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In Search of the Story: *Narratives of Intellectual Property*

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ABSTRACT

Current intellectual property debates are advanced through distinctive and competing narratives. This article examines the leading narratives in the Western world, ranging from Lockean copyright and Kantian author's right, to economic theory and the Coase theorem, to the narrative of the elusive author. In doing so, it exposes commonalities and differences among the narratives, as well as a bewildering trend (for lawyers at least) away from the law as the underlying structure of ordering. Analyzing these narratives and their role as tools of persuasion—and ultimately as authority—the article highlights a fundamental flaw of non-author-centric narratives, suggesting that this flaw may explain the difficulty these narratives have faced in the legal discourse. The article concludes by suggesting that the foundations of the legal system would have to change for such narratives to become persuasive.

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I. INTRODUCTION

¶ 1 A fight is raging. Jack Valenti called it a "furious battle";[1] Lawrence Lessig termed it a "struggle"[2] and a "war."[3] How much protection should society afford to authors of creative works? This battle is over the heart and soul of an information society: to find the appropriate balance between protecting creative works and permitting them to be shared, enjoyed and exploited freely, even perhaps against the will and wish of their creators. Much is at stake. Intellectual property is traded on huge, transnational markets. Over five percent of GDP in North America and Europe is attributed to the "copyright industries," a whopping USD 430 billion annually in the United States alone.[4] For much of the last decade and a half, the growth rate of the intellectual property market has been about double the growth rate of the (quite healthy) general U.S. economy,[5] thereby increasing its share of the overall economic output.

¶ 2 On an average day, according to a UNESCO study, 548 million newspapers are printed and sold globally.[6] And a recent SIMS-Berkeley study estimates that every year

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1. *See Privacy & Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry: Hearing Before the Senate Committee on Homeland Security and Governmental Affairs,* 108th Cong. 17 (2003) (statement of Jack Valenti, President & CEO, Motion Picture Association) [hereinafter *Privacy & Piracy*].

2. *See* LAWRENCE LESSIG, FREE CULTURE 13 (2004).

3. *Id.* at 17.

4. International Federation of the Phonographic Industry (IFPI), *What is Copyright?*, http://www.ifpi.org/site-content/copyrightcreativity/what_is_copyright.html (last visited Nov. 8, 2005).

5. *See* Stephen Siwek, *Copyright Industries in the U.S. Economy: The 2004 Report*, *available at* http://www.iipa.com/pdf/2004_SIWEK_FULL.pdf (last visited Nov. 8, 2005).

6. Kamil Idris, World Intell. Prop. Org. (WIPO), *Intellectual Property: A Power Tool for Economic Growth*, WIPO Pub. 888 at 207 (2003), *available at* http://www.wipo.int/about-wipo/en/dgo/wipo_pub_888/index_wipo_pub_888.html.

about 950,000 unique new books are published,[7] together with 10.7 billion office documents[8] and 90,000 musical CDs.[9] Each year, approximately 4 billion books are sold worldwide, while in 1999 the average American consumed over 1500 hours of television, over a thousand hours of radio and another 250 hours of music on CDs, rounded out with 330 hours of reading books and magazines.[10] Overall, Americans consume more than three thousand hours of intellectual property annually, almost fifty percent more than the amount of hours they spend working.

¶ 3 For Jack Valenti, sharing these products of creative labor without permission constitutes stealing, thereby endangering the central source of economic growth not just in the United States but around the world. Striking the wrong balance, Valenti implies, will lead to the demise of a vibrant sector in our economy.[11] Not only is Hollywood at stake, he claims, but our economic future as well. Lawrence Lessig, rarely outdone in apocalyptic predictions, sees even more at issue. For him, permitting people to share creative works is a central tenet of a free society: giving rights holders too much power may threaten our very societal existence. Faced with a choice between Valenti's Scylla—the destruction of our economy—and Lessig's Carybdis—the end of our free society—we, to paraphrase Woody Allen, have to choose wisely.[12]

¶ 4 Both sides bolster their respective viewpoints with tightly woven narratives about the underpinnings of and reasons for the legal protection of creative works. There are, however, more than two sides to the story. Various alternative narratives of the system of "intellectual property protection"—this frequently used term in the English speaking world itself connoting a specific narrative—have been put forward. Our reasoning, our understanding, and our acceptance of the system of protecting creative works appear to be predicated upon the validity and persuasiveness of these narratives.

¶ 5 In the first part of this paper, I seek to analyze the debate about "intellectual property" through the lens of the main narratives put forward in support of the concept and to expose some of the linkages, junctures, and chasms between these narratives. More importantly perhaps, by examining the protection of creative works through the associated narratives, I hope to unearth some of the implicit assumptions and connotations they contain. "Space," Rohan Samarajiva once said, "is no neutral container"; neither are stories.

¶ 6 In the second part I analyze the role of authority in the narratives of the protection of creative works, and how the connected societal mechanism of imbuing narratives with authority puts a certain kind of narrative of creative works at a [relative] disadvantage. In

7. PETER LYMAN & HAL R. VARIAN, UC BERKELEY, SCHOOL OF INFORMATION MANAGEMENT AND SYSTEMS (SIMS), HOW MUCH INFORMATION? 17 (2003), http://www.sims.berkeley.edu:8000/research/projects/how-much-info-2003/printable_report.pdf (last visited Nov. 8, 2005).
8. *Id.* at 18.
9. *Id.* at 67.
10. *Id.* at 53 (citing U.S. CENSUS BUREAU, U.S. STATISTICAL ABSTRACT 580 tbl.920 (1999)).
11. *Privacy & Piracy, supra* note 1 (statement of Jack Valenti).
12. *See* WOODY ALLEN, SIDE EFFECTS 57 (1980) ("More than any other time in history, mankind faces a crossroads. One path leads to despair and utter hopelessness. The other, to total extinction. Let us pray we have the wisdom to choose correctly.").

concluding, I examine what hurdle would have to be overcome to create a more inclusive mechanism.

II. NARRATIVES OF THE PROTECTION OF CREATIVE WORKS

¶ 7 In the following section, I put forward several major narratives surrounding the explanation, elucidation, and grounding of the protection of creative works. To be sure, these are neither all the available narratives, nor even the only important ones. They are themselves thick, content-rich stories, woven together of different strands, reflecting "intellectual property's" structural complexity.

A. The Utilitarian Copyright

¶ 8 In 1690 John Locke published his "Two Treatises of Civil Government."[13] In it he posited that in the beginning "earth and all inferior creatures" are common to everybody. But every individual who mixes what nature has provided with his own labor creates something new, and thus makes this his property. If Locke's labor theory of property is applicable to physical goods—so the argument goes—it is even more applicable to informational goods: creative works—which, for lack of duplication technologies, were at the time limited largely to the written word—represent perhaps the purest form of an individual's labor. Moreover, a few years before publishing his "Two Treatises," Locke had drafted a memorandum to parliament urging for the abolition of the old publishers' privileges and their replacement with what seemed like a more author-centric copyright.[14] Consequently, and not surprisingly, John Locke became copyright's *über-father*.

¶ 9 Expanding on Lockean influence, copyright was seen not just as an extension of his labor theory of property, but also as one of his more general ideas of utilitarianism. Copyright, it has been said over and over again, is necessary to incentivize authors, to induce them to continue their creation for the advancement of society. The world's first copyright law, the Statute of Queen Anne in 1709[15] was hailed as the embodiment of Locke's argument, as it gave authors an exclusive right to their creations for the duration of fourteen years (with the chance for a one-time extension of another fourteen years if the author was still alive).

¶ 10 This utilitarian strand of intellectual property is also evident in the premier post-Lockean large-scale codification project of the English-speaking world: the American Constitution. Early in the drafting process Madison, Jefferson's man, included a provision that empowered the federal government to institute a legal framework for the

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13. JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).
14. John Locke, *Memorandum*, *in* THE LIFE OF JOHN LOCKE 202–09 (Peter King ed., 1884).
15. Statute of Anne, 8 Ann., c.19 (1709) (Eng.) ("An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned.").

protection of intellectual property.[16] Furthermore, the U.S. Federal Copyright Act was one of the first laws passed by the U.S. Congress.[17]

¶ 11 Patent laws promulgated in most industrializing nations during the nineteenth century, too, were seen in utilitarian terms, as a necessary requirement to keep inventors innovating, while ensuring diffusion of their inventions throughout society.

¶ 12 At least in the English speaking world, Locke's labor theory of property and the utilitarian emphasis of intellectual property protection are visible in all of the IP laws enacted over the last two hundred years. It is the story that the laws reflect, the courts invoke, and the leading intellectual property scholars in the U.S. and in Europe tell when they talk about the Anglo-American model of copyright in particular, and intellectual property protection in general. Few of them, however, recognize that entangled in that story are fundamental notions about one's conceptions of such rights.

¶ 13 Locke's creational moment (or what has been made of it) is less one of genius and creativity, and more one of hard work, investment of time, effort, and money. Who then, one is prompted to ask, needs the biggest economic incentive—the creator, who produced the actual work, or the publisher, who invested early in the creator's endeavors? Moreover, linking copyright with Locke's theory of property writ large implies that creative works are similar to physical goods. Both can be owned, both can be "propertized." Thus, authors, for example, can sell their copyrights like any other property right, and the new owner of such rights is—at least legally—like its creator. In fact, the term intellectual *property* itself implies that intellectual creations are just another, albeit slightly special, form of property, of goods that can (and should) be owned, for the utilitarian aim of economic advancement.

¶ 14 Moreover, as recent studies have shown, the Lockean connection is questionable. Bettig[18] argues that it is doubtful Locke had creative works in mind when advancing his labor theory in his Two Treatises. And his memorandum in favor of author's rights that others use as evidence of a deliberate Lockean conception of intellectual property is, according to Bettig as well as Rose,[19] likely an argument *against* publishers' privileges and (perhaps) crown censorship. At least historically, the linkage to Locke's labor theory of property is fragile at best.

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16. Madison argued in the Federalist papers that "states cannot separately make effectual provisions" of intellectual property protection. *See* THE FEDERALIST NO. 43 (James Madison). Madison's activities to get a respective clause included in the U.S. Constitution is chronicled in BRUCE W. BUGBEE, THE GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 125–27 (1967). *See also* RONALD V. BETTIG, COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY 26–28 (1996); U.S. CONST. art. I., §8, cl.8 ("The Congress shall have power . . . 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.")

17. Passed May 31, 1790. *See* EDWARD W. PLOMAN & L. CLARK HAMILTON, COPYRIGHT: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 16 (1980).

18. *See* BETTIG, *supra* note 16, at 20–21.

19. *See* MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 32–33 (1993).

B. The Kantian Author's Right

¶ 15 What Locke is to the Anglo-American experts, Kant is to the continental Europeans. In his essay "On the Illegitimacy of Print Piracy" ("Von der Unrechtmäßigkeit des Büchernachdrucks"), Kant asserts the presence of a direct link between the author and the reader of the author's work. [20] Through the author's book, the author speaks directly to the reader. The ability to do so is thus the author's inalienable right. The author therefore does not have a (property) right over the book, but instead a right to connect with the reader through the work. Fichte built on this idea by differentiating between three forms of existence—(1) the ideas in the book, which are free and cannot be "owned" at all, (2) the intellectual instantiation of the idea, over which the author maintains a form of control, and (3) the individual copies of the book which can be owned as simple property. [21] This is the foundation on which Bluntschli built his concept of a largely personal author's right in 1844,[22] later extended by Kohler to include economic rights. [23] Continental European copyright theory (and practice) subsequently bifurcated on the question—for our context less important—of whether personal and economic dimensions create two related but separate rights ("dualism") or two aspects of the same unitary right ("monism").

¶ 16 Unlike patent law, which in continental Europe follows the Anglo-American lead of investment protection, laws guaranteeing authors' rights, as well as authors' rights theory, are largely phrased in terms of a *personal right* with economic implications. The charged term "property" is mostly avoided (and only resurfaced in the 20th century as a literal translation from the English term of "intellectual property"). In its place, most continental European laws speak about authors or creators' rights. And at first blush, counter to any Lockean utilitarianism on the continent, authors' rights are protected irrespective of the potential economic or societal utility of their creation.

¶ 17 Again, conceiving of rights in such terms is not neutral, but value-laden. A personalized author's right, for example, is immutably linked with the author. Hence, it cannot be simply traded as property. To this day, continental European authors' rights are inalienable and nontransferable. Use of intellectual creation thus has to be largely organized through contractual permission, not transfer of property. The personal dimension of authors' rights implies that authors retain some right-based control over how their works may be used and by whom.

¶ 18 The Kantian conception of creators' rights, hence, differs substantially from the Lockean one and provides another layer of the complex history and structure of our

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20. IMMANUEL KANT, VON DER UNRECHTMÄßIGKEIT DES BÜCHERNACHDRUCKS 137 (UFITA 106 reprint 1987) (1785).

21. Johann Gottlieb Fichte, *Beweis der Unrechtmäßigkeit des Büchernachdrucks*, BERLINER MONATSSCHRIFT 443 (1793).

22. *See* MANFRED REHBINDER, URHEBERRECHT 25 (9th ed. 1996).

23. JOSEF KOHLER, URHEBERRECHT AN SCHRIFTWERKEN UND VERLAGSRECHT 15 (1907).

current intellectual property regimes.[24]

¶ 19 Yet, and similar to the connection with Locke, the conception of intellectual property as an emanation (and societal recognition) of creativity may both overplay the Kantian link and provide—at least historically—an overly simplistic view of the continental European landscape. European legislators and theorists followed the Anglo-American development with great interest, and thought the ideas not too dissimilar from their British counterparts. "Revisionists" have recently argued that the differences between the Lockean and Kantian approach in practice are minimal, [25] and point to the fact that both camps have been able to agree to numerous treaties harmonizing intellectual property laws internationally.[26]

C. The Public Choice Dimension of Intellectual Property Rights

¶ 20 Like archeologists, we have uncovered the prominent Lockean layer of conceptualizing intellectual property. Digging further revealed another layer, distinct from and—at least to an extent—contradictory to the Lockean premises. Both layers make up what can be termed the orthodox views of intellectual property—these are the roots of the Anglo-American and continental European theories.

¶ 21 Recently Jessica Litman has persuasively juxtaposed these two views with a third, vastly different view of the history and structure of intellectual property laws.[27] For her, it is less about grand theories and underlying philosophies of utilitarianism, innovation, creativity or personhood, and more about a vivid lesson of public choice theory. To Litman, the history of intellectual property laws is but a reflection of the power of vested interests, mostly of rights holders.

¶ 22 Public choice theory suggests that actors in the political arena behave similar to participants in a market.[28] They tend to maximize their individual profits. Politicians will act to get reelected, and citizens will attempt to influence policy makers to legislate their way. Such an influence will be strongest, and more successful, the theory posits, the better a particular interest is organized, and the less organized the opposition is. Comparatively obscure issues will cause less of a public interest, and will permit highly focused stakeholders to shape the legislative outcomes.

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24. *See* JULIA ELLINS, COPYRIGHT LAW, URHEBERRECHT UND IHRE HARMONISIERUNG IN DER EUROPÄISCHEN GEMEINSCHAFT (1997) (for a comprehensive study of the differences between the Lockean copyright and the Kantian author's right).

25. *See, e.g.*, Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063 (2003) (arguing for the centrality of "authorship" in both the copyright and the author's rights system); Michael B. Gunlicks, *A Balance of Interests: The Concordance of Copyright Law and Moral Rights in the Worldwide Economy*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 601, 669 (2001) (suggesting that "no compelling reason exists to continue the controversy over moral rights and to resist a greater consensus between the European and American copyright systems").

26. *See* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1896; World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996; Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), Apr. 15, 1994.

27. JESSICA LITMAN, DIGITAL COPYRIGHT (2001).

28. *See generally* DENNIS C. MUELLER, PUBLIC CHOICE (1979).

¶ 23 Litman contends that this is exactly what has been happening in the area of intellectual property laws in the United States for at least the last thirty years. The interests of the rights holders, mostly the publishing industry, the music industry and what is colloquially called "Hollywood," have been bundled in very well-financed trade associations. These trade associations have, over many years, organized their lobbying efforts and fine-tuned their political donation practices and access strategies. Assessing decades of intellectual property legislation, Litman concludes that rights holders have been able to continuously strengthen and widen the scope and substance of their rights. And Lessig notes that while the duration for copyright has been extended only once in the first one hundred years of its existence, and once in the following fifty years, it has been extended eleven (!) times in the past forty years, mostly at the behest of rights holders.[29] Disney, for example, has repeatedly been able to persuade Congress to extend the duration of copyright, sometimes just weeks before Mickey Mouse would have become public domain.[30]

¶ 24 According to Litman, the only (and few) stoppages to continuous intellectual property extension were provided by (a) the Supreme Court and (b) issue-specific lobbying by powerful rights *users*, like the American Library Association (ALA). As Congress subsequently undid most of the loosening of intellectual property protection afforded by the courts, lobbying by rights users' interest groups offered the only credible and powerful counterbalance in this political game. But libraries and similar user-side stakeholders focus on a few specific issues. Consequently, rights holders not only command the terrain, they regularly meet with their user-side counterparts and negotiate draft statutes directly. In a well-orchestrated *fait accompli*, legislators are then routinely presented with a final text, which—unsurprisingly given the lack of public interest—gets enacted with little debate and even less modification.

¶ 25 For Litman, intellectual property laws, at least in the U.S., are not based on any foundational theory, or grounded in sound logic. The laws are results of informal, secretive negotiations among a limited number of stakeholders. If she is right, then there is nothing more to understand about intellectual property as an institution, nothing to conceptualize and nothing to uncover. Not just the use of the term "property," but also all the other myriad facets of the existing intellectual property setup, are just results of a stakeholder dominated political process. Instead of Locke and Kant, we find intellectual property laws as legislative outcomes of a public choice dynamic when a small, well-organized and well-financed group of stakeholders faces the unorganized, uneducated and diffuse public interest.

D. The Economic View of Information as Lighthouses

¶ 26 While public choice theory is applied economics of political decision-making, information economists generally suggest a very different foundation for intellectual

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29. *See* LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 107 (2001).

30. *Id.*

property rights.[31] For them, intellectual property rights must be construed as exclusive, monopolistic rights by sheer necessity.

¶ 27 Their starting point is fairly simple. Property rights of physical goods are mostly exclusive. Understanding and enforcing such rights is frequently akin to maintaining control over one's goods. Excluding or fencing out others from one's property is comparatively easy. The object to be protected is clearly defined. Behavior, signs, fences and the like provide ample signals for others to recognize. Violators are generally easily detected and enforcement is comparatively straightforward.

¶ 28 Intellectual property is different. It consists of information, and as such, is non-rivalrous and often (but not necessarily) non-exclusive. Economists sometimes liken it to a lighthouse. The signal of the lighthouse can be seen by any ship regardless of whether that particular ship contributes to the upkeep of the lighthouse or not, and regardless of how many other ships may also be looking at it. In economic terms, like the signal of a lighthouse, information is often seen as a public good, difficult to maintain control over once it has been passed on to others, and hard to "fence in." Once the author of a book has given one copy of the book to a reader, the book is outside of his or her immediate and direct control. The author then depends on the appropriate behavior of the reader to maintain some sense of control over his or her work.

¶ 29 Intellectual property, economists suggest, must be supported by stringent legal rules, preferably of an exclusive and monopolistic nature; otherwise it will likely end up as a public good. To be sure, an information market approach is not the only imaginable reward structure for creativity. One could imagine a system of patronage, or one of a creativity tax. Either alternative, however, as economists remind us, is straddled with severe (and perhaps insurmountable) allocation problems.

¶ 30 In other words, if society wants to reward creators by ensuring they retain some right to trade their creations on information markets, then from an economic point of view, exclusive, monopolistic property rights are the only available option.

E. The Coase Theorem and Lessig's Dystopia

¶ 31 The next narrative stems from a critique of the lighthouse-inspired property economics I have just discussed. The critique first agrees that individual rights of ownership are important but only as a precondition for ensuing market transactions. The emphasis of a legal framework for intellectual property must not be placed on the static notion of property—it is just a necessary requirement—but on the dynamic nature of market transactions.[32]

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31. *See* Ejan Mackaay, *An Economic View of Information Law*, *in* INFORMATION LAW TOWARDS THE 21ST CENTURY 43 (Wilhelm F. Korthales Altes et al. eds., 1992); *see also* CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES (1998) (discussing an economic perspective of intellectual property rights).

32. *See* Viktor Mayer-Schönberger, *E-Commerce, Entrepreneurship, and the Law: Reassessing a Relationship*, *in* THE EMERGENCE OF ENTREPRENEURSHIP AND PUBLIC POLICY 195 (David M. Hart ed., 2003); Viktor Mayer-Schönberger, *Information Law Amid Bigger, Better Markets*, *in* GOVERNANCE AMID BIGGER, BETTER MARKETS 266 (John D. Donahue & John S. Nye, Jr. eds., 2001).

¶ 32 Ronald Coase, more than forty years ago, postulated his second theorem, according to which an individual right of ownership tends to end up with the person that can make the greatest use of it, given—and this is the important part—negligible transaction costs.[33] His Nobel Prize winning theorem is one of the foundations of law and economics theory, assigning to law the role of ensuring that transaction costs are kept at a minimum. In effect, it can be argued (as I have)[34] that one of law's central roles in the market economy is to lower transaction costs and keep them at least lower than the costs incurred by somebody who appropriates another's right without a proper transaction. In other words, law must ensure that buying is considerably cheaper than stealing. Otherwise markets will, as Coase has shown, not be efficient institutions for the allocation of (informational) goods.

¶ 33 Unfortunately, this is a central problem for intellectual property. Until recently, copying somebody else's intellectual property was tedious, costly, and entailed a noticeable loss in quality. But modern technology, especially digital technology, has made it not only easy and cheap to copy, it also has practically eradicated the notion of original and copy. A digital file of a book manuscript can be copied—the result is two identical files. What is the original, and what is the copy? Almost all music today is digitized, more digital cameras are sold worldwide than traditional ones, and digital movie distribution—DVD—is overtaking videocassette sales. In these instances the copy is as perfect as the original—in fact it *is* the original. Moreover, unlike traditional media, the Internet is fundamentally a many-to-many network, in which every receiver can act as a sender and vice versa. This creates an easily accessible, global (and quasi-costless) infrastructure for the dissemination and distribution of digitized information.

¶ 34 As the technological and economic incentives to buy intellectual property have eroded, unauthorized copying of somebody else's creations has become cheaper. By the same token, attempting to transact legally has become relatively pricier as the information markets are transformed from national, high value, low volume to global, low value, high volume. Take a simple picture found on the Internet. To use it in a book, one has to identify the rights holder, contact him or her, and then negotiate a transaction to use the picture. Frequently these transaction costs are prohibitively high—and substantially higher than just using the picture without asking. Chances are that the rights holder will not notice anyway.

¶ 35 Napster, Gnutella, eMule, BitTorrent, and all of the other latest peer-to-peer tools to share files among users, are only the consequence of the problem. Even without them, the change in transaction costs has shifted users' behavior. For instance, by April 2002, sales of blank CDs exceeded those of recorded music.[35]

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33. *See* Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

34. *See* Viktor Mayer-Schönberger, *Recht am Ende?*, *in* FREIHEIT – SICHERHEIT – RECHT: FESTSCHRIFT GEORG WEISSMANN 537 (Österreichische Notariatskammer ed., 2003).

35. *See* LYMAN & VARIAN, *supra* note 7; International Federation of the Phonographic Industry (IFPI), *One in Three Music Discs is Illegal but Fight Back Starts to Show Results* (June 23, 2005), http://www.ifpi.org/site-content/press/20050623.html (estimating that in 2004, 1.2 billion pirated music CDs were sold—thirty-four percent of all CDs worldwide).

¶ 36 Information economists focusing on the study of transaction costs suggest that to rescue intellectual property rights one must increase the cost of illegal copying. The U.S. Digital Millennium Copyright Act[36] and the European Union Directive on Copyright[37] already explicitly prohibit the circumvention of technical copy-protection schemes. That, however, is hardly sufficient. When a programmer published a small piece of software on the Internet that broke the technological lock of DVDs (digital video discs) and permitted any user to make perfect copies, the programmer—who was imprudent enough to identify himself—was charged with a felony. But within twenty-four hours of its publication, the software tool had been downloaded over 30 million times around the world.[38] The genie was out of the bottle.

¶ 37 Rights holders and technology companies alike have most frequently suggested a technological solution to this problem: to create a global information infrastructure—from networks to computers to software—that makes it easy and cheap to transact legally, and difficult and costly to copy without permission.[39] The European Union has spent more than Euro 100 million to develop such a digital rights management (DRM) system, and bills have been introduced in Congress that would make it illegal for hardware companies to sell products that do not incorporate such a digital rights management scheme.

¶ 38 If we were to believe in this international movement of rebalancing transaction costs through digital rights management systems, intellectual property would shift from a legal to a largely technological institution. Intellectual property, then, is everything that the global digital rights management *system* protects. Irrespective of the potentially insurmountable practical hurdles to implementing such a *system,* the advantages of a technological solution are appealing: unlike national intellectual property laws, it would be global in reach. Enforcement would be simple and straightforward—built into the technology—and information markets would be efficient again. As a result, intellectual property as a *legal* institution would largely vanish, supplanted by technological structures.

¶ 39 For many, this thought is intuitively troubling. A vocal number of intellectual property experts, however, argue that this is nothing new: creators only became concerned about their ownership rights once technology permitted cheap and easy copying (and creations thus became tradable). Furthermore, it was not the law but rather the technology introduced by rights holders that reset the balance by incorporating technological bottlenecks capable of limiting illegal usage.

¶ 40 Similar to the model of information economics described above, this conception

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36. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in 17 U.S.C. §§ 101, 104, 114, 512, 1201–1204).

37. 2001 O.J. (L 167) 10.

38. *See* DeCSS Central – CSS and DeCSS, http://www.lemuria.org/DeCSS/decss.html (last visited Nov. 8, 2005); *see also* LITMAN, supra note 27, at 152–53; LESSIG, FUTURE OF IDEAS, *supra* note 29, at 187–90.

39. *See generally* DAVID BRIN, THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM? (1999).

of intellectual property foregoes any grand theory or historical foundation. It needs neither a notion of "property" nor a societal institution to guarantee it. According to this conception, intellectual property is whatever the privately ordered global information system defines and protects. Laws—the legal and political system—play at best a minor supporting role, as a reflection of a technological *Weltgeist*. Lawrence Lessig has persuasively described the strong lure of technological solutions and elaborated on the (mostly negative) consequences of pervasive software and hardware systems taking over rule-making and enforcement; these include a lack of transparency, accountability, procedural fairness and democratic oversight.[40] Nevertheless, intellectual property as an artifact of a (technological) system maintains a strong currency in our Internet world.

F. The Curse of Monopolistic Rights of Ownership

¶ 41 A further narrative, too, is grounded in economic theory. The previous sections looked at the economic nature of information, examining the resulting consequences for its institutional protection, and also at the relative difficulty or ease of managing economic transactions of information, relegating legal institutions to a minor position in a largely technological conception of intellectual property. The center of attention now moves from individual rights and transactions to the macroeconomic level. What, political economists ask, is actually happening to intellectual property markets?

¶ 42 Bettig has perhaps written the most elegant study on this subject.[41] He contends that our current conceptions of intellectual property—Kantian and Lockean—evoke either the rhetoric of the creative genius that society justly rewards, or the utility of incentivizing the creatively enterprising individual. Yet, in practice, intellectual property markets are extremely concentrated. The six "majors" control over 96 percent of the market in cinemas and over 80 percent of the market for videos. Microsoft's market share for operating systems is well over 90 percent, and its market share for leading office applications is even higher. With the mergers of CNN, Time-Warner and America Online to form AOL/Time-Warner, the mergers of Vivendi and Seagram, and the aggressive acquisitions of Bertelsmann and Rupert Murdoch, the world of media is witnessing an accelerating drive toward consolidation and concentration.

¶ 43 It seems that the very concept of intellectual property—exclusive, monopolistic rights—inherently creates strong incentives for market concentration. Unlike the view that intellectual property laws are just reflections of technological possibilities, this notion envisions intellectual property as ultimately suicidal—corrupting and then destroying the very incentive and reward structure for individual creativity that it set out to build.

¶ 44 "We realize," a high-level bureaucrat from the European Commission told me, "that after doing what seemed natural—fortifying and bolstering intellectual property

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40. LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999).
41. *See* BETTIG, *supra* note 16.

rights upstream—we are facing severe antitrust and competition issues downstream."[42] He still holds out some hope that competition law can tame this monopolistic dynamic. His is a system-conformant variation: the problem created by the legal institution of intellectual property is real, yet the legal system through competition law stands to provide a suitable remedy. In other words, intellectual property's suicidal tendency can be cured by the anti-depressant of antitrust regulation.

¶ 45 If history is any indication, he may be in for quite a surprise. Queen Anne's copyright statute in 1709[43] is generally described to be the consequence of Lockean thinking. A closer look reveals a different, less altruistic and much more pragmatic reason. In the decades prior to its passage, the leading printers' guilds in England had turned into oligopolies, not only stifling the market for new books, but—more importantly for Anne—creating a new powerful political player to reckon with. The Copyright Act of 1709 was her attempt to break the oligopoly by taking the publishers' copyright and giving it to the authors—a much less organized group. At the core, the new law was intended to expropriate the rights holders and to diminish their political and economic power. In this very real sense, it was perhaps the first antitrust law for the media sector. Yet despite Anne's hopes, giving authors the rights to their creations did not eradicate the concentration tendency of information markets—it did quite the contrary.

¶ 46 Bettig has suggested that this tendency is inherent in information markets. To him, this is a problem of markets and market structures that cannot be solved. It is embedded in the genetic code of the capitalist system. For him the very conception of intellectual *property* will lead to information monopolies. Furthermore, due to the qualities of information which assist in market concentration, society's means to slow that process, for example with antitrust and competition laws, are even less useful for information markets than for markets of physical goods.

¶ 47 Bettig's critical theory approach to intellectual property law is perhaps less extreme than it may sound. Over the past several decades, legal experts have repeatedly examined specific information markets and concluded that intellectual property rights are not necessary for their functioning, and may even hinder and hamper market efficiency.[44] Bettig adds a further layer of a possible understanding of intellectual property: it is possible that intellectual property is neither the outcome of a grand theory, nor a reflection of particular technologies. Instead, it may be a necessary institution to enable a capitalist system to extend itself to lucrative information markets, while at the same time overlooking the genetic defect that causes that institution to plant the seed for its own ultimate destruction.

¶ 48 Lessig, in his second book,[45] advances a somewhat related storyline. He, too,

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42. Statement at the 2002 Rueschlikon Conference on Information Policy, July 11–13, 2002 to the author. *See* http://www.rueschlikon-conference.org.

43. *See* Statute of Anne, *supra* note 15.

44. *See, e.g.*, Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970) (discussing the book industry).

45. *See* LESSIG, FUTURE OF IDEAS, *supra* note 29.

suggests that our information markets have become more and more concentrated. He does not, though, fault our capitalist system, but instead the creeping privatization of what he calls our "intellectual commons." Because the structures we use to communicate today are largely privately owned and virtual places are appropriated by private actors for economic gains, the areas for unfettered debate and sharing of ideas and creativity are rapidly reduced. His take is itself a bit of a remix of both Habermas' "Strukturwandel"[46] and the mantra of his first book, that the structures make the rules. He does, though, add a novel perspective: it is not just that the rights holders become more concentrated; the very structures we use to share information, too, become more concentrated and controlled. If this is an inherent tendency of the *system*—as Lessig at least at times seems to believe—then escaping it is even harder than resisting market monopolies. Thus, surprisingly, we find Lessig, the libertarian Chicago-groomed law and economics expert, in line with Bettig's Marxist view of intellectual property as a necessary but ultimately suicidal feature of our *system*.

G. The Elusive Author

¶ 49 So far we have uncovered a number of narratives, representing distinct, different and sometimes conflicting conceptions of intellectual property. Starting with the nature of the right and its foundational myths, we examined conceptions based on the qualities of information, ending at a conception of intellectual property as a component of the system at large—both economically and technologically. Yet, they all build on the idea that an author creates an intellectual product. It is now time to shift away both from the right—the abstract connection that links the creation with the creator—and from the creation itself to examine the creator.

¶ 50 Traditional conceptions of intellectual property conceive of the author as a singular individual, who creates her work *ex nihilo* and completes it before it is made available to society. This may be an awfully simplistic view. Umberto Eco reminds us as early as in the title of one of his books—*Lector in Fabula*—that the author is not the only source of the creativity that completes the work.[47] Readers have to envision the world that authors describe, and doing so produces a vital part of the final product. Thus one may suggest that giving authors, who have only contributed a part of the whole, the sole right of ownership is peculiar to say the least.

¶ 51 Literary theory has gone even further. For Stanley Fish, for example, a given work is open to innumerable interpretations; to him interpreting a piece of creative work is part of the creative act itself.[48] Interpretation is not an after-thought, an unavoidable by-product of the vagueness of language, but instead a constitutive component of creativity. Regardless of whether or not he and similar literary theorists are correct in

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46. JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (Thomas Burger trans., 1991).

47. *See* UMBERTO ECO, LECTOR IN FABULA: LA COOPERAZIONE INTERPRETATIVA NEI TESTI NARRATIVI (1979); *See also* UMBERTO ECO, THE LIMITS OF INTERPRETATION (1990).

48. *See* STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980); *see also* WOLFGANG ISER, THE ACT OF READING: A THEORY OF AESTHETIC RESPONSE (1980).

their assertions, it is clear that viewing the author as the sole creator of an intellectual work is a simplification that does not do justice to the creative act itself.

¶ 52 Moreover, creators are themselves recipients of intellectual products. They are consciously or unconsciously building on works of others. This is even truer today than in earlier centuries.

¶ 53 According to John Seely Brown and Paul Duguid, the younger generation of creators has already come to terms with this abundance of intellectual creation.[49] Instead of hoping for the singular moment of genius, they deliberately use and reuse parts of existing intellectual works as building blocks for their own. The resulting "bricolages" are creative combinations. But do we call their creators "authors"? For Seely Brown this exemplifies the foundational problem of a traditional (some may call it Western) conception of intellectual property. The envisioned unitary author is nowhere to be found, and perhaps does not even exist (anymore).[50] If that is the case, then the entire idea of linking a creative product to a specific singular creator—an author—is on shaky ground.

III. The Story Narratives Tell: Of Dogmas and Second-Order Loops

¶ 54 This article has presented seven narratives of the foundations of and reasons for the legal protection of creative works. It first looked at Locke and Kant, providing philosophical and historical foundations for the Anglo-American and continental European notions of "intellectual property," then moved to economic theory, first of private and public goods, then of transactions (and their costs), and finally to the macroeconomic world of competition and markets to map the (legal) institution of intellectual property. The results must bewilder lawyers. Is it still *law* that matters or is it in fact technology, the market, capitalism, or the system? The thicket of contradictions and the value-richness of the stories make it at the same time easy and hard to comprehend the continuing weight attached to "intellectual property." If nothing else, we might have thought that at least we understood the underlying idea: the author, as the sole, identifiable creator of her work, has some right to that work. Yet, even here, a narrative introduced us to the complex mesh of readers and earlier authors, of public ideas, and of common "bricolage."

¶ 55 While these are the prevalent narratives put forward in the intellectual property debates, they are by no means the only ones. Nor should it be surprising that the argument before the law is made in the form of more or less formalized narratives. Peter Brooks has summed it up nicely saying, "narrative is indeed omnipresent in the law."[51] However, unlike in other fields, stories in the legal domain are told for a very specific reason, not simply to persuade others, but to persuade the legal system, its parts, agents, and decision makers. "Storytelling in law," Paul Gewirtz writes, "is narrative within a

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49. John Seely Brown & Paul Duguid, The Social Life of Information (2000).

50. In the Lockean system, the situation is compounded by the fact that the IP owner very often is not the creator.

51. Peter Brooks, *The Law as Narrative and Rhetoric*, *in* Law's Stories: Narrative and Rhetoric in the Law 14, 16 (Peter Brooks & Paul Gewirtz eds., 1996).

culture of argument. Virtually everyone in the legal culture . . . is explicitly or implicitly making an argument and trying to persuade. Storytelling is, or is made to function as, argument."[52] Telling a narrative in law, therefore, is not an end itself; it is a means to achieve a clearly defined goal. Storytelling in law is a tool of persuasion. To be sure, it is not the only tool to persuade. Yet, perhaps unlike some other tools, narratives are deeply linked to how we as human beings grasp and understand the world around us. For humans a good narrative, a story well told, exudes unique persuasive power. No surprise then that not just lawyers, but the law itself, often relies on stories to communicate its substance. Or as Lawrence Lessig, citing Stan Fish, put it: "The law is best understood through stories."[53]

¶ 56 This entails that whatever the narrative is, it is being shaped by the purpose and goal of the argument it is facilitating and supporting. Parts of the narrative may be emphasized; others played down or omitted altogether to "make the case."[54] Moreover, employing a certain narrative always comes with the narrative's (intentional or unintentional) baggage. For example, in the case of intellectual property, the Kantian conception of authors' rights presupposes an indisputable author. The Lockean conception is based on a societal utility of creative activity; if there is little or no such utility for the advancement of society anymore, creative works may perhaps no longer be protected. Lessig's *Code* argument rests on an implicit belief in the power of technology to shape societal behavior.

¶ 57 Implicit, too, in the narratives presented in this article are not just differing conceptions of why creative works should be protected but also varying theories on the authoritative source of protection. The Lockean and Kantian approaches rest on history as authority, whether it is history reconceived through historical analysis, as Patterson,[55] Rose,[56] Rehbinder,[57] and Luf[58] attempt, or through the formalized history of positive law, for example, in the form of Article I, Section 8 of the U.S. Constitution.[59] Other narratives present economics, the market, technology, and the *system* as authoritative sources.

¶ 58 However, the stories represent not simply a struggle over interpreting facts and words, but a battle over the very foundations on which they rest. What makes the narratives of protecting creative works unique is the relationship between the substance of the narrative and its authoritative thrust. Every narrative "as argument" aims at

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52. Paul Gewirtz, *Narrative and Rhetoric in the Law*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 2, 5 (Peter Brooks & Paul Gewirtz eds., 1996).

53. LESSIG, CODE AND OTHER LAWS, *supra* note 40, at 9.

54. *See* Martha Minow, *Stories in Law*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 24, 31 (Peter Brooks & Paul Gewirtz eds., 1996) (calling this a "troubling shortcoming").

55. LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968).

56. ROSE, *supra* note 19.

57. REHBINDER, *supra* note 22.

58. Gerhard Luf, *Philosophische Strömungen und ihr Einfluss auf das Urheberrecht*, *in* WOHER KOMMT DAS URHEBERRECHT UND WOHIN GEHT ES? 14 (Robert Dittrich ed., 1988).

59. *See* U.S. CONST. art. I., §8, cl. 8 ("The Congress shall have power . . . 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.").

persuading that it be declared the authoritative one, either through the decision of a court or the vote of a legislature. Every such act of deciding, of singling out one narrative over others, imbues it with formal authoritative power. The narratives presented here aim to do just that: to persuade successfully and thus gain authoritative power.

¶ 59 The assignment of authoritative power, however, differs within the narratives. All but one of the narratives presented argue for an identifiable source of authoritative power for creative works: the author. At the same time, each story claims that it is the "right" approach, the appropriate solution, and worthy of being awarded formal authority as the accepted narrative. For example, there is disagreement between the Kantian and Lockean narratives as to who should hold the authority of creative works, but there is agreement that there can only be one accepted approach, only one winner. In contrast, the narrative of the elusive author suggests that authority over creative works is diffuse, as works are really just "bricolages" of intellectual input. This substantive view, however, undermines severely (perhaps even fatally!) its chances to become the accepted one and thus win authoritative power: how can a narrative successfully suggest that it is the "correct" one on the meta-level of argument, if it substantively preaches that no single interpretation encapsulates the complete picture of intellectual authorship? Figuratively put, if one narrative suggests that only *cooperation* can adequately grasp a problem, how can it successfully *compete* against others without undermining its own message?

¶ 60 As a consequence, any approach positing an elusive author is inherently structurally disadvantaged when competing with author-centric narratives in a winner-takes-all contest for formal authoritative power. This may help to explain (among many other factors) the relative paucity of elusive author narratives in the relevant debates as well as their failure so far to gain formal acceptance (and thus formal authority) in any jurisdiction, despite significant academic recognition.

¶ 61 Still, lately, narratives of the elusive author have increasingly found their way into the mainstream public debate. For example, they are sometimes implicitly affirmed in projects of mass collaboration, in which it is suggested that identifying individual authorship is not only difficult, but also useless, as the sum of its parts does not adequately represent the whole. For example, Linux, it may be argued, is not just a combination of thousands of authors writing pieces of code,[60] but rather the creation of an entire ecosystem of software authors and software testers describing bugs and suggesting fixes that programmers later incorporate. Despite technology that tracks software additions and changes and thus makes authorship of code identifiable, even assigning authorship of Linux to the thousands of programmers contributing code, one may argue, is short-changing the tens of thousands of users that have contributed to the code by filing bug reports, describing fixes, and suggesting modifications.

¶ 62 Intriguingly, the open source movement[61] has largely abstained from using a

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60. Actually, following a power law distribution, Linux has a small number of very prolific authors and a great number of authors contributing just a handful of lines of code.

61. I am using "open source movement" here as a catch-all for the various open software and free software movements that suggest that current intellectual property laws are at odds with the mechanism of software creation and thus in need of change or adaptation. *See* CHRIS DIBONA ET AL., OPEN SOURCES:

narrative of a collaborative ecosystem devoid of easily identifiable authors that make the assignment of rights over their creations possible. Instead, it has maintained that authors are still identifiable, thus making open source compatible with copyright's foundation of granting creators individual rights over their creations. One may see this as a pragmatic decision. It enables open source licenses to utilize the existing copyright system, rather than having to call for a copyright revolution.[62] Perhaps, one may add, this approach enables open source to utilize the existing system as a Trojan Horse to undermine traditional intellectual property laws, thus in the long run achieving the legal revolution that the movement would have had little chance to attain at the outset by putting forth its own narrative. The most likely reason, though, for the open source movement to not abandon the idea of the author is also the most obvious one. The large majority of open source proponents do believe in traditional authorship and the individual rights stemming from it. They do not find the narrative of the elusive author convincing.

¶ 63 Those that do, however, continue to be burdened by the "genetic weakness" of the elusive author narrative and the paradoxical notion that an argument rejecting the very idea of an authoritative voice nevertheless desires to become authoritative. Discovering ways to overcome this "genetic weakness" of the elusive author argument will likely be a necessary condition for the elusive author narrative to advance, at least in the legal debates.

IV. CONCLUSION

¶ 64 This article has suggested that current intellectual property debates are being advanced through distinctive competing narratives. It examined the leading narratives, looking at their foundations, assumptions, and implications. It exposed their commonalities and differences, as well as—for lawyers at least—a bewildering trend away from the law as the underlying structure of ordering.

¶ 65 In law, narratives desire to become authoritative. Yet one of intellectual property's most intriguing narratives—that of the elusive author—may suffer from its own structural weakness in that it desires to become the authoritative story, yet substantively denies that there can be an authoritative story. If one agrees that narratives of the elusive author provide important and valuable insights, inclusion can only be achieved by overcoming the central hurdle: the competitive process of selecting one narrative as the exclusive "right" one. This mechanism would have to move beyond the binarity of choice that Kelsenian monist legal theory is grounded on, and be accepting of the multiplicity of truths and reflective in its decision-making. Law would have to move from a singular voice to a plural system of overlapping rules.[63] This may sound like a

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VOICES FROM THE OPEN SOURCE REVOLUTION (Chris DiBona et al. eds., 1999); ERIC S. RAYMOND, THE CATHEDRAL AND THE BAZAAR (version 3.0 2000), http://www.catb.org/~esr/writings/cathedral-bazaar/cathedral-bazaar/.

62. The Creative Commons Project has utilized a similar approach for all categories of intellectual creations, not just software.

63. The connotation to "legal pluralism" is intentional. Legal pluralism has been defined as saying that "the legal order is not an exclusive, systematic and unified hierarchical ordering of normative propositions depending on the state, but has its sources in self-regulatory activities of all multifarious social

tall order, perhaps an insurmountable obstacle,[64] yet for those who value bricolage it may be a worthy endeavor. And those who are advancing traditional author-centric narratives may want to ask themselves what we as a society might miss by a structural under-representation of non-conforming narratives.

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fields present in society." John Griffiths, *Legal Pluralism and the Theory of Legislation – With Special Reference to the Regulation of Euthanasia*, *in* LEGAL POLYCENTRICITY: CONSEQUENCES OF PLURALISM IN LAW 201 (Hanne Petersen & Henrik Zahle eds., 1995).

64. Legal Pluralism does not necessarily have to lead to legal indeterminacy. *Id*.