

'The History of Privatisation and the Public Domain'

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The story of IPR is the story of privatisation. The public domain is defined by privatisation. Privatisation is a word coined in relatively recent times to describe the transfer of public assets into private hands. Public assets constitute part of the public domain. The Romans, who created the principles and concepts that underlie our property law, privatised the land, and many of the inhabitants, of the territories they conquered and turned into provinces. They established in law that land or things – realty or chattels – must be conquered, annexed, possessed in order to create property.

Given the pejorative meanings attached to these verbs, it is not surprising that the history of privatisation is also a history of alienation (and the verb 'to alienate' is also used to describe the creation of property). The public domain, historically, is best understood by acknowledging the warlike history of privatisation. Throughout western history, most of that which is public, eventually becomes private. The privatisations of Roman times, which resulted in imperial oppression and domestic inequality, caused social breakdown.

The feudal system, which succeeded the Roman in Europe, established property relations based on trust – king, nobility and church, in theory, held their possessions in trust from God, and owed obligations of care to vassals or peasants, the tenants occupying land. In turn, these tenants were entitled to use of common land to grow crops or maintain animals. Peasants occupied the lowest part of the unchanging social hierarchy, but trust historically protected them from pillage. If they were exploited beyond endurance, the king's justice supposedly rectified the breach of trust.

The Reformation of the 16th century overturned the feudal system and began a new privatisation that has continued until the present day. In the English-speaking world this privatisation begins with the dissolution of the monasteries by Henry VIII, which resulted in the transfer of 25% of English land to the magnates who supported Henry. From Tudor times until the 19th century, with the greatest activity occurring in the 18th century, parliament passed acts enclosing the feudal commons. Dissolution and enclosure are two of the greatest acts of alienation in the history of England, leading to antagonism between the upper and middle classes – the beneficiaries of privatisation – and the lower classes, the dispossessed who became the urban poor of the industrial revolution.

Seen in its true context, privatisation is an act of dispossession and alienation that *invades* and defines the public domain, creating social antagonism. It represents one pole of the spectrum of social relations, opposite to the pole represented by nationalisation or land reform. However, while privatisation has underpinned the growth of capitalism, nationalisation and land reform have typically engendered socially destructive counterreactions.

In the history of privatisation and the public domain, there is only winner, and it is not the public domain. This fact is writ large in the history of IP law. The public domain awaits annexation by the conquerers at its borders, but it can be saved, not by defence but constructive engagement. In 452, when Attila the Hun, one of the most bloodthirsty privatisers in history, approached Rome with his conquering hordes, Pope Leo the Great met him and persuaded him to turn back. So too, some IP owners can be persuaded to turn back. As Creative Commons has shown, some are willing to make material available for free.