to the fact that the intellectual property regime is not binary. For example, in March 2020 the Israeli government issued a compulsory licence for the HIV drug Kaletra so that it could be manufactured more widely for use in COVID-19 treatment trials.¹¹³ This was done after the Israeli Ministry of Justice announced that the pharmaceutical company AbbVie, which held the patent to the drug, was unable to supply it in high enough quantities.

¹¹⁰ Copyright Designs and Patents Act 1988, s30A.

¹¹¹ *ibid* s30.

¹¹² *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] 1 WLR 605, [1999] FSR 610.

¹¹³ Ellen't Hoen, ‘Covid-19 and the Comeback of Compulsory Licensing’ (*Medicines Law & Policy*, 23 March 2020)

<<https://medicineslawandpolicy.org/2020/03/covid-19-and-the-come-back-of-compulsory-licensing/>> accessed 10 February 2023 .

A second consequence of viewing the public domain as being in opposition to the intellectual property regime as the territorial metaphor prompts us to do is that it legitimises the current distribution of intellectual property rights. In other words, it assumes that everything that is in the public domain should remain there in order to leave the resource open to all. However, this is problematic insofar as it masks how this construction of the public domain ‘disadvantages subordinate indigenous and other disempowered groups globally’.¹¹⁴ In particular, this binary rhetoric of ‘intellectual property versus the public domain’ disguises how the current public domain functions more ‘in the interests of traditional property holders than in the interests of the commoners’.¹¹⁵ It does so by suggesting that the public domain is open to free and equal exploitation by all, when in reality those that possess more knowledge and wealth have a higher chance of being awarded with intellectual property rights.

The neem tree incident provides one such illustration of how traditional knowledge that is in the public domain has functioned in favour of the Western world. Indigenous to India, the neem tree has been traditionally used for many medicinal and agricultural purposes. In the 1980s, various Western companies sought to obtain patents for applications of neem extracts. Though ‘Indian enterprises were aware of the commercial value of the tree’, they were ‘unable to invest the resources to patent its derivatives throughout the world’.¹¹⁶ This is an example of how traditional knowledge that rests in the public domain is exploited by those who have the means to convert the knowledge into patentable products. The Stevia plant offers a second example of this: a recent publication named *The Bitter Sweet Taste of Stevia* demonstrated how the Guarani tribe of Brazil who discovered Stevia’s sweetening properties are not receiving a fair or equitable share of the benefits that have arisen from the commercialisation of Steviol glycosides.¹¹⁷

¹¹⁴ Chander and Sunder (n 1) 1335.

¹¹⁵ *ibid* 1343.

¹¹⁶ *ibid* 1353.

¹¹⁷ Public Eye, ‘The Bitter Sweet Taste of Stevia’ (*Public Eye*, 2015)

<<https://www.publiceye.ch/en/publications/detail/the-bitter-sweet-taste-of-stevia>>
accessed 10 February 2023.

Furthermore, the patent system's formal way of recognising knowledge also poses a barrier to members of indigenous communities trying to gain property rights for their traditional knowledge. The patent system only grants patents to inventions that are new, involve an inventive step, and are capable of industrial application. Whether an invention is new is determined with reference to whether an invention is part of the state of the art, determined with reference to prior art. However, traditional knowledge is not 'new', which prevents it from passing the threshold for inventions that most patent laws have. Similarly, the prior art requirement poses a high hurdle for those looking to gain intellectual property rights to their traditional knowledge.

Therefore, in this context too, the binary rhetoric of the public domain ensued from the territorial metaphor poses a barrier to the understanding that the intellectual property regime favours certain kinds of knowledge over others. This inherently disadvantages indigenous and disempowered communities and has resulted in calls to rethink the way the system operates.¹¹⁸

V. THE TERRITORIAL METAPHOR AND WHAT INTELLECTUAL PROPERTY LAW OUGHT TO BE

Thus far, the consequences of the four characteristics associated with the territorial metaphor have been described and discussed, and it has been shown how each misrepresents the public domain and forms a barrier to determining what the intellectual property regime is. The territorial metaphor perpetuates a vision of the public domain that is static, clearly bordered, in binary opposition to intellectual property, and which propels the conviction that propertization incentivises creativity. However, this vision masks several important facts. First, that protecting the public domain through propertization will lead to its underuse, rather than depletion, which will stifle creation rather than encourage it. Second, that there is no clear and tangible border around the public domain which can be invoked to protect it. Third, because the public domain is dynamic and relational, we have the responsibility of safeguarding the balance between the public domain and the intellectual property regime so that both can equally thrive. Fourth, that we cannot overcome the dualism between the public domain and the intellectual property regime as long as we view their

¹¹⁸ Ruth L Okediji, 'Traditional Knowledge and the Public Domain' (2018) 176 CIGI Papers 1, 14.

relationship as binary or mutually exclusive.

Therefore, it is submitted that the metaphorically-driven conception of the public domain as territory fails to recognise the inherently complex and interdependent relationship between the public domain and intellectual property law. So, why is it still being referred to with such weight throughout academic and judicial discussions?

Cohen answers this by saying that the territorial metaphor is still being employed because it helps to justify and normalise the increasing enclosure of the public domain.¹¹⁹ For instance, though anti-commodificationists may argue that the narrowing scope of copyright exemptions will ‘disrupt the balance between the proprietary and the public’¹²⁰ (since they believe these exemptions form part of the public domain), pro-commodificationists can easily dismiss this argument by stating that the public domain is territorially separate from the proprietary. They can use this to argue that narrower copyright exemptions will not affect the public domain because copyrighted works themselves are not *in* the public domain. This is an example of how our conception of the public domain determines our perception of what the scope of the intellectual property system should be.

Unfortunately, the very fact that ‘opponents of the increasing encroachment of the public domain, are using the same metaphor that helps the proponents of a rising commodification in intellectual property to deny that threat, makes it impossible to reach an effective solution for the preservation of the public domain’.¹²¹ Indeed, the term ‘public domain’ alone is so entrenched in denotative and connotative meanings ‘that constitute the artistic, intellectual, and informational public domain as a geographically separate place’,¹²² that it is hard to depart from the metaphor in order to illustrate that the public domain ought to be ‘a varying bundle of rights revolving around the right to access and use’.¹²³

¹¹⁹ Cohen (n 3) 123.

¹²⁰ *ibid.*

¹²¹ Dusollier (n 36) 5.

¹²² Cohen (n 3) 123.

¹²³ Chander and Sunder (n 1) 1339.

Thus, if we adopt the view that intellectual property law ought to better protect the public domain as the building blocks of our culture and creation, then we need to shift away from the territorial metaphor in order to propel this view. Moreover, we should step away from the use of metaphors entirely, because each metaphor has its own set of connotations and characteristics which limit our thinking and misrepresent the public domain. The metaphor of the public domain as a natural resource, for instance, implies that the public domain is depletable. The metaphor of the public domain as a wasteland implies that it should not be the subject of protection. The metaphor of the public domain as an environmental commons ends up reinforcing the 'crucial binary opposition that intellectual property posits between nature and society, and discovery and artifact'.¹²⁴

Therefore, in answering the question of what intellectual property law ought to be, five interdependent suggestions are revealed over the course of this article:

1. Intellectual property law ought to recognise that it is intrinsically and unequivocally related to the public domain.
2. Intellectual property law ought to safeguard the rights and well-being of the public domain as effectively as it safeguards the rights of creators, inventors and innovators.
3. Intellectual property law ought to proactively engage in growing the space of the public domain commons, for the public domain represents the common heritage of humanity.
4. Intellectual property law ought to recognise that the mechanism of growing a commons of knowledge and ideas depends on securing the abundance of free inflow of facts and ideas.
5. Intellectual property law ought to recognise and proactively seek ways to counterbalance the inequalities it creates not only among existing intellectual creators, but also among future creators.

It is argued that we need to first positively and proactively define the scope and substance of the public domain free from any metaphors, in order to then give effect to what the intellectual property regime ought to be. By elevating the discussion of the public domain beyond the use of metaphors, we

¹²⁴ Mario Biagioli, 'Nature and the Commons: The Vegetable Roots of Intellectual Property' (2009) 382 *Max Planck Institute for the History of Science Preprint* 241, 242.

can begin to draw its blueprint in a way that does justice to its importance.

CONCLUSION

This article began with the statement that intellectual property and the public domain are ‘paired together in a perpetual dance’.¹²⁵ This dance has been examined from the viewpoint of thinking about the public domain as a land. It has been shown that using the territorial metaphor to understand what the public domain is clearly acts as a barrier to determining what intellectual property law is.

The metaphor of land perpetuates a vision of the public domain that is static, clearly bordered, and in binary opposition to intellectual property. Furthermore, it propels the conviction that propertization incentivises creativity. Although this vision is easy to understand and experience, it is false insofar as it misrepresents not only what the public domain is, but also what intellectual property law is. Namely, that intellectual property law rests on disputed justifications, with boundaries that are easy to expand and constantly shifting. This negatively impacts its dynamic, complex, and interdependent relationship with the public domain.

In answering the question of what intellectual property law ought to be, it was shown how the vision created by the territorial metaphor has been used by pro-commodificationists to further their agenda of expanding the intellectual property regime at the expense of the public domain. This illustrates how our conception of the public domain determines what we believe the scope of the intellectual property regime should be. Because this territorial conception of the public domain has become so deeply entrenched in the intellectual property debate, those advocating against the expansion of the intellectual property regime have been limited in their attempt to do so because they too have been constrained by the experiences generated by the characteristics of the territorial metaphor.

It was then argued that if we want to reverse this paradigm, we should look to the five suggestions of what intellectual property law ought to be that have been revealed by the discussion in this paper. We need to rise above the use

¹²⁵ Chander and Sunder (n 1) 1339.

of metaphors and positively define the scope and substance of the public domain, rather than perpetuate the current debate. We should look at the role the public domain needs to play in a democratic society and determine intellectual property law accordingly. Intellectual property law must not only assign ownership rights to those who are deserving, but also simultaneously promote cultural heritage, diversity, and the freedom to create. We need to overcome the dualism in our thinking of intellectual property and the public domain, in order to realise that because one depends on the other, we need to equally protect both.