Why teachers should avoid the ‘P’ word: Notes on the property paradigm

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Notice


INADEQUATE
WARNING
I think you may have just entered MY
PRIVATE PROPERTY
I'M NOT SURE ABOUT THIS
BUT I DO HAVE ENOUGH MONEY TO
GO TO COURT AND
FIND OUT
DO YOU?

Note

- Small firms, startups and entrepreneurs represent a significant part of the future economy, particularly for smaller countries.
- Serious problem in the cost of chasing highly dubious pieces of ‘property’.
- Facing corporate legal teams on issues of trademarks, trading names, copyright.
- Adding to their costs without any real feeling of reducing their risks
- Therefore underlying this discussion, there is a strong desire that future entrepreneurs should be properly compensated for their efforts.

The property paradigm

- The ‘property’ paradigm offers a comfortable, definitive (and misleading) sense of ownership of information
- The property paradigm is relatively recent one, but even if it were ancient, the longevity of an idea is no guarantee of its truth
- We must not ‘take refuge in the false security of consensus’ (Hitchens 2006)
- The property paradigm has been challenged.
- What is commonly called intellectual property might be better called ‘intellectual monopoly’ (Boldrin and Levine 2001).

History

- The original intention behind the laws seems to be to encourage invention and creativity as a benefit to society
- The original intention acknowledges a market failure: that creative effort in information (as opposed to goods) is undervalued by the market.
- Since the cost of producing further copies of the information is negligible so market forces will not compensate the original development work.
- The inventor or writer is difficult to compensate
- Solving this problem by applying a property paradigm to information newly discovered or newly arranged only creates different problems

Property paradigm as a black box

- Latour: “When a machine runs efficiently, when a matter of fact is settled, one need focus only on its inputs and outputs and not on its internal complexity.”
- Black boxes can conceal complexity
- The property paradigm is neat
- not knowing if they are composed of one or many, of a black box counting for one or of a labyrinth concealing multitudes…” (Pandoras Hope, Latour, 1999, p. 192-93)

The badly made joints are visible

- William Cornish, *Intellectual Property* (4th, 5th and 6th editions) feels the need to explain this terminology
- **Industrial property** used ‘in the common law world, but many would hold this to exclude copyright’.
- **Intellectual Property** ‘scarcely describes trade marks and similar marketing devices’ but it has now acquired international acceptance’.
  - (As in the UN organ WIPO and in TRIPS)
- International acceptance is no guarantee of validity

Cornish 4th to 6th editions

- 4th edition ‘But then, at its most serious, this is a branch of the law which protects some of the finer manifestations of human achievement’
- With the benefit of a further ten years of looking at the accumulating rubbish in the media and on the high street, the 6th edition says
- ‘While this is a branch of the law which protects some of the finer manifestations of human achievement, it also shields much that is trivial or ephemeral.’

The badly made joints are visible

- “What is IP crime?
  Counterfeiters illegally use other people's **trade marks**, whereas **piracy** relates to the illegal use of **copyright** material.”
  - from http://www.ipo.gov.uk/crime.htm
- But **patent infringement** is not, apparently, a crime.
- The three major elements, Patents, Copyright and Trademarks are roped together in a rather awkward bundle.
- Indicative of an inherent pathology in the definition
- Duffy (2005) expresses the aspiration for ‘a unified theory of property—one diverse enough to account for the similarities and differences among species of property as diverse as Blackacre and patents’.
- Otherwise known as the Holy Grail

Selective paradigm application

- ‘the secret here is that property is not as absolute as it is often claimed to be. Anyone familiar with property doctrine knows this. Numerous doctrines such as adverse possession, eminent domain, easements, zoning, and the Rule Against Perpetuities bespeak the limits on absolute property rights...In this Article, I survey fifty doctrines of property law, distilling restrictions centered on development, necessity, and equity.’
- ‘These limits, however, did not survive the relocation to IP.’ (Carrier 2004)

‘international acceptance’

- Early appearances of the use of ‘property’ are difficult to verify.
- US Constitution: ‘To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries’.
- ‘Industrial Property’ appears, along with the growth of large corporations and international trade, with the Paris Convention 1883 (though copyrights are not included)
- Uses of “intellectual property” proliferate following the founding of the World “Intellectual Property” Organization in 1967
- Usage of ‘IP’ rapidly grows from 1980s onward
- April 2007, The Patent Office, UK becomes the Intellectual Property Office

‘international acceptance’

- Instances of the term ‘intellectual property’ in US federal court opinions

1944 to 1954	1954 to 1964	1964 to 1974	1974 to 1984	1984 to 1994	1994 to 2004
9	12	20	140	743	3,211

- as a % of the total no. of cases where ‘IP’ was in fact the subject matter

1944 to 1954	1954 to 1964	1964 to 1974	1974 to 1984	1984 to 1994	1994 to 2004
0.3%	0.3%	0.4%	3.2%	13%	38%

- ‘The propertization of IP is in fact unfortunate. But it also appears to be irreversible. It sinks its tentacles further into public and corporate consciousness (as well as the IP laws) with each passing day, making it unlikely that the country will return to the prepropertization era.’ (Carrier 2004)

Information not property

- “An acre of land [here] and another in America [are] of the same natural intrinsic value” (Locke)
- “it is not barely the plough-man's pains, the reaper's and thresher's toil, and the baker's sweat, is to be counted into the bread we eat; the labour of those who broke the oxen, who digged and wrought the iron and stones, who felled and framed the timber employed about the plough, mill, oven, or any other utensils”
- Labour plus information
- The most valuable thing of all is the information embedded in those ‘utensils’
- To ‘the plough, mill, oven’ we can add mining, steel production, expertise in husbandry, crop rotation, fertilisers, pesticides, weather forecasting, combine harvesters, transport, steam engines etc etc etc.

Information develops property

- Locke’s land in the Indies can be improved to the same extent precisely because of the simultaneous use of the same piece of information.
- The piece of information is hardly discrete in the sense that the two pieces of land are
- Each piece of information is already the development from pieces of information that preceded it and is a stepping stone to pieces of information that will succeed it
- What the most recent inventor is doing is not merely earning compensation for their work, but asserting ownership of a long chain of ideas

Growth of innovation through information

- Kremer (1993) and others demonstrate that growth of innovation correlates with growth of population
- In cities many information flows are free - spillovers
- We depend on spillovers for progress, as improvers exist everywhere.
- Those who apply the property paradigm to information are seeking to increase their compensation through **total control**
- But if we apply the correct paradigm, what is controlled is a gateway or access point - one node on a network
- The full network of information ‘property’ owes something, but far from everything, to the most recent inventor or creator.

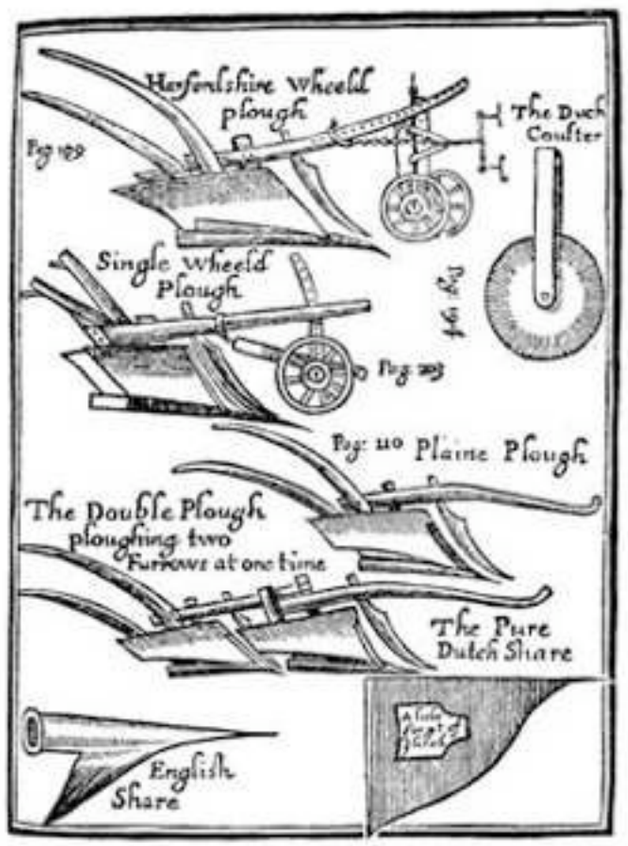
Changing paradigms

- The property paradigm v the network paradigm
- Any single invention is one node on an information network, of other ideas
- There is constant improvement, and each improver is a new inventor building on the work of all the previous ones

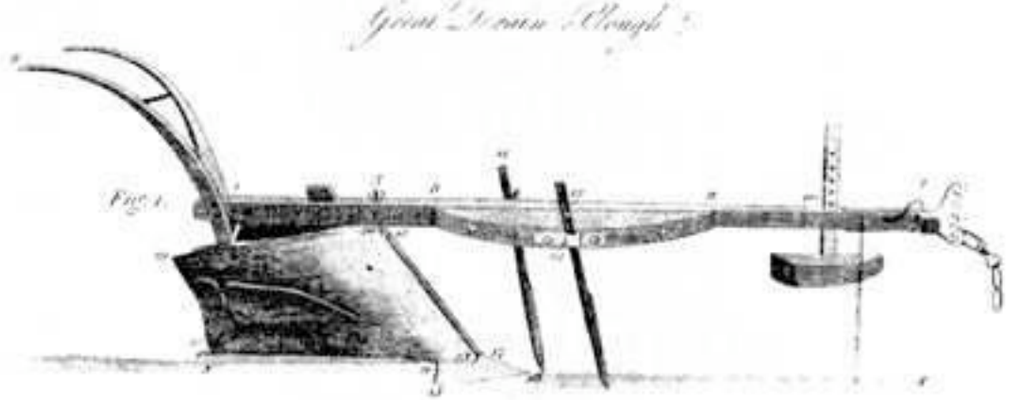




Fig. 18.—Ploughmen.—Fac-simile of a Miniature in a very ancient Anglo-Saxon Manuscript published by Shaw, with legend "God Spede ye Plough, and send us Korne enow."



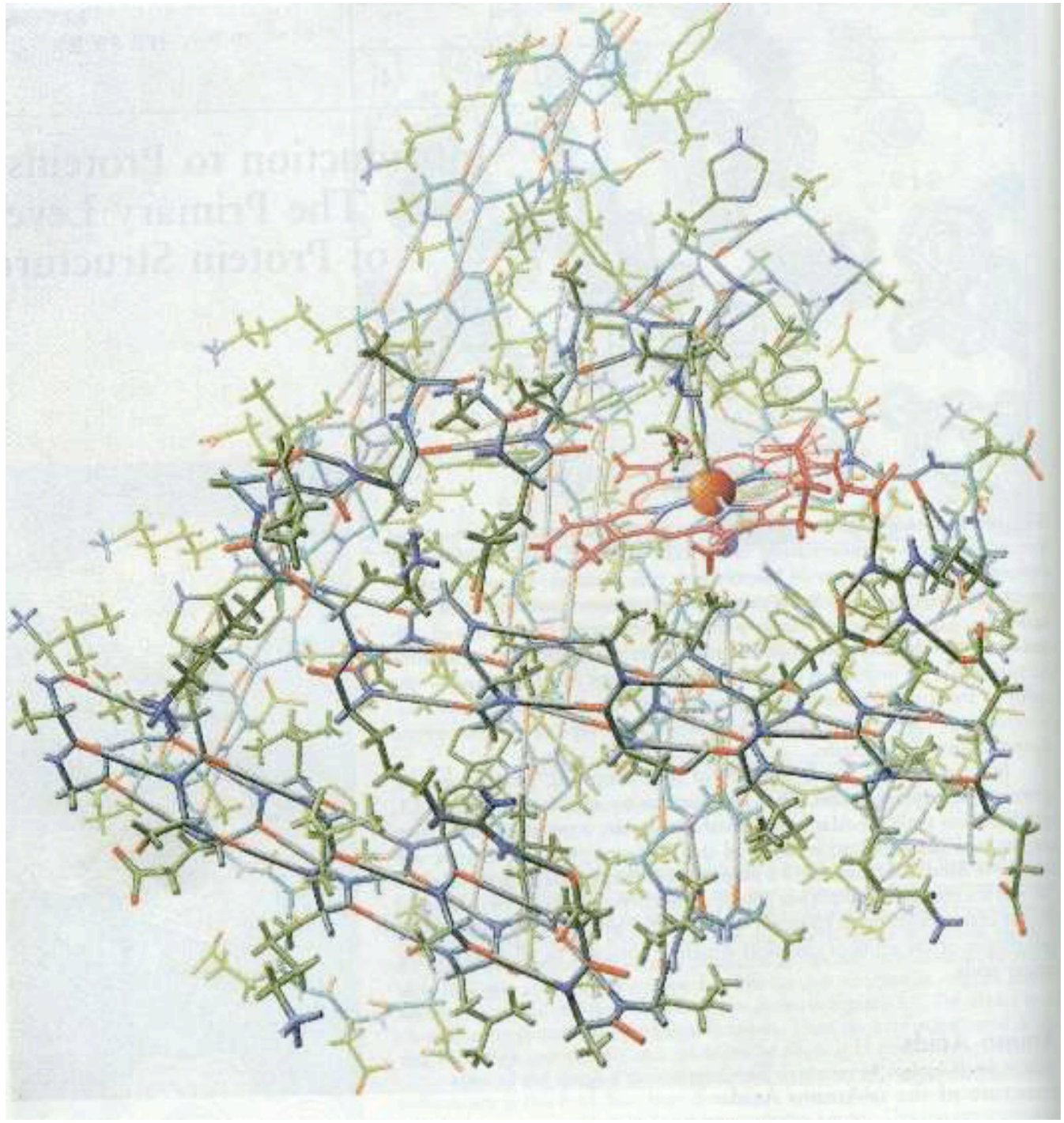
Seventeenth-century Ploughs. From Walter Blith, *English Improver Improved*, 3rd. ed., 1653.





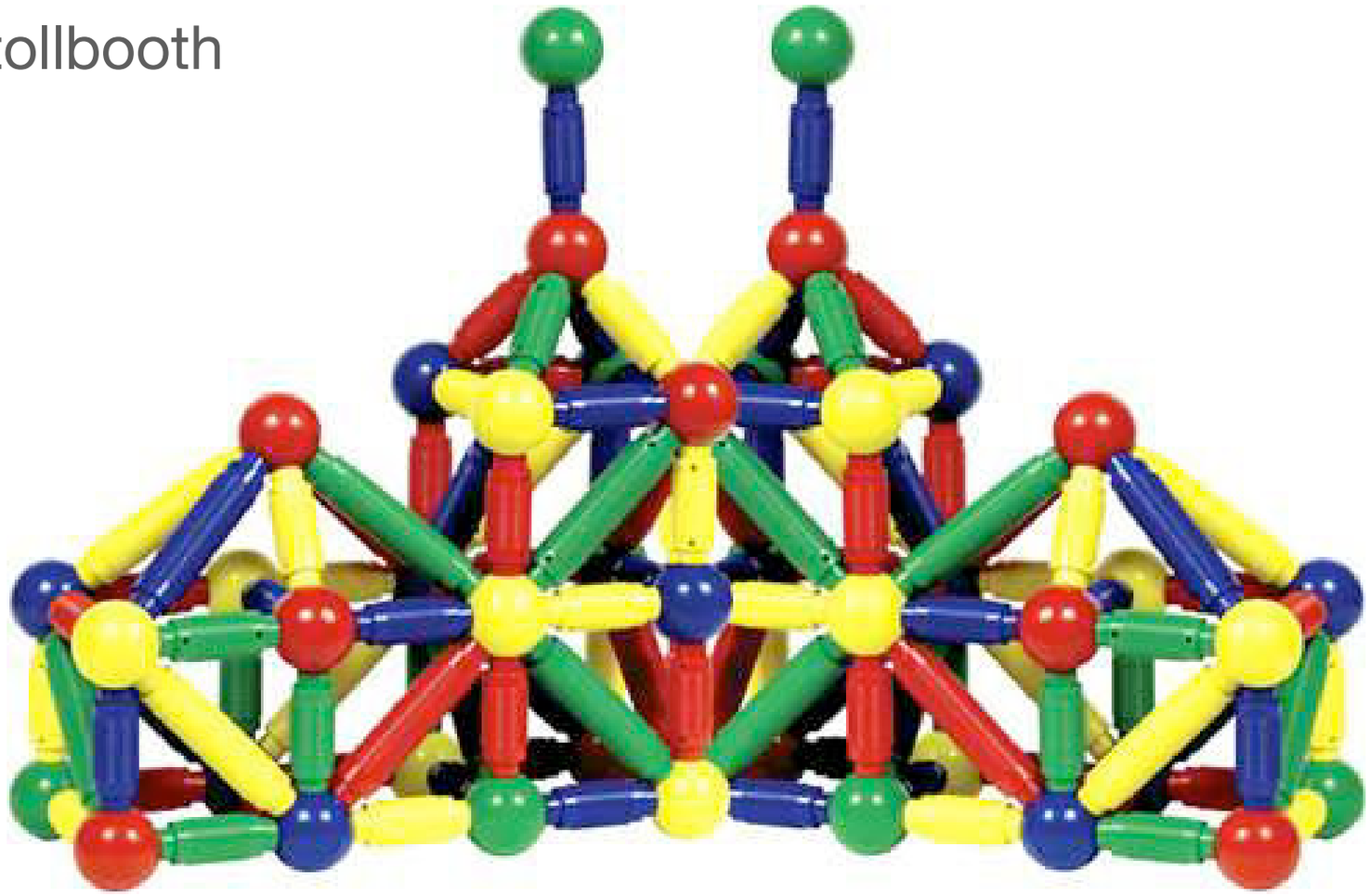
Visual Paradigm

- Each NODE on the information net represents one patent, or one creative endeavour.
- Bu the full network is really a massive effort of collaborative sharing that has been in train for thousands of years



The network paradigm

- Creativity is iterative, each idea building on the one before
- Applying a ‘property’ paradigm to the information network gives private ownership and total control over a **single node** on the network
- The best analogy for this is a tollbooth



The tollbooth analogy

- Tollbooth owners do not own the network
- Tollbooth owners need not create the network
- Analogy: private toll operator controlling a small (linking) section of a public road system
- We could easily characterise these as rent seekers



Property is a movable feast

- The objects of ownership can and do change over time.
- 1669: ‘Be it enacted and declared by this grand assembly, if any slave resist his master ... and by the extremity of the correction should chance to die, that his death shall not be accompted felony, but the master ... be acquit from molestation, since it cannot be presumed that prepensed malice ... should induce any man to destroy his owne estate.’
- Perhaps information is a form of ‘qualified property’ a la Bouvier (1856):
- ‘the right which men have over wild animals which they have reduced to their own possession, and which are kept subject to their power; as a deer, a buffalo, and the like, which are his own while he has possession of them, but as soon as his possession is lost, his property is gone’

Reasons for using term ‘intellectual property’

- It asserts ownership in a way nothing else can
- Refreshes the parts of the public consciousness other paradigms can’t reach
- It is better from a PR perspective
- Property is more up-market than labour (who likes having a sweaty brow?)
- Producers can more easily defend the value of property than the value of labour
- It is a small step to label copiers as *pirates* or *thieves*
- Producers can achieve over-compensation more easily
- Property avoids the negative connotations of ‘monopoly’ and potential anti-trust issues, particularly in the US

Reasons for using ‘intellectual property’

- It sounds much sexier at cocktail parties



Establishing the terminology of the debate

- “a few citizens with a lot to gain will fight, campaign and lobby much harder than millions of citizens with very little to lose”
- Example: the sugar industry in the US is protected by tariffs which advantage 50k workers and disadvantage 300m consumers to the tune of $6 each
- ‘Trade barriers...rob the majority, and favour a small pressure group...It takes effort to work out...It is counterintuitive to hear that exposing American jobs to foreign competition is good for ordinary Americans’ (Harford 2008)
- The soundbite value of ‘property’ is immensely important and sidesteps discussions about excessive compensation or rent seeking.

Establishing the terminology of the debate

- ‘The stakes in the battle over the music business are small enough to get lost in rounding error for world GDP of about $30 trillion.’
- ‘Existing firms will lobby vigorously to prevent a transfer from them to consumers, but economists should stand ready to explain that the policy goal should be to maximize consumer welfare, not such popular proxies as “exports” or “Industry revenues”.’ (Romer 2002)
- or, I might add, “real estate’.

Characteristics of property

- Property law exists to settle disputes about ownership where the use of the resource entails rivalrous, or potentially rivalrous, claims
- Overuse of a scarce resource has calamitous consequences (Hardin).
- The exact opposite is the case with information; the more simultaneous use we make of it the faster things improve (as with spillovers).
- Over-use of land may cause starvation.
- But with the information on how to bake five loaves and catch two fish we may feed a multitude.

Characteristics of property

- ‘A successful property system establishes clear, easily-determined rights.’ (Bessen and Meurer 2008)
- The notice problem:
- Inventors can hide claims (the boundary)
- Claims are very difficult to interpret
- The meaning of claim language can change over time
- Cost of searching (finding the boundaries) is high (particularly for small firms)
- The boundary can only be determined (incurring considerable expense) by a decision of the court. (Llewelyn 2004)
- Small firms are at a massive disadvantage

Incentive to invest - rent seeking behaviour

- ‘copyright law disproportionately inflates the revenues of the most popular creations, which leads publishers to spend increasing amounts on promotional campaigns, which...drowns out economically marginal creations.’
- ‘This discourages, rather than encourages, investment in many new creations.’ (Nadel 2004)
- ‘IP rights may...encourage rent-seeking via advertising and marketing efforts that dissipate some of the social value of the surplus.’
- ‘Private parties will spend up to the total value of the benefit seeking to capture it.’ (Lemley 2005)
- Cornish’s vision of the ‘trivial or ephemeral’.

Lobbying and interest groups

- New **authors** will not really benefit from extensions to copyright terms.
- Breyer's dissenting opinion in Eldred v Ashcroft points out that if an author expected to live 30 years after her book was published, extending that period by 20 years increased her income (and incentive to write) by 0.33%.
- Media companies will benefit

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