Intellectual Property

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One of the challenges in any discussion about intellectual property is that it necessarily remains abstract. This abstraction arises from the fact that intellectual property is everywhere, and yet nowhere, at the same time. It shapes modern life in dramatic ways but is so ubiquitous and naturalized as to be almost invisible. Much like the Chinese proverb in which fish cannot recognize the water that surrounds them, we have difficulty seeing and therefore describing adequately that which is all around us. And it is all around us: anyone who has sampled recordings in the creation of a new remix, or downloaded electronic books from Amazon, or clicked "I Agree" after scrolling through a lengthy software licensing agreement, or, for that matter, purchased a car with an onboard computer control system, or taken prescription medication, or even sipped a can of Coke, has interacted with intellectual property. In the following paragraphs, I'll lay out the history of intellectual property as a principle, and as a term. I'll then show how approaches to intellectual property have shifted over the last several decades, through examples drawn from culture practices as well as court rulings. These examples foreground critical issues surrounding authorship, intellectual labor, (now global) economies, and the creative freedom to remix.

The Origins of Intellectual Property

To begin, it should be immediately pointed out that sampled-based music, or prescription pills, or any of the items listed above are not intellectual property in and of themselves. This is to say: intellectual property is none of those *things*. Rather, copyrights, trademarks, patents, and trade secrets are a set of legally regulated social relations. More practically, intellectual property

can be conceived of as a set of legal mechanisms that grant particular rights for creations of the mind. U.S. Court of Appeals Judge Richard Posner and economist William Landes further define intellectual property as

> ideas, inventions, discoveries, symbols, images, expressive works (verbal, visual, musical, theatrical), or in short any potentially valuable human product (broadly, "information") that has an existence separable from a unique physical embodiment, whether or not the product has actually been "propertized," that is, brought under a legal regime of property rights.[1]

Although Posner and Landes do not link intellectual property with corresponding legal rights per se, for our purposes, it is worth unpacking just how "property" functions here. In order to do that, we must visit the origins of the concept of intellectual property, as it is documented in the United States Constitution.

Clause 8 of Article I, Section 8 of the U.S. Constitution grants Congress the 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."[2] While it does not mention them explicitly, this clause is generally understood as the origin of copyright and patent law in the United States. The purpose of the clause the Framers had in mind was twofold. On the one hand, it would provide the citizenry with incentive to create and innovate. With the legally-backed assurance that they could exclusively exploit (for financial gain) what they made, creators would be motivated to write books, or develop technologies. We might think of this incentive as the clause's "short term" goal. On the other hand, the "limited times" granted to those creators meant that their monopolies would eventually expire and, in the long term, the ideas and expressions they produced would become accessible for all to use, in turn helping to cultivate the intellectual enrichment of a newly-born nation. The accretion of the public domain lies at the heart of Clause 8. Despite the fact that in our contemporary moment the concept of intellectual property may seem to sit comfortably within the logic of absolute property rights, it

is instead a mechanism designed to balance the needs of individuals and the national, public good.

The term "intellectual property" appears at least as early as the 1860s in England, when inventors and other specialists employed it to argue that legal protections should be given to new discoveries and technological advancements in the same way that creative expressions are granted protection through copyrights.[3] Its usage becomes more pronounced in the second half of the twentieth century with the emergence, especially in the West, of post-industrial or "information" economies. Such economies have been characterized by the dominance of value production derived through intangible goods or services—in short, the cubicle worker replaced the factory worker, producing less automobiles than computer software.[4] Apple's iTunes is but one example of intellectual property in action: consumers purchase media content through the company's service, but are not securing physical copies of music albums, movies or books so much as buying access to digital versions that may be transmitted to a variety of devices. Even as their media libraries expand, consumers own no actual property, but rather a collection of licenses that Apple, and the content industries, ultimately control. It is this control over information and its commodification that forms the crux of the debate over the boundaries of intellectual property.

Authorship, Labor, and Culture as Rental

For many critics, intellectual property rights have expanded substantially in recent years, leaning too far in favor of individual (and, importantly, corporate) interests at the expense of the notion of sharing ideas and creativity as a common good. The force of this criticism becomes apparent when we look at the changes made to copyright in the United States over the past several decades. In that time, the law seems to have become only more author-centric. For

example, the Copyright Act of 1976 shifted in favor of the author in three key respects. First, it lowered the threshold for what constitutes protected expression to such a degree that virtually anything short of a math equation or list of alphabetized names (i.e., “facts”) qualifies. Second, the Act lifted the requirement that works be registered with the federal Copyright Office; the moment expressions became “fixed in a tangible medium” they would be granted protection. These changes mean, in effect, that any napkin doodle is copyrighted the moment it is scrawled. Third and perhaps most crucially, the Copyright Act of 1976 increased the term length of protection, from a possible maximum of fifty-six years to life of the author plus seventy-years. For works made for hire, the term increased to a fixed seventy-five years.[5]

In 1998, two amendments to copyright were enacted that further augmented the rights of the author. The Copyright Term Extension Act increased the length of copyright to life of the author plus seventy years, and ninety-five years for works made for hire.[6] In the same year, the Digital Millennium Copyright Act (DMCA) proposed criminal penalties for those who would develop technologies that circumvented encryption systems on copyrighted materials—for instance, designing code that could break into read-only electronic books, or descramble commercial DVDs so that they might be copied, even if the copying was valid.[7] As recently as 2015, the DMCA prohibited auto owners from attempting to repair their own vehicles by reconfiguring the computer systems within them. Only after continued public pressure did the Library of Congress (which oversees copyright regulation) acquiesce that owners modifying their own cars and trucks was not de facto copyright infringement.[8]

Of course, from the point of view of enterprising authors and their labor, none of these changes to copyright law appears entirely unreasonable. Especially for those who depend directly on the protection of their intellectual property for a living—say, for instance, an

independent software developer, or a commercial photographer who licenses her or his images—the intellectual work performed in the creation of new expressions might justify robust laws. Yet the reality is that within the creative industries today, a great deal of the intellectual property produced is not owned by those who author it. Works made for hire, freelance and contract work, in the form of photography, graphic design, audio engineering, 3D modeling and the like, often become properties that large corporations exploit. Hollywood and the music industry are obvious examples, entities whose profitability depends on legions of innovative, creative laborers. Viewed through the lens of the division of labor, then, intellectual property is conceived of as an ideological instrument. Propping up the "inspired genius" of individuation as a foil for furthering their economic interests, corporations use intellectual property to help ensure that the line—however now blurry—between producers and consumers of content remains definite, and calculable. Producers own properties; consumers merely "rent" them, and are further pressured not to tamper with their rentals, through laws that punish copying, collaging, remixing, redistributing, and appropriation generally. The economic status quo, the authority of the propertied class, remains intact.

The most egregious examples of the distilled instrumentalization of intellectual property are to be found in so-called copyright and patent "trolls," companies that manufacture no product, perform no service, but rather exist to secure creative assets and, moreover, police the creative industries for potential infringements. Within "golden age" hip hop, Bridgeport Music, Inc. is the most notorious of copyright trolls.[9] Bridgeport owns the rights to much of the back catalog of soul and funk music, including the work of George Clinton. The company has taken scores of hip hop artists to court seeking compensation for alleged infringements, and along the way changed the genre, one founded on the inventive collaging of snippets of old music into new

compositions, for the worse. *Bridgeport Music, Inc. v. Dimension Films* (2005) pitted the sample-trolling company against N.W.A, who lifted a two-second guitar riff from a George Clinton recording in the creation of the track "100 Miles and Runnin'."[10] Ultimately a federal court essentially declared that any sampling, regardless of length or how recognizable it is, constitutes copyright infringement. "Get a license or do not sample," the opinion starkly decreed.[11] Given the outcomes of this and other cases in the late 1980s and 1990s, it would simply be too cost prohibitive today for a major record label to produce such seminal and sample-laden albums as Public Enemy's *It Takes a Nation of Millions to Hold Us Back* (1988), De La Soul's *3 Feet High and Rising* (1989), or the Beastie Boys' *Paul's Boutique* (1989).[12]

New Approaches to Intellectual Property

The litigious environment surrounding much of hip hop, as just one indicator of the corporate efforts to secure culture as private property for rent, takes on a further ominous tone when we zoom out and consider intellectual property on a global scale. The World Intellectual Property Organization (WIPO), an agency under the United Nations founded in 1967 to "lead the development of a balanced and effective international intellectual property (IP) system that enables innovation and creativity for the benefit of all," is criticized for privileging the business interests of Western nations at the expense of the needs of poorer peoples and developing countries.[13] The patenting of medical technologies and pharmaceuticals rake in billions of dollars for U.S. corporations, while innovation stagnates because new IP becomes too costly to develop. One need only look to the health crises in parts of Africa, or the exorbitant prices for prescription medication in the United States, as examples of corporate intellectual property regimes that have gone awry. Now, with treaties between nations such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Trans-Pacific Partnership (TPP), a new, global

intellectual property order, modeled after United States laws and corporate lobbyist trade prerogatives, is arising. Advocates believe these agreements will help international trade to everyone's advantage, while critics decry them as neo-authoritarian measures that ultimately seek to quash not just innovation and creativity but also fairness, and justice, on a global scale.[14]

Yet the picture painted above need not be so bleak. If we survey, at the very least, the current condition of what we might generally call "remix culture," it is not. On the contrary; by many measures, people are copying, reconfiguring, and sharing information and culture as never before. From amateur documentary videos to "bedroom" electronic music producers, from the spreading of memes appropriated from mass entertainment to Ivy League schools offering free courses online, it might even be said that we are living in the most creative period in human history.[15] Of course, remix practices have become of interest to academia—the book you are reading now is proof of that interest—and appreciably changing attitudes about and relationships with IP are becoming increasingly evident.

To be sure, companies such as Disney and Mattel will continue to vigorously defend their IP in Mickey Mouse and Barbie. Hip hop artists will continue to run the risk of legal action through unlicensed sampling. And proud mothers such as Stephanie Lenz will continue to receive DMCA take-down notices for the videos they upload that contain copyrighted music in their backgrounds.[16] Yet in this last example, after YouTube removed a video Lenz had recorded of her children dancing to Prince's "Let's Go Crazy," she filed a counter-claim against Universal Music Group, the copyright holder of the song. Lenz argued that her use was authorized under copyright's fair use doctrine, which holds that in some circumstances, the copying of protected materials is not infringement.[17] Notably, the federal appeals court ruled that content producers like Universal are obligated to consider whether such videos satisfy fair use requirements before

deciding to request that they be removed. *Lenz v. Universal Music Corp.* (2015) is considered not only a win for Lenz, but also a decision that defines fair use not merely as an affirmative defense against possible infringing action, but an actual right that may be asserted in the everyday copying and sharing of content.

Other recent legal disputes, including *Cariou v. Prince* (2013) and *Authors Guild v. Google* (2015), further illustrate just how sympathetic U.S. courts have become to copying and transforming intellectual property. In the former case, artist Richard Prince produced a series of paintings by appropriating a suite of photographs taken by Patrick Cariou. The photographer sued Prince for copyright infringement. After the District Court initially ruled in favor of Cariou, the Circuit Court reversed the decision, finding that the majority of Prince's works were sufficiently transformative and thus fair use; the rest in question were remanded back to the lower court. Specifically, the Circuit Court clarified that appropriations such as Prince's need not criticize or even refer back to their sources in order to be considered fair use, in a way that parody, for instance, necessarily does (Prince claimed his paintings were not meant as commentary on Cariou's images but new "remixes" in their own right).[18] This left the question as to what qualifies as fair use in artistic expression far from answered. Then, the decision in *Author's Guild* seemingly went a step further. The circumstances in that case involved information giant Google digitally scanning millions of physical books in order to index them into a searchable database for public research. While the books' contents would not be wholly available to users for download, Google copied the volumes in their entirety, giving the for-profit company control over vast amounts of information, and leverage over much of the future of accessible knowledge. Yet the court ruled that even non-expressive and blatant reuses such as Google's are transformative, performing a service vital to the public.[19]

In tandem with these lawsuits there have also been grassroots efforts to educate creative communities about the fair use doctrine. Patricia Aufderheide, one of the contributors to this book, has played a central role in developing fair use "best practices" for artists, filmmakers, academics, and others who work with protected materials and might otherwise be reluctant to exercise their right to copy in light of draconian intellectual property laws.[20] One of the core principles in this fair use advocacy is the notion that the doctrine should not be considered as a special exception to copyright, but rather one of its defining features, without which the law would not properly function (the reader will recall that copyright is originally designed as a balance between individual rights and public good). This is to say that if you agree with fair use, you must also agree with the concept of copyright itself (and by extension, intellectual property).

This last point is an important one to reflect upon. In the ethical and legal battles over the contours of intellectual property, the various positions taken have become increasingly polarized. In response to the apparent overreach of corporate copyright through stricter laws, opponents have, in some cases, sought to jettison them altogether. In more extreme examples, we encounter groups such as The Pirate Bay, a peer-to-peer file sharing service whose supporters believe any and all knowledge should be shared freely and widely through the Internet. The Pirate Bay's antagonism is primarily against the "property" part of intellectual property. Less subversive but no less significant are "copyleft" efforts such as the free software movement and Creative Commons, which have championed knowledge sharing by instituting practices and policies that help people regulate the distribution of their work as they see fit. In all of these cases, the solutions proposed (even the illegal file sharing of protected materials) seek to compensate for the perceived failings of intellectual property law to adequately address the realities—and potential—of twenty-first century knowledge production and distribution.[21]

For those who believe intellectual property is yesteryear's idea, left over from a pre-industrial era and positioned now mostly to serve the interests of a few, working towards its obsolescence seems the proper option. For those who believe in the ideals of intellectual property, and accept legislative shortcomings as projects to improve upon, working towards new licensing schemes such as Creative Commons, or towards strengthening the fair use doctrine are more apt courses of action. Yet so much of the thinking around these decisions depends on how we position ourselves within the chains of cultural production. While we may have little sympathy for entertainment executives whose bonuses shrink because of movie or music pirating, we might not be so cavalier about dismissing the concerns of those who pay the bills by directly selling the works they create. In an ongoing lawsuit, Richard Prince is again being sued for copyright infringement for appropriating Instagram users' photos.[22] Other than existing as enlarged canvases (and not small, digital images on screens), Prince's "portraits" are identical copies of the pictures he appropriates, and they sell for $90,000 each. Should a court rule that these self-serving artworks qualify as instances of fair use, it will call into question the very limits of copying protected materials and potentially open the flood gates for similar takings. Or more simply, a positive fair use decision will raise the question: what, in the name of artistic expression, can't be copied? Photographers everywhere should be watching this case closely.

Intellectual Property: From the Legal to the Ethical

In conclusion, I return to the abstract, but in the form of simple questions. Where do you, the reader, the potential remixer, stand? How do you value your creative labor? Can a price—economic or otherwise—be placed upon it? Is the euphoric feeling of sharing freely, of connecting with others, compatible with a belief in being fairly compensated for your work? How to define fair compensation? How would you feel if someone copied your Instagram photos

outright, and sold them as works of art for large sums of money? But also: what do you think about life all around us being caught up in property rights regimes? How do you feel about the fact that Instagram controls (and can exploit) whatever is uploaded to its servers? Our understanding of the concept of intellectual property depends on your answers. Perhaps we should be concerned less with laws—and lawsuits—than with our ethical, or even moral, positions, always with an eye towards being fair to both ourselves and others (which makes it no less difficult a task). A friend of mine recently gave me a painting as a gift. It is a multicolor, geometric composition, with a single sentence that might provide guidance for future generations of remixers: *Copy the Art of Others as You Would Want Them to Copy Your Work*.

Notes

[1] William M. Landes, Richard A. Posner, *The Economic Structure of Intellectual Property Law* (Cambridge, MA: Harvard University Press, 2003), 1.

[2] Article I, Section 8, *Constitution of the United States*, https://www.senate.gov/civics/constitution_item/constitution.htm#a1_sec8 (accessed January 5, 2017).

[3] See Adrian Johns, *Piracy: The Intellectual Property Wars from Gutenberg to Gates* (Chicago, IL: University of Chicago Press, 2011).

[4] The larger narrative of an information economy is fraught with complications. The entire concept of intellectual labor, required of such economies, implies a work force that has acquired needed technical skills through access to both higher education and new technologies. The lower and working classes, often ending up not in colleges classrooms but on factory floors, have been mostly excluded from this process. With the decline of traditional, industrial production in the U.S. (offshored to countries with cheaper labor forces), economic opportunities for the factory class have likewise fallen off. Trump's "Make America Great Again" slogan is precisely an expression of the anxiety brought about by this post-industrial condition.

[5] See "Copyright Laws of the United States, and Related Law Contained in Title 17 of the United States Code," https://www.copyright.gov/title17/circ92.pdf (accessed January 11, 2017).

[6] See "Sonny Bono Copyright Term Extension Act," https://www.copyright.gov/legislation/s505.pdf (accessed January 11, 2017).

[7] See "H.R.2281 - Digital Millennium Copyright Act," https://www.congress.gov/bill/105th-congress/house-bill/2281 (accessed January 11, 2017).

[8] See David Kravets, "US regulators grant DMCA exemption legalizing vehicle software tinkering," *Ars Technica*, http://arstechnica.com/tech-policy/2015/10/us-regulators-grant-dmca-exemption-legalizing-vehicle-software-tinkering/ (accessed January 11, 2017).

[9] See http://bridgeportmusicinc.com/index.html (accessed January 15, 2017).

[10] The formal comparison between George Clinton's "Get Off Your Ass and Jam" and N.W.A's "100 Miles and Runnin'" is shown in the 2007 documentary *Good Copy Bad Copy*, https://www.youtube.com/watch?v=WEKl5I_Q044 (accessed February 2, 2017).

[11] *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005), http://fsnews.findlaw.com/cases/6th/04a0297p.html (accessed January 16, 2017).

[12] For further reading about copyright, samples, and hip hop music, see Kembrew McLeod and Peter DiCola, eds., *Creative License: The Law and Culture of Digital Sampling* (Durham, NC: Duke University Press, 2011).

[13] See http://www.wipo.int/about-wipo/en/ (accessed January 15, 2017).

[14] See the Electronic Frontier Foundation's web video outlining the implications that the TPP will have on users' rights in digital spaces: https://www.youtube.com/watch?v=p3KlrfjcjV4 (accessed January 16, 2017).

[15] See, for example, Harvard University's free online courses, https://www.edx.org/school/harvardx (accessed January 17, 2017).

[16] See Ben Sisario, "YouTube 'Dancing Baby' Copyright Ruling Sets Fair Use Guideline," *New York Times*, https://www.nytimes.com/2015/09/15/business/media/youtube-dancing-baby-copyright-ruling-sets-fair-use-guideline.html?_r=0 (accessed January 17, 2017).

[17] On fair use, see Section 107, Title 17 of the United States Code, https://www.copyright.gov/title17/circ92.pdf (accessed January 17, 2017).

[18] *Cariou v. Prince*, 714 F. 3d 694 (2nd Cir. 2013), https://scholar.google.com/scholar_case?case=5845890683658306826&hl=en&as_sdt=6&as_vis=1&oi=scholarr (accessed January 23, 2017).

[19] *Authors Guild v. Google, Inc.*, 804 F. 3d 202 (2nd Cir. 2015), https://scholar.google.com/scholar_case?case=2220742578695593916&hl=en&as_sdt=6&as_vis=1&oi=scholarr (accessed January 23, 2017). For more information on the case, see Patricia Aufderheide's contribution in this volume.

[20] To download codes of best practices, see http://cmsimpact.org/program/fair-use/ (accessed January 24, 2017).

[21] On the free software movement, see https://www.gnu.org/philosophy/free-software-intro.html (accessed January 25, 2017); on Creative Commons, see https://creativecommons.org (accessed January 27, 2017).

[22] See Eileen Kinsella, "Outraged Photographer Sues Gagosian Gallery and Richard Prince for Copyright Infringement," *Artnet News*, https://news.artnet.com/exhibitions/laurie-anderson-heart-of-a-dog-times-square-400736 (accessed January 26, 2017).

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