Pirates, Parasites, Reapers, Sowers, Fruits, Foxes… The Metaphors of Intellectual Property

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Abstract

This article examines metaphor, its legal context and its communicative power within that context. It briefly traces the existing literature on the general use of metaphor in legal writing and then turns to the specific area of intellectual property, noting the distinction between metaphor that is 'on the surface' of the language and conventional or 'submerged' metaphor. Both the surface and the submerged metaphors of intellectual property are examined, with a particular emphasis on the latter, analysing the scope and potential rhetorical effect of certain specific metaphors which are not absolutely unique to intellectual property writing but which are very closely associated with it (as for example, the terms 'pirates' and 'parasites' for unauthorised users of copyright works and the comparison of authors and inventors to farmers who 'reap' and 'sow' and deserve the 'fruits' of their labours).

'THE ESSENCE OF METAPHOR IS UNDERSTANDING AND EXPERIENCING ONE KIND OF THING IN TERMS OF ANOTHER.'[1]

1. Introduction

I recently said to an intellectual property class that enforcing technological protection measures, which prevent both illegal *and* legal access to copyright works by denying legitimate, fair dealing with those works, was, 'keeping everyone out of a public park because a few people are vandals.' I was immediately challenged by a student who said that, given the prevalence of piracy, a more accurate statement would be that such enforcement was more like, 'keeping everyone out of a public park because 90 per cent of people are vandals'. The class, which had until then been resting quietly as Monday morning classes tend to do, immediately became invigorated. Students threw themselves into the discussion, referring initially to the metaphor and refining it further ('more like 100 per cent' or 'it's a trough, not a park') and then moving increasingly into an abstract discussion of the appropriate limits to copyright protection in a society which values freedom of expression and broad access to information.

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1 George Lakoff & Mark Johnson, *Metaphors We Live By* (1980) at 5.

Lord Hoffman, in dealing with the notoriously indeterminate and abstract concepts of substantial part and originality and the relationship between the two in copyright law, took the occasion a few years ago to express his thoughts on the matter as follows:

> Generally speaking, in cases of artistic copyright, the more abstract and simple the copied idea the less likely it is to constitute a substantial part. Originality, in the sense of the contribution of the author's skill and labour, tends to lie in the detail with which the basic idea is presented. *Copyright law protects foxes better than hedgehogs.*[2]

A new legal metaphor was born and, judging by the immediacy and extent of its quotation and analysis, was received with considerable pleasure, annoyance, admiration and interest.[3]

These instances of metaphor use and appreciation share the context of occurring within legal 'speech' (in particular, within the legal 'speech' of intellectual property), and they also reveal something about the communicative power of metaphor. This article aims to examine metaphor, its legal context and its communicative power within that context. It will briefly trace the existing literature on the general use of metaphor in legal writing and then turn to the specific area of intellectual property, noting the distinction between metaphor that is 'on the surface' of the language (as in, for example, the description of trade marks which are registered but no longer used as 'abandoned vessels in the shipping lanes of trade')[4] and conventional or 'submerged' metaphor (as in, for example, 'the law strikes a balance between conflicting interests'). Both the surface and the submerged metaphors of intellectual property will be examined, with a particular emphasis on the latter, analysing the scope and potential rhetorical effect of certain specific metaphors which are not absolutely unique to intellectual property writing, but which are very closely associated with it. For example, the terms 'pirates' and 'parasites' for unauthorised users of copyright

2 *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700 (hereafter *Designer's Guild v Williams*) at 706 (Lord Hoffman) [Emphasis added.].

3 The metaphor was picked up in *L. Woolley Jewellers Ltd v A & A Jewellery (No 1)* [2003] FSR 15 at 260 (Arden J), in speculation about the meaning of the metaphor; it was described as Lord Hoffman's 'sibylline observation' in *L. Woolley Jewellers Ltd v A & A Jewellery Ltd (No 2)* [2004] FSR 47 at 934 (Fysh J); and was criticised and analysed in Michael Spence and Timothy Endicott, 'Vagueness in the Scope of Copyright' [2005] 121 *LQR* 657 at 672, 'The foxes and hedgehogs metaphor has insufficient process and guidance value'; in Ronan Deazley, 'Copyright in the House of Lords: Judicial Reasoning and Academic Writing' [2004] *IPQ* 121 at 133, 'That is, the commentary which emerged in the wake of *Designers* proved too concerned to pin down the fox, to take sufficient notice of the hedgehog lurking within.' The metaphor was again quoted in *Navitaire Inc v Easyjet Airline Co, Bulletproof Technologies Inc* [2005] ECDR 17 [2004] EWHC 1725 (Ch) Ch D at 203 (Pumfrey J); *Ultra Marketing (UK) Limited, Thomas Alexander Scott v Universal Components Limited* [2004] EWHC 468 (Ch) Ch D at [20] (Lewison J); and again in *Hi-Tech Autoparts Ltd v Towergate Two Ltd* [2002] FSR 15 at 18 (Floyd R).

4 *Re Laboratories Goemar SA* [2002] ETMR 34 at 389 (Jacob J). Nautical and sea-based metaphors are actually quite common in trade mark cases. See, for example, Smithers J's discussion of parallel importing and what happens when 'a manufacturer puts a trade mark on his goods and sends them into the course of trade *on the billowing ocean of trade*' in *Atari Inc v Fairstar Electronics Pty Ltd* (1982) 50 ALR 274 at 277. [Emphasis added.]

works, and the comparison of authors and inventors to farmers who 'reap' and 'sow', and deserve the 'fruits' of their labours.

Metaphors can be, and are, used rhetorically. They persuade us even as they please us. It is perhaps not unduly speculative to think that the common good can yield to the interests of a limited class, if that limited class can dominate and manipulate the discourse by, inter alia, the use and misuse of metaphor. Because the boundaries of intellectual property protection are never finally fixed, those boundaries are always a matter of contested political choice in which persuasion and rhetoric of this kind (and, of course, of other kinds) can have substantive effect. It will be argued in this article that many of the submerged metaphors, and in particular the 'metaphor clusters' of intellectual property discourse, are functioning in a rhetorical manner to attach a highly negative set of associations to persons (such as unauthorised users of intellectual property) whose interests diverge from, or at least do not converge with, the interests of the owners and producers of intellectual property. Although these negative metaphors are dominant in the discourse, it is not one-sided, and those who support restricted intellectual property rights in favour of more expansive public access to creative works do also themselves make significant rhetorical use of metaphor, in particular, the metaphor of the 'commons'.

2. Metaphor in Legal Discourse

The insights of cognitive science into the role of metaphor in our linguistic and conceptual functioning have resulted, over the past two decades, in a significant shift in general scholarly understanding of the nature and function of metaphor. The traditional view of metaphor is one of a decorative, figurative use of language in which one thing is described in terms of another,[5] an addition to literal language that takes place in statements or phrases which are expressive and aesthetic but not truth-bearing. So, for example, in Lord Atkin's well-known metaphor in *United Australia Ltd v Barclays Bank Ltd*, the truth-bearing thought viewed as 'underlying' the actual language, is something like, 'the just solution to a modern legal problem may not be found by following old precedent:'

> When these ghosts of the past stand in the path of justice clanking their mediaeval chains, the proper course is for the judge to pass through them undeterred.[6]

The imagery of ghosts and chains and brave judges charging along through them in pursuit of justice provides a striking, memorable and novel way to phrase the thought. Similarly, a judge exercising the equitable jurisdiction may deny relief to a plaintiff on the express basis that the plaintiff does not have 'clean hands'. The language chosen expresses in the vivid, concrete terms of daily human life, an abstract principle of legal reasoning about denial of relief to a plaintiff whose own

5 The *Shorter Oxford English Dictionary* defines 'metaphor' as 'the figure of speech in which a name or descriptive word or phrase is transferred to an object or action different from but analogous to that to which it is literally applicable'.

6 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 29 (Lord Atkin). Lord Atkin was himself extending the metaphor about forms of action in tort that was earlier begun by Maitland in 1909. See Frederick Maitland, *The Forms of Action at Common Law* (1963) at 2 that 'the forms of action we have buried, but they still rule us from their graves'.

conduct has been improper in relation to the transaction which forms the basis of the plaintiff's cause of action against the defendant.[7]

This view of what metaphor is about has not been demonstrated to be wrong, but it has been shown to provide an inadequate account of a broader and considerably more significant role of metaphor. Metaphor, on this newer view, is a conceptual phenomenon which is fundamental to our ability as humans to access and grasp abstract subjects. A metaphor may do much more than 'phrase the thought'. It may structure the thought. It may even make the thought possible.[8] Modern scholarship has come in recent years to recognise that, '[o]ur ordinary conceptual system, in terms of which we both think and act, is fundamentally metaphorical in nature',[9] and that metaphor is an essential cognitive tool, not only in speaking and writing, but in thinking.

Interest has, in particular, moved from the analysis of overt or 'surface' metaphors (like the ghosts and chains above) in specific texts and, in particular, in the texts of poetry and literature, to the tracing of 'metaphor clusters' in ordinary speech and writing and in the ordinary, apparently literal writing of specific academic and professional disciplines. The following is the full paragraph surrounding the brief quotation with which this article began. The analysis under consideration in the paragraph is of the metaphor, 'argument is war,' a metaphor particularly widespread in legal texts of all kinds ('Your claims are *indefensible*. He *attacked every weak point* in my argument. I *demolished* … his argument. He *shot down* all of my arguments'):

> This is an example of what it means for a metaphorical concept, namely, ARGUMENT IS WAR to structure (at least in part) what we do and how we understand what we are doing when we argue. *The essence of metaphor is understanding and experiencing one kind of thing in terms of another*. It is not that arguments are a subspecies of war. Arguments and wars are different kinds of things — verbal discourse and armed conflict — and the actions performed are different kinds of actions. But ARGUMENT is partially structured, understood, performed and talked about in terms of WAR. The concept is metaphorically structured, the activity is metaphorically structured, and, consequently, the language is metaphorically structured … Moreover, this is the *ordinary* way of having an argument and talking about one. The normal way for us to talk about attacking a position is to use the words 'attack a position'. Our conventional ways of talking about arguments presuppose a metaphor we are hardly ever conscious of. The metaphor is not merely in the words we use — it is in our very concept of an argument … We talk about arguments that way because we conceive of them that way — and we act according to the way we conceive of things.[10]

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7 The 'clean hands' principle is usually cast as a maxim, 'he [sic] who comes into equity must come with clean hands' and is of ancient usage in courts of equitable jurisdiction. See Roderick Pitt Meagher, John Heydon & Mark Leemings, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (4th ed, 2002) at 98–102.

8 See Theodore Brown, *Making Truth: Metaphor In Science* (2003) at 33, 'To conceptualize such abstract domains of thought we relate them to more concrete concepts with which we have direct experience. We do this by mapping across domains, making connections between the elements of the more abstract conceptual domain and corresponding elements of the more concrete one'.

9 Lakoff & Johnson, *Metaphors We Live By*, above n1 at 3.

Metaphors are conceptual before they are linguistic and the metaphors which we use almost unconsciously in our speaking and writing may be the most controlling of all, because they can alter and form our conceptual system and influence our thinking about particular things in ways that we are not aware of.[11] And on that of which you are not aware, you will not reflect.[12]

The modern understanding of the role, the appropriateness and the relevance of metaphor in legal discourse reflects much of the above. Striking, novel, decorative, apt metaphors, like those of Lord Hoffman and Lord Atkin, above,[13] occur from time to time and are met with varying appreciation, success and citation, depending on how striking, novel, decorative and and they are. But there is also an abiding judicial wariness of such metaphors. A well-known expression of such resistance is found in the judgment of Cardozo J in *Berkey v 3d Ave Ry Co*: 'Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it'.[14] Gummow J in the High Court of Australia, has similarly fulminated against the use of metaphor in legal discourse as something that 'may obscure the underlying principles that are in issue'[15] and is 'apt to obscure rather than illuminate'.[16]

Both of these denunciations of the use of metaphor do themselves whether consciously or not employ metaphor, and in a legal judgment, to make their point: Cardozo J mobilises striking images of slavery and liberation, and Gummow J uses, in both instances, a metaphor of light and darkness.[17] The point here is not to demonstrate anomaly or hypocrisy on the part of these eminent judges, but rather to emphasise the prevalence, the ubiquity, the potency, the 'embeddedness' of

10 Id at 4–5. Lakoff and Johnson are cognitive scientists and linguists who are widely acknowledged to be the founders of modern metaphor theory.

11 George Lakoff & Mark Turner, *More Than Cool Reason: A Field Guide To Poetic Metaphor* (1989) at 62, 'The things most alive in our conceptual system are those things that we use constantly, unconsciously and automatically'.

12 Metaphors of this submerged type are often called 'conventional' metaphors, 'that is, metaphors that structure the ordinary conceptual system of our culture, which is reflected in our everyday language'. See Lakoff & Johnson, above n1 at 139. This view of metaphor is in significant contradistinction to the view that metaphors which occur frequently and attain widespread usage in fact lose their creative power and become useless. See Earl Mac Cormac, *A Cognitive Theory of Metaphor* (1985) at 6.

13 For another famous example of a successful legal metaphor, see the description of how the common law and equity relate: 'the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters', from Deni Browne, *Ashburner's Principles Of Equity* (2nd ed, 1933) at 18. Many, if not most, lawyers could substitute their own favourite examples of judicial or professorial metaphors here and list metaphors they use without thinking much about how to convey an idea efficiently to their colleagues (such as 'opening the flood-gates' or 'in a nutshell' or 'striking a balance' or '*res ipsa loquitur*').

14 *Berkey v 3d Ave Ry Co* 244 NY 84 (1926), 94.

15 *The Commonwealth of Australia v Yarmirr* (2001) 208 CLR 1 at 68 (Gleeson CJ, Gaudron, Gummow & Hayne JJ).

16 *Truth About Motorways v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 (hereafter '*Truth About Motorways*') at 625 (Gummow J). The difficulties in interpretation and application generated by the fox-hedgehog metaphor in *Designers Guild Ltd v Williams* do seem to bear out Gummow J's complaint. See above n3.

metaphor, even in the words of speakers who do not (at least apparently) wish to speak metaphorically and who do not perceive themselves to be speaking metaphorically.

Judicial strictures against the use of overt metaphors, like those of the ghosts clanking their chains, of foxes and hedgehogs, of equity's water not mingling with common law water, can and probably do have considerable effect. Such metaphors are therefore perhaps relatively rare, at least in comparison to other academic and professional disciplines. Those strictures and their effect cannot be such, however, as to abolish or even reduce the level of submerged or conventional metaphor in legal writing and speaking. How, for example, could lawyers and judges and legal academics and law students do without the 'argument as building' metaphor ('The *foundation* of her argument. He *built* his argument *up* slowly and carefully. The matter proceeded *on the footing* that.')[18] or the 'law as person' metaphor ('This statute *contemplates*. The *body* of case-law. The *conscience* of Equity. The *long arm* of the law. The cases do not *suggest* that … The defendant was, in the *eyes* of the law …')?[19] Metaphor, in short, is here in law and it is here to stay.

3. Metaphor in Intellectual Property Discourse

Considerable work has been done, particularly in the United States, in tracing some embedded metaphors and articulating the way that such metaphors function in various areas of law.[20] Apart from some well-aimed jibes at the manipulative use of terms such as 'pirate', however,[21] relatively little work has been done to isolate and analyse the use of metaphor in the discourse of intellectual property. I propose here to analyse three 'metaphor clusters' found, *passim*, in the writings of intellectual property, namely, the metaphor of the unauthorised user of intellectual property as a 'pirate' or 'parasite' or 'poacher', the metaphor of the author or inventor of an intellectual work as a 'farmer', and the metaphor of intellectual creations, which are not subject to the private ownership, as a 'common'.

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17 It is perhaps worth pointing out, however, that in the same year that Gummow J was admonishing the bench and the bar about the use of metaphor in legal discourse, in *Truth About Motorway* his Honour participated in a unanimous High Court judgment approving a passage containing the following excellent and enjoyable metaphors: 'Trademarks are often selected for their effervescent qualities, and then *injected into the stream of communication with the pressure of a firehose* by means of mass media campaigns. Where trademarks come to *carry so much communicative freight*, allowing the trademark holder to restrict their use implicates our collective interest in free and open communication'. See *Campomar Sociedad, Limitada v Nike International Limited* (2000) 202 CLR 45 at 67 (Gleeson CJ, Gaudron, Gummow, Kirby, Hayne & Callinan JJ), quoting Judge Kozinski, 'Trademarks Unplugged' (1993) 68 *NYULR* 960 at 973. [Emphasis added.]

18 An example of the building metaphor taken, perhaps, just too far may be seen in Justice Hugh Laddie, 'Copyright: Over-strength, Over-regulated, Over-rated' [1996] *EIPR* 253 at 253: 'The concept of owning matter created by the brain is perhaps *the most fundamental foundation* of copyright law'. [Emphasis added.]

19 More specific and extended examples of the 'law as person' metaphor can readily be found. To take a fairly random example, see Brad Sherman and Lionel Bently, *The Making Of Modern Intellectual Property Law* (1999) at 2, '… the law *working through* an on-going series of problems that it has *grappled with* for many years' or '… the law responded to these envisaged difficulties *by attempting to distance itself* from judgment' at 179. [Emphasis added.]

I wish to take 'academic notice' of the widespread existence of these metaphors in intellectual property discourse. The concept of 'academic notice' is of course a reference to (and a borrowing from) the concept of 'judicial notice', wherein a judge can take notice of the existence of certain common and well-known facts, without requiring empirical evidence or other 'proof' of those facts from one of the parties in the case. There are certainly some striking instances of very extensive metaphor use in specific intellectual property writing which can be tracked down, such as one author who, in an article about unfair competition and intellectual property rights, uses the phrase 'reaping without sowing' no fewer than thirteen times.[22] But I wish here to use, as a backdrop to the analysis, a general assumption of fairly widespread use of the metaphors, and make specific reference only to those instances about which I have something particular to say.

The first metaphor cluster draws upon some highly negative images of lawlessness, and violent, predatory behaviour (pirates, predators), exercised against helpless victims, or of a creature eating away at and undermining the health and well-being of innocent victims (parasites) or a thief who by stealth removes what is not his or hers from an innocent owner (poachers) or a person riding for free while others must pay (free-riders). These metaphors occur both by themselves and, frequently, together, compounding the negative effect of each metaphor:

> The world of pop music is in these times richly endowed and prosperous. It is not therefore surprising that it is much afflicted by *parasites*. Pop stars and the

20 See, for example, Robert Tsai**,** 'Fire, Metaphor and Constitutional Myth-Making' (2004) 93 *Geo LJ* 1, for the tracing of fire-based metaphors in free speech, First Amendment jurisprudence; Bernard Hibbitts, 'Making Sense of Metaphors: Visuality, Aurality and the Reconfiguration of American Legal Discourse' (1994) 16 *Cardozo LR* 229 for the analysis of a shift from vision-based to aural-based metaphors in legal writing; Steven Winter, 'The Metaphor of Standing and the Problem of Self-Governance' (1988) 40 *Stan LR* 1371; Jonathan Blavin & Glenn Cohen, 'Gore, Gibson, and Goldsmith: The Evolution of Internet Metaphors in Law and Commentary' (2002) 16 *Harv JL & Tech* 265; Clay Calvert, **'**Regulating Cyberspace: Metaphor, Rhetoric, Reality and the Framing of Legal Options' (1998) 20 *Hastings Comm Ent LJ* 541 for an analysis of the 'information superhighway' and 'cyberspace' metaphors for the Internet; Adam Arms, 'Metaphor, Women and Law' (1999) 10 *Hastings Women's LJ* 257; and Elizabeth Thornburg, 'Metaphors Matter: How Images of Battle, Sports and Sex Shape the Adversary System' (1995) 10 *Wis Women's LJ* 225 for an analysis of how the metaphors of battle, sport and sex dominate legal speech, especially in litigation-related discourse, and play a role in the subordination of women.

21 In Laddie, above n18 at 259, the author points out that the term 'pirate' is the 'usual pejorative expression for infringers' and at 256 raised the question of why exemplary damages can be awarded against a person who has infringed copyright, but not against someone who has breached a contract or committed an act of trespass: 'Indeed, a person who conspires to steal a consignment of computers will not be amenable to exemplary damages — but flagrantly to copy one of the operation manuals is quite another matter. The copyist of the manual is a pirate, after all, whereas the thief is only a thief'. See also, Deazley, above n3 at 134 for some acerbic remarks, such as 'it is time to wrest the farmer from the frame' in respect of the use by the House of Lords, in intellectual property cases, of the agrarian metaphor of farmers and fruits of labour and reaping and sowing.

22 Sam Ricketson, '"Reaping Without Sowing": Unfair Competition and Intellectual Property Rights in Anglo-Australian Law' (1984) *UNSWLJ* 1.

> recording companies who are their sponsors and exploiters naturally wish to rid themselves of *poachers who prey* upon what they properly regard as their *preserve* … The question that arises on this appeal is whether the law has adequately provided for the protection of that preserve from the activities of *predators*, who in the pop music scene, are described as *pirates* when they make and sell copies of discs or tapes in breach of copyright and as *bootleggers* when they make an unauthorised direct recording of a live performance for the purpose of reproducing it for sale to the public.[23]

Although the term 'pirate' certainly conjures up connotations of utter lawlessness,[24] it should be noted that in fact the use of the term in intellectual property discourse is not limited to instances of unlawful copying by the pirate. While the trope would still arguably be excessive in relation to the act to which it refers, if that act were restricted to illegal copying, it could at least be defended as an image of lawlessness designed to point to an act of lawlessness. But the word 'pirate' is in fact used much more widely than that in standard intellectual property discourse and it extends to instances where, despite the actions of the 'pirate' not being against the law, it is contrary to what the writer thinks ought to be the law, or contrary to the writer's view of what the 'natural rights' of the intellectual property owner in question are. So, for example, in a leading Australian intellectual property textbook, a section of the book is devoted to a discussion of how a local business can legally claim and be granted proprietorship of a trade mark which some other business has used overseas but not in Australia. The section, which describes entirely lawful (and, on a policy basis, highly defensible) commercial conduct, is headed 'Registrability of "*Pirated*" Marks'.[25]

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23 *Ex parte Island Records Ltd* [1978] 3 All ER 824 at 831 (Shaw LJ). This is admittedly a rather extreme example, but the terms 'pirate' and 'parasite' are often found in close contact with each other. See, for example, Frederick Mostert, 'The Parasitic Use of the Commercial Magnetism of a Trade Mark on Non-Competing Goods' (1986) 8 *EIPR* 342 at 342: 'The *parasitic* use of a trade mark on non-competing goods is an increasing phenomenon in the modern commercial world. It is usually a well-known trade mark such as "Tiffany", "Rolls-Royce" or "Coca-Cola", which an unauthorised user will *pirate* as a commercial magnet for his [sic] goods. His [sic] aim is to exploit the commercial magnetism, selling power and advertising value embodied in a particular trade mark in favour of his [sic] own goods'. [Emphasis added.] See also Marie-Christine Piatti, 'Measures To Combat International Piracy' (1989) 11 *EIPR* 239 at 240: 'So long as *parasitic activity* is confined to traditional counterfeiting … the existing law is adequate to deal with it in a way which is on the whole satisfactory. But the activities of the "*pirates*" [sic] with regard to trade marks are now becoming more difficult to deal with by their nature and more dangerous by their extent'. [Emphasis added.]

24 It may be that there are other, entirely different, associations with the terms 'pirate' and 'piracy'. An anonymous reviewer of this article wrote that in his/her opinion, 'the dominant cultural associations of "pirate" are now more Captain Pugwash, the hapless pirates of the Asterix stories and the cartoon villains of the "Pirates of The Caribbean" than they are the pirates of the history books'. This perception or interpretation of the piracy metaphor as a fairly benign reference seems unlikely to be very widespread because if it were so, copyright owners would hardly be making the sort of extensive use of the piracy metaphor that they do in their efforts to persuade the public and the law-makers of the seriousness of the offence being committed against them by copyright infringers. See, for a recent example, the 'PIRACY. IT'S A CRIME' short film, currently being shown before all new release, feature-length films in cinemas in NSW.

The negative associations of lawlessness and violence that are associated with the pirate-predator-parasite metaphor lend legitimacy and even urgency to another set of metaphors, namely, the metaphors of battle, or the armed and righteous aggressive action to be taken against the 'pirates':

> The phenomenon of *piracy*, particularly where trade marks are concerned, has reached intolerable proportions, but it will grow even further if the specific measures just described are not implemented without delay. The action being taken at international level should not encourage firms to relax their *guard*; on the contrary, even if the victims of *piracy* can no longer be expected to deal with it on their own, the only hope of an instant solution lies in *mobilising* the private sector. The knowledge and skills they have acquired in their daily *struggle* against counterfeiting represent an invaluable *fighting fund*. Then again, companies from all sectors of industry and commerce have formed themselves into associations at international level with the sole objective of making life difficult for the counterfeiters *on all fronts*.[26]

Intellectual property is invariably described in legal discourse as being 'protected' by copyright or 'protected' by a patent and the warming, human language of 'protection' becomes a particularly potent rhetorical device in the service of intellectual property owners and producers. Instances where intellectual or aesthetic effort has resulted in a work which is not covered by one of the existing intellectual property regimes are referred to as instances of 'gaps in protection', with an accompanying sense of unfortunate and unintended weakness in intellectual property's protective shield.[27] Action and language which by ordinary civil liability standards (think breach of contract or breach of fiduciary duty) might be viewed as excessive seem less so when they are cast by metaphor as protective measures taken against dangerous and sinister forces. When a university student is subjected to a criminal trial and threatened with a prison term for engaging in peer-to-peer file sharing of his or her music files, it may help the record companies who own the copyright in the musical works being shared to construct, through the language, a picture of the student as a 'pirate' and a 'parasite' and of the copyright as 'protecting' the musical work. It is almost certainly more helpful in building public support for such controversial actions than it would be for the record companies to point out that the damage sustained by them as a result of such

25 Jill McKeough, Andrew Stewart & Phil Griffith, *Intellectual Property In Australia* (3rd ed, 2004) at 510. Similarly on the same legal issue, see Trevor Stevens, 'Trade Mark Ownership and Sharp Business Practice' (2004) 17 *ALPB* 4 at 7: 'With the increase in business being conducted via the internet, it is submitted that the prospects for foreign traders to thwart the theft of foreign trade marks by *local trade mark pirates* should be enhanced'. [Emphasis added.] It is important to note that these 'pirates' are actually just traders within Australia who are attempting to register trade marks here which may indeed be 'owned' in jurisdictions overseas but which have no property status whatever in Australia. The terminology of 'theft' and 'piracy' here is, on the argument presented in this paper, not just purely rhetorical, but illegitimate.

26 See Piatti, above n23 at 245. [Emphasis added.]

27 See, for example, the description of the (arguably, highly desirable) legal fact that scenes and spectacles as such are not covered by copyright or copyright enforcement remedies as a 'gap in protection' in Andrew Christie, 'Simplifying Australian Copyright Law: the Why and the How' (2000) 11 *AIPJ* 40 at 43–44.

conduct is the depreciation in value of their choses in action in amounts equal to the potential royalties forgone. The latter may be the real language of the law, but that language does not have, at least to a non-lawyer, anything like the persuasive power of the former.

Another cluster of metaphors in widespread use in intellectual property discourse is one that is even more highly integrated than the pirate-predator-parasite cluster. These are the bucolic metaphors, the set of images forming an extended metaphor system and evoking a rural past of hard earthy labour and comparing that labour to the work of the modern inventor or author and the product of that labour, namely, crops or, more specifically, fruit with the book or the invention. The agrarian metaphor goes back a long way in intellectual property law. In one of the very earliest copyright judgments, the 18th century case of *Millar v Taylor*, in a finding that there was a common law of copyright, it was held to be 'not agreeable to natural justice, that a person should *reap* the beneficial pecuniary *produce* of another man's work'.[28]

The extended metaphor goes like this: farmers (authors) work hard. By the sweat of their brows, they sow their seeds (say, write their books) and look forward to reaping what they have sown and to enjoying the fruits of their labour (obtaining royalties from the sale of the books). They fence off their land (by using the law of copyright) in order to keep out the thieves and poachers, but sometimes, the thieves come over the fence and steal that fruit (copy the books) and thereby reap what they have not sown (they make money from the book despite not having written it). The agrarian extended metaphor actually forms a kind of short story or parable, although any given legal text ordinarily utilises only one or perhaps two of the metaphoric elements of the story.

> This principle rests on the conviction that a person is entitled to the *fruits* of his [sic] own intellectual effort and that equity demands that he [sic] is entitled to *reap where he has sown*.[29]

Minor variations can refresh the metaphor and contribute further detail to the overall effect of the country scene, as for example, in Lord Bingham's addition of 'season' to the trope in *Designers Guild Ltd v Russell Williams (Textiles) Ltd*:

> The law of copyright rests on a very clear principle: that anyone who by his or her own skill and labour creates an original work of whatever character shall, for a limited period, enjoy an exclusive right to copy that work. No one else may *for a season reap* what the copyright owner has *sown*.[30]

The metaphor of 'sweat of the brow', which is closely associated with the 'fruits of labour' metaphor, was sufficiently extended and entrenched in American copyright jurisprudence so as to be the designation for a particular legal doctrine.[31] The 'sweat of the brow' doctrine, which consisted of the principle that a finding of

28 Note that the decision in *Millar v Taylor* (1769) 98 ER 201 at 218 (Mansfield J) was very shortly thereafter reversed in *Donaldson v Beckett* (1774) 98 ER 257, a case in which 'reaping and sowing' was not at all the focus of judicial attention. [Emphasis added.]

29 Mostert, above n23 at 346. [Emphasis added.]

originality in a copyright work did not require a finding of creativity or novelty, but a finding that sufficient skill, labour and effort had gone into its creation, was expressly rejected by the Supreme Court of the United States in *Feist Publications Inc v Rural Telephone Service Co.*[32]

The agrarian metaphor is in fact an important linguistic resource for the originality doctrine in copyright law, and two of the most significant cases in the history of that doctrine make use of the 'reaping and sowing' metaphor[33] and that of 'fruits of labour'.[34] Both of those cases contain overt unfair competition reasoning in their findings with respect to copyright law and since the tort of unfair competition is founded on factual situations in which the defendant has appropriated profit generated by someone else's effort and money, it is no coincidence that the 'reaping and sowing' metaphor is prominent in such cases.[35] The issue in these cases is whether the threshold requirement for a finding of 'originality' should be such as to allow it (and therefore uphold the copyright) to be found where a work displays little or no creativity, but is the result of significant effort (energy, skill, labour, money) having been put into it. If a person, by the

30 *Designers Guild v Williams*, above n2 at 701 (Lord Bingham) [Emphasis added]. The agrarian metaphor can become quite extended with several additional details of farming life. See Prime Minister's Science and Engineering Council, *The Role of Intellectual Property in Innovation: Vol 2: Perspectives* (1993) at 61, as quoted in McKeough at al, above n25 at 23: 'Without this barrier [of intellectual property law], innovation is like a *crop in an unfenced field*, free to be *grazed* by competitors who have made no contribution to its *cultivation*'. [Emphasis added]. See also various extensions of the piracy-predator metaphor, as, for example, '… counterfeiting and *piracy ravage* modern economy and society. Combating this criminal "*scourge*" surely makes a worthy policy goal…' Charles-Henry Massa & Alain Strowel, 'The Scope of the Proposed Intellectual Property Enforcement Directive: Torn Between the Desire to Harmonise Remedies and to Combat Piracy' [2004] 26 *EIPR* 244 at 244 [Emphasis added.]; Lawrence Lessig, *Free Culture* (2004) at 66, 'understand the harm of peer to peer [file-sharing] a bit more before we condemn it *to the gallows with the charge of piracy*' [emphasis added.] Note that attempts by the US Department of Justice to extradite individuals suspected of copyright 'piracy' take place under the codename 'Operation Buccaneer' as referred to in Matthew Rimmer, 'Hail To The Thief: A Tribute To Kazaa' (2005) 2 *U Ottawa L & Tech J* 173 at 180 [emphasis added], or see the US Department of Justice website: <http://www.cybercrime.gov/ob/obmain.htm>.

31 There are other instances in Anglo-Australian intellectual property law of a judicially-created metaphor being so successful and apt that it comes to be the actual designation of the doctrine or principle to which it refers. See, for example, the 'spring-board' doctrine in the law of breach of confidence, begun in *Terrapin Ltd v Builder's Supply Co (Hayes) Ltd* [1960] RPC 128 at 130 ('… a person who has obtained information in confidence is not allowed to use it *as a springboard* for activities detrimental to the person who made the confidential communication') or the principle of 'pith and marrow' in patent infringement: *Clark v Adie* (1877) 2 App Cas 315 at 320 (Lord Cairns).

32 499 US 340 (1991) (hereafter '*Feist Publications*').

33 *Walter v Lane* [1900] AC 539 at 552.

34 *Ladbrooke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 291 (Lord Devlin): 'Free trade does not require that one man should be allowed to appropriate without payment *the fruits of anothe's labour*, whether they are tangible or intangible'. [Emphasis added.]

35 See, for example, the statement in *International News Service v Associated Press* 248 US 215 (1918), the case which introduced the tort of unfair competition into American law, that the defendant was 'endeavouring to reap where it has not sown' and was 'appropriating to himself [sic] the harvest of those who have not sown' at 250.

sweat of his or her brow, produces, say, a telephone directory with the names in alphabetical order, and copyright 'protection' is denied to the directory, then another person can copy and disseminate the directory and thereby 'reap what they have not sown'.[36]

The agrarian metaphor is particularly prevalent in copyright law, but it also plays a role in the discourse of trade marks, in particular, in argument about the extension of trade mark law to cover situations in which the defendant's use of the plaintiff's mark is purely expressive (that is, it is a 'cultural use' not a trade use and it carries no risk of confusing the public about trade source). So, for example, when the United States Supreme Court denied the right to use the term 'Gay Olympics' for a sporting competition proposed by a gay rights association, it expressly adopted the emotive 'reaping and sowing' metaphor, possibly as a rhetorical counter to a sense that the term 'Olympics', with such a long and important history, ought to be something that belongs to anyone who wishes to use it:

> The mere fact that the SFAA claims an expressive, as opposed to a purely commercial purpose, does not give it a First Amendment right to appropriate to itself the *harvest of those who have sown*.[37]

Like all metaphors, this one can be resisted and used with vigour and effect against its proponents, (although the strategy does require that the metaphor first be recognised *as* a metaphor):

> "*Reaping without sowing*" declare those with a strong sense of the injustice. "But the *sower's seed* came from the *crops* of others before her", answer those who would preserve a sense of moral proportion in the matter.[38]

Similarly, the agrarian metaphor can be used, in a rhetorical turn-around, against trade mark owners in arguments that when a trade mark owner takes economic advantage of the extra cultural associations that can attend and benefit a famous trade mark, it is appropriating value which it has not created:

> One could argue that if the public creates meanings for Barbie in excess of the signifier's capacity to signal Mattel's toy, *they have done the sowing and thus they*

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36 In the United States, as a result of *Feist Publications* the 'sweat of the brow' doctrine and its requirement of a modicum of creativity to justify copyright was rejected and hence there is no copyright in a telephone directory. In Australia, as a result of the reasoning (exemplified in the 'reaping and sowing' metaphors) of originality cases like *Walter v Lane* [1900] AC 539 and *Ladbrooke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273, there is full copyright protection for telephone directories. See also *Desktop Marketing Systems Pty Ltd v Telstra Corporations Ltd* (2002) 192 ALR 433.

37 *San Francisco Arts & Athletics Inc v US Olympics Committee* 483 US 522 (1987) [Emphasis added.]

38 William Cornish, *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights* (4th ed, 1999) at 33 [Emphasis added.] See also Deazly, above n3 at 134, 'it is time perhaps to wrest the farmer from the frame'. The metaphor can also simply be met and used directly in rebuttal, as for example in Gerald Dalton, 'Copyright: Protecting Original Expression or the Efforts of Authors?: Review of the Approach of Originality by Australian Courts in Recent Cases' (2000) 11 *AIPJ* 129 at 131: 'It is worth remembering at this point that there is no general right to the fruits of one's labour under Anglo-Australian law'.

> *should do the reaping*; in short, authorship of such meanings should reside in the public sphere.[39]

The 'pirate-predator-parasite' and the 'agrarian' metaphor clusters are rhetorically beneficial for the producers and owners of intellectual property rights, damaging to unauthorised users of intellectual property and possibly damaging to the public interest, in that the metaphors seem to leave no rhetorical room for a public interest argument. But the latter two groups, unauthorised users and possibly the 'public', do themselves have a metaphor cluster, which they can and do use rhetorically in their own interest. That metaphor cluster is that of the 'common', an image of property, especially land, held in common by all and used by all for their own *and* for the common benefit. This is sometimes referred to in intellectual property discourse as the 'intellectual common', defined as 'a true commons comprising elements of intellectual property that are ineligible for private ownership'[40] and evoking benign communal images of peaceful sharing and cooperation, evocative of an earlier time of community and non-alienated labour.[41]

The 'commons' metaphor has become even more extended with the expansion of intellectual property rights being compared to the enclosure movements in which, over a period of some centuries, the commons were sold off into private ownership. The metaphor has in particular been deployed extensively in trade mark law, as judges have struggled with the problem of which words and devices should be allowed to pass into the exclusive control of particular traders, and which should remain available for all traders to have equal access. See, for example, *Kenman Kandy Australia Pty Ltd v Registrar of Trade Marks*:

> To allow registration, for confectionary, of the shape of a real or readily imagined animal would be to commence the process of "*fencing in the commons*" which would speedily impose serous restrictions on other traders.[42]

Wilcox J was in that case continuing a long metaphorical tradition in the law governing trade mark registration opposing such registration on the basis that use of the word or sign in question would upon registration pass into the exclusive

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39 Rosemary Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (1998) at 67 [Emphasis added.]

40 Jessica Litman, 'The Public Domain' (1990) 39 *Emory LJ* 965 at 975. See also Patricia Loughlan, 'Protecting Culturally Significant Uses of Trade Marks (Without a First Amendment)' (2000) 22 *EIPR* 328 at 328; David Bollier, 'Why We Must Talk About the Information Commons' (2004) 96 *LLibJ* 267; Peter Drahos & John Braithwaite, *Information Feudalism: Who Owns The Knowledge Economy?* (2002) at 2, referring to the global transfer of 'knowledge assets from the *intellectual commons* into private hands'. [Emphasis added.]

41 An analysis of the recent attempt by the owner of the registered trade mark, 'McDonalds', to prevent the registration of the marks 'MacTea, MacNoodles and MacChocolate' in *McDonald's Corp v Future Enterprises Pte Ltd* [2005] 1 SLR 177 was described as the attempt to remove 'the relatively common prefix … from large swathes of the *commons of commerce*'. [Emphasis added.] See David Llewelyn and Susanna Leong, 'Trade Mark Dilution in Singapore: The Aftermath of McDonald's v MacTea' (2005) 16 *AIPJ* 138 at 150.

42 *Kenman Kandy Australia Pty Ltd v Registrar of Trade Marks* (2001) 52 *IPR* 137 at 145 (Wilcox J) [Emphasis added.]

control of the trade mark owner. An early and much-cited instance of the use of the metaphor in trade mark law is found in *Re Joseph Crosfield & Sons Ltd*:

> Wealthy traders are habitually eager to enclose part of the *great common* of the English language and to exclude the general public of the present day and of the future from access to *the enclosure*.[43]

The image of a collective resource, functioning for the benefit of all, being privatised evokes pictures of peasants with their children being forced out of their farming villages and cast into the pits of the city (the 'satanic mills').[44] It is a most effective metaphor for its purposes and it shares the flaws of the agrarian metaphor that is used on the other rhetorical side.

The fact that metaphor draws attention to some aspects of similarity between two subjects while obscuring other aspects of the experience or concept has been noted, both in judicial growls about the potentially misleading nature of metaphor[45] and in modern metaphor theory itself:

> The very systematicity that allows us to comprehend one aspect of a concept in terms of another (eg, comprehending an aspect of arguing in terms of battle) will necessarily hide other aspects of the concept. In allowing us to focus on one aspect of a concept (eg, the battling aspects of arguing), metaphorical concept can keep us from focusing on other aspects of the concept that are inconsistent with metaphor. For example, in the midst of a heated argument, when we are intent on attacking our opponent's position and defending our own, we may lose sight of the cooperative aspects of arguing. Someone who is arguing with you can be viewed as giving you his [sic] time, a valuable commodity, in an effort at mutual understanding. But when we are preoccupied with the battle aspects, we often lose sight of the cooperative aspects.[46]

The agrarian metaphor in intellectual property discourse highlights only the individual nature of creation and the interest that a labourer has in the product of his or her labour. As does the pirate-predator-parasite metaphor, it helps to create a conceptual model of copyright which disguises (or at least does not highlight) the inevitable contribution of predecessors and others in the field to the creation of any intellectual work, and to the common cultural heritage which makes any such work possible:

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43 *Re Joseph Crosfield & Sons Ltd* [1910] 1 Ch 130 at 141 (Cozens-Hardy MR) [Emphasis added.]

44 See James Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain' (2003) 66 *Law & Contemp Prob* 33 at 37, and in particular, his description of intellectual property rights as 'the *enclosure of the intangible commons* of the mind'. [Emphasis added.] See also Yochai Benkler, 'Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain' (1999) 74 *NYULR* 354. Benkler's title makes use of another intellectual property–related metaphor, from the dissenting judgment of Brandeis J in *International News Service v Associated Press* 248 US 215 (1918) that 'The general rule of law is, that the noblest of human productions — knowledge, truths ascertained, conceptions and ideas — become, after voluntary communication to others, *free as the air* to common use' at 250. [Emphasis added.]

45 See above nn 13–14.

46 Lakoff & Johnson, above n1 at 10.

> The whole of human development is derivative. We stand on the shoulders of the scientists, artists and craftsmen who preceded us. We borrow and develop what they have done; not necessarily as *parasites*, but simply as the next generation.[47]

Both the agrarian and the parasite metaphors, in effect, hide the public interest in accessing privately owned works and the effect of excessive copyright protection on the 'market-place of ideas', to borrow a highly successful metaphor from the jurisprudence of free speech.[48] There simply is no room in the picture for that interest or that effect.

The same outcome of an illuminating similarity attained at the price of an accompanying distortion to the concept which is the subject of the metaphor can also be seen in the 'surface' or 'novel' metaphors which occasionally frequent the pages of intellectual property judgments and journals. One legal commentator, for example, in arguing against the granting of patents for naturally occurring gene sequences on the basis that the claimant isolated, discovered and refined the sequence, asks rhetorically, 'How many people would think that the rock they pick up in the park becomes an invention of theirs after they have washed and polished it?'[49] The metaphor is vivid, striking and memorable, and it is doing what metaphor should do, namely, increasing the accessibility of a highly abstract concept by reference to a common and concrete experience which brings out structural or inherent similarities between the two. But the metaphor is partial. There is much that it leaves out. Picking up, washing and polishing a rock is an entirely simple and cost-free activity; the sequencing of a gene is not. In terms of cost and level of expertise required, the two experiences are highly asymmetric, but the metaphor obscures that asymmetry entirely.

4. Conclusion

The premise of this article has been that in law, and, specifically, in intellectual property law, metaphor matters and metaphor clusters may have significance beyond what could be apparent from any individual use in a judgment or in an article of one of the metaphors under consideration. The existence and prevalence of the 'pirate-predator-parasite' metaphors and the agrarian 'reaping and sowing' and 'fruits of labour' metaphors, even in apparently neutral, non-partisan legal writings like judgments and textbooks, merit some analysis.[50] The former metaphors are highly charged with negative associations of lawlessness, violence and disease and the latter is equally highly charged with positive, even Biblical,

47 Laddie, above n18 at 259 [Emphasis added.]

48 See *Abrahams v United States* 250 US 616 (1919), at 630: 'When men have realized that time has upset many fighting faiths, they may come to believe … that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can be safely carried out'.

49 Peter Drahos, 'Biotechnology Patents, Market and Morality' [1999] *EIPR* 441 at 443.

50 The focus of the analysis here has not been on the 'intellectual commons' metaphor simply because its advent is much more recent and its usage is, so far at least, almost exclusively restricted to academic articles and not very many of those.

associations of hard work and deserved reward.[51] Both of those sets of prevalent metaphors favour those who own intellectual property rights and not those who use products covered by intellectual property rights without the authorisation of the owner.

Metaphor functions within a language of moral and political persuasion in helping to portray where the 'right' lies. It has been said that metaphor can take us to 'the silent territory just outside what has hitherto been said',[52] and that is indeed one source of metaphor's power to enchant and to persuade. But metaphor in legal discourse can also help to lock us into the internal logic of an image or set of images, structure our thinking in a way that may weaken or distort our rational decision-making capacities.[53] The effect of the 'piracy' metaphor in setting the agenda and the normative framework for interpreting the issues in international trade treaty negotiations over copyright and patent rights has been noted, '[t]he piracy metaphor effectively changed a policy debate into an absolutist moral drama. Theft is simply wrong'.[54] It may be more difficult to make fair and rational decisions about appropriate levels of intellectual property protection if the decision-maker is hearing, reading and participating in a discourse in which unauthorised users of intellectual property are put into a category which includes the malarial amoeba and the intestinal tapeworm. The picture of the farmer losing the fruits of his or her labour strongly stirs the moral imagination, but it may do so by distracting and even stupefying the intellect.

51 The language of 'reaping and sowing' is indeed Biblical, a link which builds upon two thousand years of understanding in Western culture and which compounds the positive associations of the terms for the intellectual property owners whom they benefit. See Holy Bible (King James Version), *Old Testament*, Hosea VIII 7 'For they have sown the wind and they shall reap the whirlwind'; Holy Bible (King James Version), *New Testament*, Galatians VI 7 'Be not deceived; God is not mocked: for whatsoever a man soweth, that shall he also reap' and so is the 'fruits of a man's labour' metaphor. See also Holy Bible (King James Version), *New Testament*, Timothy II 2 'The husbandman that laboureth must be first partaker of the fruits'. The extended metaphor of the farmer sowing seeds is itself the basis of parable in the Bible. See Holy Bible (King James Version), *New Testament*, Mark IV 3–4 'Hearken; Behold, there went out a sower to sow: And it came to pass, as he sowed, some fell by the way side…'.

52 Paul Komesaroff, 'Uses and Misuses of Ambiguity' (2005) 35 *Intern Med J* 632 at 632.

53 It is the wrecking of that internal logic of images that makes the mixed metaphor a weak rhetorical device and one long scorned by literary critics. For a recent, rather extreme, example, see the description in *Twentieth Century Fox Film Corp v South Australia Brewing Co* (1996) 66 FCR 451 at 467 (Tamberlin J) of the defendant's action of marketing its product under the name 'Duff Beer'. The defendant was said by Tamberlin J to be attempting '*to "sail as close as possible to the wind"* in order *to "cash in"* on the reputation of "The Simpsons" without *stepping over the line* of passing off or deceit'. [Emphasis added.]

54 Robert Weissman, 'A Long, Strange TRIPS: The Pharmaceutical Industry Drive to Harmonize Global Intellectual Property Rules, and the Remaining WTO Legal Alternatives Available to Third World Countries' (1996) 17 *U Pa J Int'l Econ L* 1069 at 1088. See also Susan Sell & Aseem Prakash, 'Using Ideas Strategically: The Contest Between Business and NGO Networks in Intellectual Property Rights' (2004) 48 *Int Studies Q* 143.