The Perils of Property Speak in Academia

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Over the past two days, it's been a twisted pleasure for me to learn in gory detail about intellectual property law's alarming incursions into academia. It is nearly Halloween, after all, so thank you. In the same spirit, I'd like give you some additional reasons to be frightened. But I am also happy to report that I am actually optimistic about the long-term prospects for academia in this struggle. Let me explain.

The challenge that we face is not just about lawsuits and public policy. It's also about a larger cultural pathology – the idea that knowledge and creative works should be owned outright an absolutely. I call this political and moral orientation Property Speak. It a belief that knowledge ought to be enclosed in tight little envelopes of property rights. The idea, of course, is that copyrights and patents reward people for their creative labors, encourages their work to be sold in the marketplace, and thereby generates wealth. What's not to like? The premise is that knowledge cannot achieve its true value without being propertized. After all, if knowledge is free to share – if it has no price -- how could it possibly be valuable?

The line of thinking that I have just described – a worldview, really – amounts to a kind of secular fundamentalism. You're either with us or against us. You're either a property owner – or an evildoer who is soft on "theft" and "piracy." This is the "self-evident" proposition – that copyrights and patents are the only morally legitimate and only functional legal regime for managing creations of the mind.

Property Speak is meant to shut down a broader political discussion about how knowledge ought to circulate in our culture. It is intent on preventing consideration of an alternative social reality -- that perhaps valuable knowledge *can* be produced and disseminated without sweeping copyright and patent monopolies, especially in the Internet age. Property Speak wants to foreclose the imagining of something so subversive.

Well, I believe this is precisely what academia must do. It must begin to imagine and develop a stronger, more coherent argument about how academic communities create value. Academia must begin to take on some of the fallacious premises of copyright and patent law. It must begin to explain how the university differs from the marketplace.

One of the most promising strategies for doing this, I believe, is to assert the value of *the commons*. Openness, sharing and collaboration are fundamental to its success. Academia is a highly productive "gift economy" in which value is created by the members of a community giving and taking and interacting without contractual *quid pro quos* or the exchange of money. Anyone is free to build upon the work of others without permission or payment. Recognition is based on community standards of merit, not on who is richest.

The case I want to make today is this: By talking about academia as a commons, we can begin to forcefully defend the *non-market* ways in which academia generates valuable knowledge. This, in turn, will help us devise better ways to champion and protect academia's distinctive form of knowledge-creation. The language of the commons can help us confront what I call the "tragedy of the market." This is the tendency of markets and property rights to stifle open access to knowledge, follow-on research, innovation and competition.

To avoid any confusion, let me just say straight-up that I believe in copyrights and patents. They can provide significant and necessary incentives to invest in new works, especially in a market context. *But the university is not a market.* And in any case, copyrights and patents are not working very well in the Internet era. They are becoming ends in themselves, disconnected from their purported goals, such as the one stipulated by the U.S. Constitution – to "promote progress in science and the useful arts." Instead of carefully balancing private interests and public needs, copyrights and patents are becoming crude, anti-social instruments of intimidation and control.

This is the conclusion that I came two nearly two years ago when I published a book that explored the absurd expansions of copyright and trademark law. It's called *Brand Name Bullies*. It's filled with dozens of stories of copyright and trademark owners bullying citizens, artists, scholars and others with ridiculous legal threats. The problem is, most intellectual property disputes are so legally complex and inscrutable that ordinary people can't understand what's going on. And yet ordinary people are very much affected by these bodies of law. So I decided to demystify the workings of the law through stories.

One of my favorite stories about the alarming expansion of copyright law involves ASCAP, the American Society of Composers, Authors and Publishers, the body that collects performance licensing fees from restaurants with jukeboxes, funeral homes and other places where recorded music is played.

ASCAP decided that, since it already collects fees from these "public performances" of music, why not summer camps? Why shouldn't singing around the campfire be considered a kind of "public performance" that should be licensed? ASCAP approached the American Camping Association in 1996 and said it wanted blanket performance licenses from hundreds of summer camps – something on the order of $300 to $1,400 per season per camp.

Well, this caused quite a ruckus. When it was discovered that ASCAP wanted money for the Girl Scouts to sing "This Land Is Your Land" and "Puff the Magic Dragon" around the campfire, the press went nuts. There were stories where campers were actually dancing the Macarena without music, and resorting to non-copyrighted songs like "The Bow-Legged Chicken." An ASCAP official heartlessly told a reporter: "They [camps] buy paper, twine and glue for their crafts – they can pay for the music too." Eventually, after a huge public outcry, ASCAP backed down. But interesting enough, its legal authority to charge summer camps for their "public performances" of copyrighted songs remains intact.

My book is about these kinds of stories. Here's another one. I met a painter named Barry Kite, who calls himself an appropriationist artist. Here's his best-selling image -- *Sunday Afternoon, Looking for My Car.* It's a takeoff of Seurat's famous painting, *A Sunday Afternoon on the Island of La Grande Jatte.* Kite specializes in spoofs of classic paintings. They're pretty funny and sometimes quite off-color.

When Kite did a painting he called the *Sistine Bowl Off,* which depicts one of Michaelangelo's naked figures bowling, he received a cease-and-desist letter from the Bridgeman Art Library in London. They apparently administer copyrights for the Vatican, and they objected to his parody. Kite defended it as fair use – and was lucky that they didn't pursue the matter. Kite had an epiphany when someone used a portion of one of his paintings. He called his lawyer and said, "What should I do?" His lawyers said, "You can sue him and then you'll be paying *two* lawyers." Lawyers are the only ones making any money off intellectual property law.

To dramatize how much copyright and trademark law are inhibiting art, an enterprising cultural activist, Carrie McLaren of Stay Free! magazine in New York City, and Brewster Kahle, the founder of the Internet Archive, mounted a traveling

museum exhibit that she called the "Illegal Art" exhibit. The exhibit is subtitled, "Freedom of Expression in the Corporate Age."

This image features Matt Groening's cartoon character, "Binky the Rabbit" punching the Trix bunny. It was featured on a 'zine called "Bunnyhop." It is an illegal image! When I tried to get it, its creator, Noel Tolentino, said he couldn't provide it to me. I got this one from the Illegal Art exhibit. The Illegal Art exhibit also featured Starbucks mermaid logo renamed "Corporate Whore," and Heidi Cody's *American Alphabet*, an installation piece that consists of the 26 letters of the alphabet taken from corporate logos.

The issue in so many of these battles is, *Who shall control public meaning?* Mattel is legendary in trying to protect the cultural "meaning" of Barbie. It has gone after *any* unauthorized uses of Barbie. It went after a series of photographs by Mark Napier called *Distorted Barbie,* which dared to depict Barbie as fat or as having Down's Syndrome. Even highly distorted images of Barbie that were essentially unrecognizable were deemed unacceptable by Mattel.

Mattel has gone after a magazine that caters to adult collectors of Barbie dolls. It has spurred culture-jammers, such as the self-styled Barbie Liberation Organization, which substituted voice boxes of GI Joe with those in Barbie, so that GI Joe would say, "Let's plan our dream wedding," and Barbie would yell, "Vengeance is mine!" Mattel even pressured the Seattle publisher of a book, *Adios, Barbie: Young Women Write About Body Image and Identity*, to change the title. The book was reprinted as *Body Outlaws*.

Two years ago, I am happy to report, a federal circuit court in the United States may have put an end to most of Mattel's bullying litigation. Utah photographer Tom Forsythe made a series of 78 photos of Barbie for his *Food Chain Barbie* exhibit. It featured Barbie in enchiladas, stuffed into a blender and in other kitchen and sexual poses. Only a few of Forsythe's photos sold. He spent about $5,000 to mount the exhibit, and lost money.

No matter, Mattel wanted to send a message that you can't mess with Barbie. It spent years litigating the case, requiring Forsythe to find pro bono legal counsel, which spent nearly $2 million defending him. In 2004, Forsythe prevailed in the circuit court, which delivered a stinging rebuke to Mattel for bringing a "groundless and unreasonable" trademark dilution claim.

The corporate privatization of words is another disturbing trend. The owner of the "Godzilla" trademark – a Japanese company – has a habit of threatening all

sorts of people who use the phoneme "zilla," including a website called "Davezilla" that featured a lizard-like cartoon character.

The corporate obsession with owning words is really quite extensive. McDonald's claims to own 131 words and phrases. The San Diego-based McDonald's actually claims to own the Scottish prefix "Mc." It has successfully prevented companies from naming their restaurants or carryouts McVegan, McSushi and McMunchies, and it prevented a motel chain from naming itself McSleep.

Ralph Lauren, the clothing line, went after *Polo* magazine, run by an equestrian organization, claiming it was a trademark infringement for the polo players to use the word "polo"! MasterCard went after Ralph Nader for using "priceless" in his campaign ads when running for President in 2000. He won the case. But the gay athletes who wanted to host a series of athletic competitions in San Francisco could not use the phrase "Gay Olympics" because that phrase is owned by the U.S. Olympic Committee, who gets to decide who can use it. "Special Olympics" for disabled kids is OK, but not "Gay Olympics."

The TV demagogue Bill O'Reilly reportedly went ballistic when he learned that the comedian Al Franken was using the words "fair and balanced" as a subtitle in his book that mocked various right-wing leaders, including him. The federal court laughed Fox News' case out of court, and Franken won. But pity the people who can't afford to hire Floyd Abrams, a prominent First Amendment attorney, to represent them. A woman from Los Angeles dared to name her neighborhood newspaper the *Beechwood Voice*. She was threatened with legal action by the *Village Voice*, which claimed that use of the word "voice" as a newspaper name diluted its trademark.

The Online Computer Library Center, OCLC, which many of you know, claims the Dewey Decimal Classification System as a trademark. A friend of mine in North Carolina once got a cease-and-desist letter telling his online archive to stop using the name or to pay a licensing fee. This is especially offensive to me because the Dewey Decimal System was created by thousands of libraries over time as a commons, and now they're being prevented from using the name.

Not many people realize it, but Martin Luther King, Jr.'s "I Have a Dream" speech" is copyrighted by his estate – and zealously protected. That's because the King estate actively licenses use of the speech and Martin Luther King's image. Two notable clients were the telecom companies Alcatel and Cingular, in ads that make dubious use of the famous March on Washington and "I Have a Dream Speech" to sell phone service. When CBS News used news video of the speech in a

documentary about the civil rights era, the King estate sued for the unauthorized use of the speech. The estate wanted its cut.

Iowa law professor Kembrew McLeod actually secured a trademark on the phrase "Freedom of Expression" years ago. He did it to make a point, that someone could actually own the phrase. He thought that his big break came when AT&T mounted a marketing campaign using the phrase, "Freedom of Expression." McLeod sued AT&T – which promptly ignored him, knowing full well that McLeod didn't have the resources to pursue a serious lawsuit.

Several years ago, a group of women were taking snapshots of each other in a Starbucks. A store manager rushed up to tell them that they couldn't take photos in a Starbucks – it's against the company's rules. When Professor Larry Lessig put this story up on his blog, dozens of people came forward with similar firsthand stories, saying that they had had the same experience! The apparent motivation – Starbucks never came clean on this – is that it was trying to protect the trade dress interior design of its stores from potential thieves – its customers.

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These stories illustrate just how far Property Speak is willing to go in order to enforce its vision of the world. It wants to propertize all of culture and declare it synonymous with the marketplace. Property Speak has no problem requiring people to obtain permission and to make payments before embarking on any modestly derivative new creativity. That's what it's all about. This approach, not coincidentally, favors the Disneys, Time Warners and Rupert Murdochs because it protects the market value of large inventories of propertized works. It actively disadvantages expression that is local, amateur, civic scientific or non-commercial in nature -- which describes a great deal of academic work.

The over-extension of copyrights into academia could be termed the enclosure of the academic commons. Academics have a very different set of ideals and moral values than corporations. They are fundamentally committed to the sharing and diffusion of knowledge whereas corporations are about maximizing cash returns to shareholders. Academics generally want their discoveries to advance the public good, not enrich private investors. They want their work to be made as broadly available as possible, and to posterity. They need access to knowledge created by those who came before us, so that they can build on it.

For all of these reasons, Property Speak is a "bad fit" for much of academic work. It advances a worldview that subtly and not-so-subtly erodes some core values of academia.

A spate of recent books documents how academic commons, especially in science, is being enclosed by IP law.[1] Professor Sheldon Krimsky of Tufts University sums up what's happening in biotechnology: "Secrecy has replaced openness; privatization of knowledge has replaced communitarian values; and commodification of discovery has replaced the idea that university-generated knowledge is a free good, a part of the social commons."[2]

If there is an identifiable starting point to this problem, at least in the United States, it was in 1980 when the U.S. Congress enacted the Bayh-Dole Act, authorizing universities to patent the fruits of federally funded research.

For decades earlier, there had been a broad consensus that the intellectual property rights of federal research should stay in the public domain, or at least be licensed on a nonexclusive basis. That way, taxpayers could reap the full measure of value from their collective investments. In the late 1970s, however, large pharmaceutical, electronics and chemical companies mounted a bold lobbying campaign to reverse the presumption of public ownership of federal research. Since enactment of Bayh-Dole, we have seen a land rush to propertize and sell academic research that was once freely available to all.

Of course, there have been benefits. The flowering of biotechnology parks and silicon corridors in university towns – Austin, Cambridge, Palo Alto, Raleigh-Durham – has been built on the commercial success of dozens of important new drugs and medical technologies. Between 1980 and 2000, the number of patents secured by universities grew ten-fold, bringing in more than $1 billion in royalties and licensing fees – a windfall enjoyed mostly by a dozen top research universities.[3]

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[1] Noteworthy books include Derek Bok, *Universities in the Marketplace: The Commercialization of Higher Education* (Princeton, N.J.: Princeton University Press, 2003); Sheldon Krimsk,y, *Science in the Private Interest: Has the Lure of Profits Corrupted Biomedical Research?* (New York: Rowman & Littlefield, 2003); Donald G. Stein, editor, *Buying In or Selling Out? The Commercialization of the American Research University* (Rutgers, N.J.: Rutgers University Press, 2004); and Corynne McSherry, *Who Owns Academic Work? Battling for Control of Intellectual Property* (Cambridge, Mass.: Harvard University Press, 2001).

See also a report by Seth Shulman, *Trouble on the Endless Frontier* [report], New America Foundation and Public Knowledge, May 2002; a keynote speech by David Bollier, "Preserving the Academic Commons," American Association of University Professors, June 13, 2003, available at http://www.aaup.org/events/archived/2003/03Bollier.htm; and conference proceedings from "Conflicted $cience: Corporate Influence on Scientific Research and Science-Based Policy," Center for Science in the Public Interest, July 2003.

[2] Krimsky, *Science in the Private Interest*, p. 7.

[3] North Carolina State University, "University Licensing Revenues and Patent Activity for Fiscal 2001," 2002, available at http://www2.acs.ncsu.edu/upa/peers/current/research_intensive/lice_pant_res.htm..

The undeniable economic gains have come at long-term costs and inequities that most universities prefer not to confront. As market forces insinuate themselves more deeply into academic science in particular, we are seeing four key effects:

- the privatization of the public's investments in science;
- new barriers to the open sharing of knowledge;
- an erosion of the collegial ethic in many disciplines; and
- a waning sense of the university as a public institution.

Privatizing the public's investments. Even though the public pays for the lion's share of risky basic research for new drugs, the long-term equity returns tend to go to drug companies and a handful of top research universities. In the United States, we have seen this with the cancer drug Taxol; the anti-depressant Prozac; the hypertension drug Capoten; and a number of HIV and AIDS therapies.[4]

The upshot is that citizens often have to pay twice for pharmaceuticals and other medical treatments – first, as taxpayers who finance the research, and second, as consumers who pay monopoly prices for drugs. This is just one way in which the market exploits the commons as a hidden subsidy. This is a pure giveaway because it's not even clear that companies *need* exclusive patent rights as an incentive to commercialize new drug research.

Meanwhile, multinational corporations are claiming ownership in indigenous knowledge and plants, a practice known as bioprospecting or biopiracy.[5] The life sciences industries see the developing world as a rich source of biodiversity. They travel to Madagascar, Costa Rica, Brazil and other developing countries to find plants and microorganisms that might be used in making new medicines and genetically engineered crops. But as Seth Shulman writes in his book, *Owning the Future*, "Who, if anyone, should be able to claim ownership rights to the globe's genetic and cultural inheritance?"[6] Should universities be in the business of helping privatize indigenous knowledge or knowledge that is the common heritage of humankind?

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4 A leading activist and policy expert on this topic is James Love, director of the Consumer Project on Technology, at http://www.cptech.org.

5 See, .e.g., Vandana Shiva, *Protect or Plunder: Understanding Intellectual Property Rights* (New York: Zed Books, 2001), and Michael F. Brown, *Who Owns Native Culture?* (Cambridge, Mass.: Harvard University Press, 2003).

6 Seth Shulman, *Owning the Future*, ((Boston, Mass.: Houghton Mifflin, 1999), pp. 127-152.

Sir John Sulston answers this question eloquently in his book, *The Common Thread*, which chronicles the race to de-code the human genome.[7] A private startup company, Celera, was aggressively trying to privatize genomic sequences and put them in one big proprietary database. That way, it would have a monopoly over future use of the genomic data. (It planned to license access to its database.) Fortunately, a coalition of public-sector scientists published the data first, which is why the human genome is now in the public domain. Sir John answers, quite rightly, that the human genome must be treated as the "common heritage of humankind."

We dodged a bullet there! Yet this controversy is not an isolated episode. It is the logical culmination of a path first opened by the U.S. Supreme Court's *Diamond v. Chakrabarty* ruling in 1980, which authorized the patenting of live, genetically altered microorganisms. The patenting of living organisms opened the way for an ecologically and ethically dubious future in which the life forms that are part of the sacred web of life can be owned and treated as commodities. Knowledge is treated as a proprietary investment, not as a public good. This ethic has enabled Harvard University to become the proud owner of a transgenic mouse injected with a cancer gene, the so-called "onco-mouse," which is used in laboratory experiments. Interestingly, the Canadian courts have refused to recognize this patent.

New barriers to sharing. One inevitable result of all these new ownership claims is the rise of new barriers to open sharing, collaboration and discovery. Patents are increasingly being granted for "upstream" research, which means that basic knowledge that everyone else must use for the field to advance, is becoming proprietary. Harvard, MIT and the Whitehead Institute, for example, have a patent on all drugs that inhibit something known as NF-kB cell signaling. Since this physiological process is believed to have something to do with many diseases such as cancer and osteoporosis, the patent deters others from pursuing their own scientific investigations in this area.[8]

The Wisconsin Alumni Research Foundation, or WARF, a patent licensing organization affiliated with the University of Wisconsin, claims exclusive commercial rights to heart, nerve and pancreatic cells derived from human embryonic stem cells. In other words, it has patents on some fundamental physiological knowledge. Consumer groups have charged that these patents are impeding new research and pushing stem cell research offshore – because the patents only apply in the U.S.

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[7] John Sulston and Georgina Ferry, *The Common Thread: A Story of Science, Politics, Ethics and the Human Genome* (Washington, D.C.: John Henry Press, 2002).

[8] Arti Rai, "The Increasingly Proprietary Nature of Publicly Funded Biomedical Research: Benefits and Threats," in Donald G. Stein, *Buying In or Selling Out? The Commercialization of the American Research University* (New Brunswick, N.J.: Rutgers University Press, 2004), pp. 117-126.

Then just last month, the Governor of Wisconsin said that Wisconsin-based researchers could have free licenses to the patents – but that out-of-state researchers would have to pay![9]

Contrast this beggar-thy-neighbor possessiveness with Jonas Salk, the inventor of the polio vaccine. When journalist Edward R. Murrow asked him, "Who owns the patent on this vaccine?" Salk replied, "Well, the people, I would say. There is no patent. Could you patent the sun?" This anecdote helps us remember that contemporary notions about ownership of knowledge are not inevitable and universal; they are socially constructed.

The propertization of academic knowledge has only intensified over the past twenty years as the courts – in the United States, at least – have lowered the standards for obtaining patents while broadening the scope of what is patentable. It is now possible to own mathematical algorithms embedded in software programs, for example – a problem that affects all sorts of academic fields, such as biotechnology, which are becoming tightly integrated with computer technology. The very tools needed to conduct scientific research are being privatized.

I like to imagine what might have happened to biotechnology and computer science if contemporary patent rules had been in place in the 1950s and 1960s. Neither the biotech nor the computer revolution would have occurred in the first place. Too much fundamental knowledge would have been proprietary.

The over-patenting of knowledge sometimes results in what is called an *"anti-commons"* problem, in which property rights for a given field of research are so numerous and fragmented that it becomes very difficult to conduct research.[10] The transaction costs for clearing rights are simply too numerous and costly. For example, there are thirty-four "patent families" for a single malarial antigen, and those rights, applying to different pieces of the research agenda, are owned by different parties in many different countries.[11] One reason that a malaria vaccine has been so elusive is because the patent rights are so numerous and dispersed.

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[9] Andrew Pollack, "*Agency Agrees to Review Human Stem Cell Patents," *New York Times,* October 4, 2006, available at http://topics.nytimes.com/top/reference/timestopics/people/p/andrew_pollack/index.html?inline=nyt-per.

[10] The classic treatments of this problem are Michael A. Heller and Rebecca S. Eisenberg, "Can Patents Deter Innovation? The Anticommons in Biomedical Research," *Science*, May 1, 1998, pp. 698-701; and Michael A. Heller, "The Tragedy of the Anti-Commons," *Harvard Law Review*, vol. 111 (1998), p. 621.

[11] Melinda Moree, Malaria Vaccine Initiative, Program for Appropriate Technology in Health, at conference, "Collective Management of Intellectual Property: Tackling the Anti-Commons," Bellagio, Italy, November 2-25, 2002.

Private ownership of scientific knowledge has gotten so extreme that some scientists and even companies have begun to engage in "defensive publishing." They publish research quickly and preemptively so that it will remain in the public domain and not be claimed in patents.[12] Indeed, this was what helped keep the human genome in the public domain.

It is worth noting that openness, sharing and the public domain do not harm the market. Quite the contrary. They invigorate it. In January 2005, I co-hosted a conference called "Ready to Share: Fashion and the Ownership of Creativity." It explored the power of openness in apparel design. Precisely because no one can own the creative design of clothes – they can only own the company name and logo, as trademarks – everyone can participate in the design commons. The result is a more robust, innovative and competitive marketplace. This is exactly the effect that Linux, the open-source computer operating system, has had on the software sector. It has opened up new opportunities for value-added innovation and competition in a marketplace otherwise dominated by the Microsoft monopoly.

Erosion of the collegial ethic. The most enduring effect of the marketization of universities may be the erosion of academic collegiality. When companies convert a commons into a market, they typically damage the dense web of social relationships and shared history that makes up that community. Instead of honoring their collegial relationships, some academics begin to lust after the big money. They care more about their stock options in a startup company, their lucrative corporate grants and their conference junkets.

Such blandishments from the market economy put the integrity and independence of an academic discipline at risk. It discourages scientists from sharing unpatented research tools and data. They sign non-disclosure agreements with sponsoring companies and agree to delay publishing research results. As data-sharing and collaboration decline, scientific research suffers.

Then there are the ethical conflicts of interest. When a UC San Francisco researcher, Betty Dong, found that a popular thyroid drug performed about as well as three cheaper medicines, the company that sponsored her research sought to discredit her work and suppress her research. Another notable case was that of Nancy Olivieri, who was threatened with a lawsuit for breach of contract if she disclosed that a liver drug had dangerous side effects. Brown University researcher

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[12] Stephen Adams and Victoria Henson-Apollonio, "Defensive Publishing: A Strategy for Maintaining Intellectual Property as Public Goods," International Service for National Agricultural Research, Briefing Paper 53, September 2002.

David Kern was pressured not to publicize evidence of a potentially fatal lung disease that he had discovered at a local manufacturing plant.

An article in the *Washington Monthly* in 2004 explored "why you can't trust medical journals anymore."[13] Marcia Angell, when she was editor of the *New England Journal of Medicine*, once wrote a lead editorial, "Is Academic Medicine for Sale?"[14] She considers many corporate/university partnerships to be bad bargains, period. They may be useful to companies in exploiting the talent and prestige of universities, but they have limited value for advancing technology transfer or the public good.

The university as a public institution. Finally, we are also seeing a waning sense of the university as a public institution. This is a profound loss that is barely recognized. As Ralph Nader has written: "Academic science, with its custom of open exchange, its gift relationships, its willingness to provide expert testimony that speaks truth to power, its serendipitous curiosity and its nonproprietary legacy to the next generation of student-scientists, differs significantly from corporate science, which is ridden with trade secrets, profit-determined selection of research and awesome political power to get its way…."[15]

As universities become more attentive to their revenue-generating potential, they are assuming the mentality of corporate science and shouldering new structural conflicts-of-interest. Should they serve the public good or their parochial market interests? There are those who say that serving one's market interests *is* the public good, and that may be so in certain cases. But ultimately, it is very difficult for a university to serve two masters.[16]

Yale University and the University of Minnesota each hold patents on HIV and AIDS drugs developed with public funds. This means they must decide whether to extract the maximum revenues from their patents, and charge top dollar for AIDS drugs in the midst of the African pandemic – or decide to honor their historic role as public-spirited institutions dedicated to serving needs that the market won't.

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13 Shannon Brownlee, "Doctors Without Borders: Why You Can't Trust Medical Journals Anymore," *Washington Monthly*, April 2004, available at http://www.washingtonmonthly.com/features/2004/0404.brownlee.html.

14 Marcia Angell, "Is Academic Medicine for Sale?" *New England Journal of Medicine,* May 18, 2000, pp. 1516-1518.

15 Foreword to Sheldon Krimsky, *Science in the Private Interest: Has the Lure of Profits Corrupted Biomedical Research?* (New York: Rowman & Littlefield, 2003), p. x.

16 See David Bollier, "Preserving the Academic Commons," keynote speech to American Association of University Professors, June 13, 2003, available at http://www.aaup.org/events/archived/2003/03Bollier.htm.

One of the more insidious effects of corporate sponsorship of university research is a shift of research priorities. Instead of pursuing basic R&D, or issues that may not be receiving much attention like sustainable agriculture, there is a greater premium to pursue applied research that serves the strategic needs of sponsoring companies. The *Wall Street Journal* recently reported that corporations are now designing actual courses in universities like UC Berkeley so that graduates will be trained in their specific ways of doing business. "Majoring in IBM," is how the *Journal* candidly described it.

As university presidents and tech transfer offices woo new corporate money, they should heed the warning, "Be careful what you wish for!" What if legislatures and courts really began to treat universities more as market players than as public-sector institutions? It could force universities to compete as market players and surrender many privileges they have as nonprofit institutions! Already, the courts in the United States are eroding the "research exemption" under patent law that has allowed academic scientists to use patented materials and inventions for free, in furtherance of their research. The courts are saying that universities profit from their patents, so why should they be entitled to a nonprofit research exemption? You can't play both sides of the street.

This is a game that universities can only lose. Do universities really want to become serious market competitors, enclose more and more of its knowledge in proprietary envelopes, and compete on the same field as multinational corporations? I don't think so. Yet that's where they are headed.

The basic problem with Property Speak is that it is a seductive and normative worldview that, as a creature of The Market, doesn't know when to stop. It has no way of setting limits for itself. There's always more money to be made, and more ingenious ways of monetizing knowledge. Even universities with little chance of succeeding in the marketplace are willing to jettison their academic ethic; they can't resist the idea that they might strike it rich with a breakthrough patent.

And so we get the kinds of over-reaching absurdities that I've mentioned here. Monopoly property rights are being handed out like candy, and avidly embraced – at the expense of the larger, long-term needs of the academic community.

And yet, here's the rub: using the categories of property discourse to fight back is generally not effective. Fair dealing, the first-sale doctrine and the public domain are all stepchildren in the house of copyright law. They don't have respect or standing. Content industries are doing everything they can to shrink these public rights – using DRM, shrink-wrap licenses, proprietary technologies, campaign

contributions and strong-arm lobbying. In the best of circumstances, fair dealing and associated legal doctrines are irregularly applied *exceptions* to the honored norms of intellectual property law. In the U.S., for example, fair use is simply a defense, and one with very vague standards and inconsistent applications. It is not an affirmative right and it is not even a reliable defense.

Quite simply, the intellectual property industries and bar are not prepared to have a serious conversation about the proper balance between property rights and public needs. They want absolute and perpetual property rights, period. They insist that the "free market" and property rights will solve whatever ails you.

This why I believe it's imperative for universities to develop a different way of engaging these controversies. Academia is not primarily a creature of the market. It therefore needs a discourse that can get beyond the market premises of copyright and patent law. Academia needs to develop a better way of asserting the enormous value of free, un-metered sharing of information. It needs a stronger way to assert the supremacy of its community ethic and its public-spirited mission.

Yes, let's talk in the received categories of copyright and patent law, as necessary, in public policy and legal circles. But if we want to assert our own set of values, over and above those of Property Speak, we need to develop a fresh and different discourse. We need a discourse that will enable us to out-maneuver the polemical narratives and categories used by Property Speak. I like the language of the commons gives us a deep analysis for explaining why academics can out-perform the market in producing certain types of knowledge and why, therefore, academic norms should be zealously protected from enclosure.

Yale Professor Yochai Benkler argues in his magisterial book, *The Wealth of Networks*, that a great deal of knowledge production is more effectively pursued through a commons than through markets. It is far more effective to rely upon self-selected, decentralized inquiry in the context of peer communities and an open, diverse environment. Why can't money simply "buy" the knowledge it needs? Because money tends to subvert the social dynamics that make the academic commons work. It can sabotage self-directed inquiry. It undermines the social trust, candor and ethics that are essential to academic research.

So Commons Speak is valuable first, because it helps us critique the limits of the market. But it also provides us with a new platform for taking the offensive. Instead of cowering in a defensive crouch, fighting one policy attack after another, the commons helps us reassert some venerable principles of the academic enterprise. It forces our adversaries to come onto *our* polemical turf. It gives us a coherent

framework for describing the generative power of openness, sharing and collegiality outside of the marketplace and property norms.

The commons is not just about developing a new strategic framing. It is about hoisting up a new banner than brings together a lot of commons-based projects that are otherwise seem as isolated and unrelated. I'm talking about, for example, the proliferation of social networking websites, the growth of Wikipedia, the explosion of blogs, and the wide use of peer-to-peer networking on the Internet. I'm also talking about lots of academic commons, such as open access publishing, institutional repositories, Creative Commons licensing and open source software platforms, not to mention the countless academic bodies that function as commons.

The Creative Commons licenses, launched just four years ago, deserves special mention. They are fast-becoming the default legal architecture for the sharing and re-use of creative works and information. The CC licenses are now used in more than 150 million online works. Versions of the licenses have been adapted for use in more than 30 nations, with a few dozen more in the wings. The Creative Commons recently launched a new international advocacy group, iCommons, that is going a step further by bringing together the many constituencies that care about free culture.

Within academia, open access publishing is starting to get some real traction. Led by the Public Library of Science and BioMed Central, there are now more than 2,300 open access journals out there. These journals are enabling researchers to keep their copyrights, avoid the huge subscription rates that commercial journals are charging, and yet share their work with larger readerships – all at less cost.

Many universities are creating digital institutional repositories to help archive and disseminate scholarship. Moving beyond their historically passive role in simply buying materials from publishers, universities are taking pro-active steps to create their own digital commons for their own faculty and students, and for specialized disciplines.

Other commons models are also flourishing. MIT has famously made the curricula for dozens of its courses available for free, online, through the Open CourseWare initiative – an effort now being emulated by other institutions. Rice University's Connexions project is a rapidly growing collection of free scholarly materials and a powerful set of free software tools to help authors publish and collaborate and instructors build and share customized courses. More than one million people from 194 countries are tapping into the 3,577 modules and 186 courses developed by a worldwide community.

One of the more exciting commons developments that I've encountered is the Science Commons, another spinoff of the Creative Commons. This project aims to help different academic disciplines build new knowledge commons and overcome barriers to sharing. At a seminal conference held last month, I learned that such diverse fields as astronomy, archaeology, biomedicine and the social sciences are venturing into the commons. They realize that if they are going to reap the benefits of distributed computing networks – if they are going to make great leaps forward in their research and discovery – they need to devise new software platforms and licensing regimes to allow knowledge to circulate freely. In short, they need to reinvent the commons.

Once you start to talk about the commons, you open up a whole new vector of discussion. A market may serve atomized consumers and look to the bottom line, but a commons serves a community. And isn't that what academic disciplines are mostly about?

When professors worry about copyrighting their lectures and patenting their research; when science can't progress because data are proprietary and incompatible with other databases; when medical researchers can't develop cures because of the anti-commons effect; when conflicts-of-interest proliferate because of corporate influence on campus; when the rules of intellectual property law and markets begin to govern what goes on at universities – we must begin to ask:

How can we find our way out of the House of Funhouse Mirrors that intellectual property law has become? How do we establish a set of legal rules, university practices and social norms that advance our highest ideals of academia?

I believe a good place to start is with the commons. We would do well to explore and "build out" the commons paradigm for all it's worth. It has a depth and power that can help us reassert the public ideals of the academy at a time when Property Speak is threatening to turn it into a pay-per-use vending machine. Considering the rate of market enclosures on universities, we have no time to lose.

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